ORIGINAL

In the

Supreme Court of the United States

EASTEX, INCORPORATED,

Petitioner,

V.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 77-453

Washington, D.C.
April 25, 1978

Pages 1 thru 49

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EASTEX, INCORPORATED, Petitioner,	:	
v.	:	No. 77-453
NATIONAL LABOR RELATIONS BOARD, Respondent.	:	

Washington, D. C.,

Tuesday, April 25, 1978.

The above-entitled matter came on for argument at 1:31 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
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
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

JOHN B. ABERCROMBIE, ESQ., Baker & Potts, 3000 One Shell Plaza, Houston, Texas 77002; on behalf of the Petitioner.

RICHARD A. ALLEN, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D. C. 20530; on behalf of the Respondent.

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 77-453, Eastex against NLRB.

Mr. Abercrombie, I think you may proceed when you're ready.

ORAL ARGUMENT OF JOHN B. ABERCROMBIE, ESQ.,

ON BEHALF OF THE PETITIONER

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

This case arose out of a refusal of Eastex to allow distribution of a union circular on its plant premises. The circular is found on pages 2 and 3 of the Appendix. The refusal was because sections 2 and 3 of the circular were considered to have no relevance to any matter concerning Petitioner's employees as employees and was political in nature. Petitioner had no objection to Sections 1 and 4 of the circular.

Section 2 of the circular consisted of a polemic against inclusion by a Texas Constitutional Convention of a "right to work" provision in a proposed revised Constitution.

Section 3 contained criticisms of then President Nixon's veto of a minimum wage bill, comments about oil industry profits, and requested employees to register to vote. Over one-half of Section 3 was concerned with oil industry profits.

Sections 2 and 3 of the circular made up the bulk.

There was no evidence in this case that Petitioner had taken a stand, either pro or con, with relation to any matter discussed in Sections 2 or 3. The record is clear that the union had previously publicized its political messages by mail and with lists furnished by Eastex, and that its only reason for requesting in-plant distribution of this circular was increased mailing costs. There is no evidence that distribution off the plant premises was impractical.

The Administrative Law Judge decided the case solely on Section 7 grounds, no consideration of Eastex's property rights was made.

The Board, pro forma, affirmed. The Fifth Circuit originally granted enforcement under Section 7 and the First Amendment and adopted the holding that the union could distribute whatever is reasonably related to the employees' jobs or status or condition, as employees, to the full range permitted by Section 7's language, valid local laws, and the First Amendment.

On motion for rehearing, the Court excised its First Amendment references, but denied rehearing.

The basic issue before the Court today is whether the mutual aid or protection language of Section 7 of the Act protects a distribution on an employer's premises, which is political in nature and is not significantly related to the employees' immediate employment relationship.

That issue divides into two parts whether the mutual aid or protection language of Section 7 protects political expression, and if it is found that it does, does the nature and strength of such a right mandate or warrant the interference with the employer's property rights, which is inherent in an in-plant distribution?

QUESTION: Isn't there a sub-question there, Mr. Abercrombie, even assuming that both of the last two -- both of your questions are answered in favor of the Board, as to whether the principle of Republic Aviation should be applied the same way to strictly political literature as to organizational literature?

MR. ABERCROMBIE: Mr. Justice Rehnquist, we believe that that is part of the basic question, of whether the mutual aid of protection language of Section 7 protects political expression. But to the extent that Republic Aviation states that there is a right to in-plant distribution, that case is, of course, limited by its terms to in-plant distribution by employees relating to organizational effort.

QUESTION: But that was an upholding by this Court of the Board's finding that this particular type of rule was reasonable with respect to organizational material.

MR. ABERCROMBIE: Yes, sir.

QUESTION: And my question to you is: Even though one were to conclude that the sort of literature that was sought to

be distributed here was covered under Section 7, and even though the Board were permitted to conclude under the Act that some distribution was permissible on the employer's property, would it necessarily be entitled to simply use the Republic Aviation formula without any re-weighing of factors?

MR. ABERCROMBIE: No, sir. And that is exactly what the Board and the Fifth Circuit did in this case, was to use the presumptive invalidity of the refusal of distribution, the presumptive rule of right to distribute on an employer's property, growing out of Republic Aviation, was of course based on the organizational efforts of employees under the fundamental provision, or the fundamental rights of Section 7.

We are asking the Court to declare that political activity on an employer's premises is unprotected. Otherwise, the possible consequences of allowing unions --

QUESTION: Well, put that way, you aren't necessarily arguing that it's unprotected, you're just saying you can't do it on an employer's premises.

MR. ABERCROMBIE: We are --

QUESTION: Or are you arguing both of them?

MR. ABERCROMBIE: I'm arguing both of them.

QUESTION: Even if it's protected, you can't do it on the employer's premises and it isn't protected in the first place, is that it?

MR. ABERCROMBIE: Mr. Justice White, it is our posi-

tion that it is unprotected. It is our further position that it is unprotected on the employer's premises, as a separate and distinct issue.

QUESTION: Yes. Well, I just -- I suppose you can say a lot of things are protected, but you just can't do them some places.

MR. ABERCROMBIE: That's right, sir.

QUESTION: Freedom of speech, there's a time and place for it sometimes.

MR. ABERCROMBIE: That's right, sir.

QUESTION: You wouldn't challenge the right to circularize this outside the company gates, on the public sidewalk, would you?

MR. ABERCROMBIE: Yes, sir.

QUESTION: On the public sidewalk?

MR. ABERCROMBIE: Mr. Chief Justice, I would --

QUESTION: I'm speaking now of employees leaving work, going home at night, after hours.

MR. ABERCROMBIE: I would challgne the right to do so under the provisions of Section 7 of the National Labor Relations Act.

QUESTION: Well, does Section 7 have anything to do with it if it's out in a public place?

MR. ABERCROMBIE: Section 7 establishes the rights of employees in dealing with their employer. It does not establish

the rights of employees as citizens to engage in off-plant political activities.

QUESTION: That's why I asked you whether Section 7 has anything to do with what they do out on the public highway.

MR. ABERCROMBIE: No, sir.

QUESTION: So they could hand the leaflets out on the sidewalk, as the employees came out of the plant?

MR. ABERCROMBIE: Yes, sir, but you asked me, not in the context of a union organization, but just whether it had anything to do with employees handing out political literature. It doesn't. It defines only certain rights within the employer-employee relationship.

It is our position that nothing in the Act prevents an employer from discharging or refusing to hire an employee because of his political beliefs or actions as a citizen, not as an employee.

QUESTION: Mr. Abercrombie, following up on Justice Rehnquist's question, I don't understand you to contend that the right to distribute literature is limited to organizational literature.

MR. ABERCROMBIE: No, sir, I am not so contending. I am contending that the right to distribute literature in-plant is limited to literature that is related to the fundamental employee rights to organization, collective bargaining, to join and assist labor organizations; that it does not extend

to the distribution of political literature.

QUESTION: You do concede, don't you, that if this pamphlet had included nothing but Items 1 and 4, it would have been protected?

MR. ABERCROMBIE: Yes, sir, it would have been.

QUESTION: And 4 is what, just the general exhortation in favor of unions, isn't it?

MR. ABERCROMBIE: I beg your pardon?

QUESTION: Item 4 is just sort of a general exhortation that unions are fine organizations; isn't it?

MR. ABERCROMBIE: Yes, sir, it is.

QUESTION: And that sort of general exhortation, you say is protected. Well, why aren't 2 and 3 in the same general category?

MR. ABERCROMBIE: They are not; 4 is at least relating to, or could be considered as union institutional literature not related to the question of political beliefs.

Bear in mind we are talking,in Sections 2 and 3, about political matters, and that was the issue there, Mr. Justice Stevens.

QUESTION: Mr. Abercrombie, suppose they urged them to vote for minimum wage; that's political?

MR. ABERCROMBIE: Mr. Justice Marshall, it is my view that that is unprotected for distribution on the employer's premises.

That is essentially the case before us today. Before this Court today.

I said that the purpose of -- or what the Board and the Court have done, would be to politicize the work place on issues or candidates it supports or objects to. The Board admits as much on page 34 of its brief.

We believe that this Court should draw the same sharp distinction between political activity and traditional and fundamental union representation activity, that it drew in International Association of Machinists vs. Street, and, more recently, in Abood vs. Detroit Board of Education, certainly in a different context.

This Court recognized,in Street and Abood, the separation between a union's pursuit of its traditional role as a collective bargaining representative and its ancillary role as a political, social and fraternal organization.

We would also state the Court that this -- that it is clear that Section 7 is not co-extensive with the First Amendment, as the Board and the Court below impliedly assert. Nor is the employer's plant a public park or a marketplace of ideas.

QUESTION: Nor is the employer the Congress of the United States, I take it.

MR. ABERCROMBIE: I beg your pardon?

QUESTION: I said, nor is the employer the Congress

of the United States, so as to be forbidden from abridging freedom of speech.

MR. ABERCROMBIE: No, sir. This is not a First Amendment freedom of speech case; this is a Section 7 case, but we would submit that the Board and the Court below have impliedly made it a First Amendment case, by the assertion that the Board makes in its brief that the employer has no right to prevent distribution of union literature, so long as it does not disrupt production or discipline and contains material relating to any union objective, is a First Amendment argument; no prior restraint except in case of clear present danger or disruption.

Another fault of the Board and the Court below in this case is the assertion and the finding that the term "employee" used in Section 7 of the Act encompasses the generic employee as a worker of the world. And that petitioner's employees are protected under Section 7 in rendering "mutual aid or protection to such workers as a broad class". This is also inherent in the Court's rationality.

Certainly the language of Section 2(3) of the Act defining "employee" encompasses more than employees of a particular employer. But we submit that it is no broader than the definition of "labor dispute" found in Section 2(9) of the Act, in that a union's right to distribute on our premises or to deal in relationship with employees a workers, is no broader

than the definition of labor organization found in the provisions of Section 2(5) of the Act.

We might add to this Court that the Board itself has found that political litarature is not protected, where, in the Ford Motor Company case, it stated: "wholly political propaganda not related to employees' problems and concerns qua employees can be prohibited."

The Board and the Court below would distinguish the particular political expression used on the grounds that it was reasonably related to the employees' jobs or their status or condition as employees in the plant.

Apart from such rationality, the Court below would apparently agree that it was unprotected. As our brief points out, the logical extension of such a rule would result in the politicalization of the work place.

But we have also pointed out the Court's finding results from the Court's consideration of the term "employee" as used in Section 7 of the Act in the generic sense, which is overly broad and, we submit, is in error. And does not take into consideration the purposes and policies of the Act, to regulate the relations between an employer and his employees, or the limited intrusion on an employer's property rights allowed by this Court, place is of equal concern in defining Section 7 rights as is substance or actions taken. It is only by limiting the protections of the other mutual aid or protec-

tion language of Section 7 to in-plant distributions which concern matters significantly connected to the employees' relationship to their employer; the policy of the Act, the conflicts between opposing rights and the practical operation of employer-employee relations can be reconciled and harmonized.

This Court has never said, and should not say here, that any yielding of an employers' property rights is necessary, except where an employer -- except where they are in conflict with the fundamental right of self organization, representation and collective bargaining.

As this Court said in Central Hardware, and I quote, "This principle requires a yielding of property rights only in the context of an organizational campaign; absent such a yielding, there is no Section 7 right on an employer's property."

Republic Aviation, referred to by Mr. Justice Rehnquist, required a yielding only in the posture that prohibition of in-plant solicitation was an unreasonable impediment to the exercise of the right to self organization, and then only on non-work time and in non-work areas.

Babcock & Wilcox did not require such a yielding in the absence of a showing of a special need; but again in an organizing context.

Magnavox, cited by the Board in its brief, was a waiver case. But to the extent that it dealt with the problem, it was concerned with fundamental Section 7 rights. A key

footnote omitted in the Magnavox quotation in the Board's brief makes it clear that this Court has not extended Republic Aviation as the Board asserts.

That footnote states: "To indicate consideration of alternative means of communication is at least a part of the range of any inquiry into the need for in-plant solicitation if Section 7 rights are to be protected."

Republic, Babcock & Wilcox, and Magnavox can be delineated as "who and where" cases in connection with self organization.

This case, this Eastex case seeks to define what can be distributed.

Section 7 does not exist in a vacuum. Section 7 rights co-exist with other competing interests, and, as this Court has stated, the exercise of such rights must be balanced against such competing interests to determine where they fall on the spectrum. Organizational activity is obviously an overriding consideration under the Act. But even there it has been circumscribed.

Political expression is at the other end of the spectrum, if it is protected at all.

QUESTION: Suppose an employee of a particular company, on his off time, helps picket another employer during a strike, and he gets fired for it?

MR. ABERCROMBIE: That is protected activity --

QUESTION: Well, it hasn't anything to do with the relationship between the fired employee and his employer.

MR. ABERCROMBIE: No, sir. But he is engaging in primary fundamental rights, and he is not engaging in that activity on the employer's premises. That same --

QUESTION: Or time.

MR. ABERCROMBIE: Excuse me?

QUESTION: Or his time, the employer's time.

MR. ABERCROMBIE: Or the employer's time.

QUESTION: So what about -- what if the union member, an employee, in his off-hours time or in non-working time, distributes information about the union's own welfare plan or medical plan or own legal services plan. Hasn't anything to do with the employer or the relationships between the employer and the union. But they distribute it on the property and the employer doesn't like it.

MR. ABERCROMBIE: We would state that in that context it would be the employer would have the right to prohibit that distribution, in the same sense that it would have the right to prohibit a distribution by the union of literature extolling its parade or extolling its softball team and suggesting that people come out and join the softball team for the game with Local IBEW.

QUESTION: Although I suppose if he fired some employees for participating in some union program, that he just didn't

like, it might be a completely bona fide union program, the employer just didn't like it and he fired an employee for it. Although the program didn't have anything to do with the employer's business.

MR. ABERCROMBIE: Your Honor, that is a -- really it's a closer question, but the protection, if any, that such an employee would receive under the Act, under Section 7 of the Act, which establishes those protections, would be the question of whether he was assisting a labor organization.

QUESTION: Yes. Well, I would suppose that -- you're not arguing it in this case, but I would suppose you could easily think of cases where it's a protected activity generally, but you just can't do it on the employer's premises.

MR. ABERCROMBIE: Well, sir, I'll give you a very good example of that. An employee on strike against his employer has a right to picket that employer. But he has no right to do that, to exercise that fundamental Section 7 right, --

QUESTION: On the employer's premises.

MR. ABERCROMBIE: -- on the employer's premises. Nor does he have a right as an employee or as a union member to go on someone else's premises for the purposes of organizing. That's what Babcock & Wilcox held.

And of course you can always consider the Fansteel situation where they sit down on the employer's premises.

QUESTION: Well, you wouldn't suggest that the

employer could fire the union people for distributing right-to-work literature, if they weren't distributing it on the employer's property. And you wouldn't say that -- and wouldn't you say it would violate Section 7 to do that?

MR. ABERCROMBIE: I would say --

QUESTION: The union is banding together and they all want to oppose right-to-work laws, and they pass out literature out on the public street; and the employer says, "I just don't like you fellows getting into this kind of business, I'm going to fire you."

Now, is that an unfair labor practice?

MR. ABERCROMBIE: Your Honor, we would submit that it was not, that political activity is not protected under Section 7. I agree with Mr. Justice White that it is a lot closer question, but it's not directed to fundamental employee rights as opposed to --

QUESTION: Yes, but you could lose that argument and still win the one you're making today.

MR. ABERCROMBIE: Yes, sir. Yes, sir.

QUESTION: Well, if it isn't on the employer's time and his premises, Section 7 has nothing to do with it, I thought you agreed before?

MR. ABERCROMBIE: No, sir, if it's on the employer's time -- did you say off or on, Mr. Justice Burger?

QUESTION: Off. On the employee's own time, out in a

public place; Section 7 has nothing to do with it.

Does it?

MR. ABERCROMBIE: Section 7 has nothing to do with with political activity is what I said.

QUESTION: Well, isn't that the reason for your reply to Justice White, since Section 7, if it did have something to do with political activity, might protect the employee against the discharge; and since you say Section 7 doesn't have anything to do with it, then, so far as the Section 7 effect is concerned, the employer is free to deal with the employee as he chooses?

MR. ABERCROMBIE: Yes, sir. He can discharge a Republican if he doesn't like Republicans, he can discharge a Republican;if he doesn't like Democrats, he can discharge a Democrat; and Section 7 of the National Labor Relations Act does not protect that employee. The distribution off of the employer's --

QUESTION: Well, the union contract would probably protect him, that's the point, isn't it?

MR. ABERCROMBIE: It would be a rather ill-placed act of an employer to discharge, and certainly --

QUESTION: And he'd probably violate the ordinary mine-run collective bargaining contract, if he discharged an employee just because he was a Republican.

MR. ABERCROMBIE: It certainly would not be just --

QUESTION: And not for cause.

QUESTION: And he might have a strike on his hands, in addition.

QUESTION: Right.

MR. ABERCROMBIE: Yes, sir.

QUESTION: Mr. Abercrombie, before you sit down, one thing that puzzles me about this case, two parts of the circular, I think you've conceded, can be distributed on the employer's premises. What is the significance of the employer's right to say the other two parts must also be protected? Say, instead of political propaganda, they simply had comic strips or a fictional story, or something like that, would that justify excluding the entire pamphlet?

And why is the employer so interested, once some right to come on the property has been established?

MR. ABERCROMBIE: Well, it is the employer's property that we're talking about, Mr. Justice Stevens, and we have a right, subject to the limitation --

QUESTION: But you don't have a right to keep the people off who want to distribute Parts 1 and 4; you're objecting to something else being in the pamphlet.

MR. ABERCROMBIE: Yes, Your Honor.

QUESTION: And there's an equal invasion of your property right, it seems to me, whether the pamphlet has got two pages or four pages.

MR. ABERCROMBIE: We would prefer that nothing be distributed, Mr. Justice Stevens.

QUESTION: But, having conceded that they can come on and distribute 1 and 4, what's your serious objection to letting them put pages 2 and 3 in? That's what I'm saying.

MR. ABERCROMBIE: Because it is political material which is not related to the employees' relationship with the employer. We don't want --

QUESTION: Well, would you make the same argument if it was comic strips? Would you have the same legal --

MR. ABERCROMBIE: Oh, yes, sir. I would certainly. We don't -- according to the Board's theory and according to the logical extension of the Fifth Circuit's rules, Mr. Justice Stevens, we go from the distribution of this material to the distribution of handbills or literature solely supporting a candidate for public office who, for one reason or another, has promised that he would support a labor organization and its goals and efforts.

QUESTION: Then your position really is, your preference would be to have no solicitation; but you know Republic Aviation is on the books, so you will allow solicitation to the extent the law requires it?

MR. ABERCROMBIE: Yes, sir.

Thank you.

QUESTION: Oh, your position really -- I don't know

why it isn't, if you -- you will let be distributed on the property what you have to, but if you don't like what else they mix with it, you're going to keep it off?

MR. ABERCROMBIE: Yes, Your Honor.

Thank you, Your Honor.

QUESTION: Well, would that not be so, they could have one union message and six political messages; is that not so, Mr. Abercrombie?

If that were not so, they could have one political message, or one union message and six political messages and that would carry it, if you were not correct on that position?

MR. ABERCROMBIE: That is correct, Mr. Chief Justice. It is simply a matter of our right to do it; and the question really then turns into one of, what are you going to do? Go into a word count, as to whether it is protected or unprotected?

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Allen.

ORAL ARGUMENT OF RICHARD A. ALLEN, ESQ.,

ON BEHALF OF THE RESPONDENT

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

QUESTION: While you're on that, before you get started, do you disagree with that last proposition that the union can't carry six political messages and one union message in one pamphlet and be protected by Section 7?

MR. ALLEN: I agree with that proposition, Mr. Chief Justice, to the extent that it -- to the extent that the union is simply sticking in incidental Section 7 material in literature that is primarily a vehicle for unrelated political propaganda. The Board, I think its position is fairly clear, would not contend that that was protected activity. The Board's position is the alternative ground for affirming the judgment in this case is limited to a situation where, at least a substantial portion of the literature is protected by Section 7.

QUESTION: Well, then let's reverse it. Suppose it's three-quarters union message and just 25 percent campaigning for some candidate --

MR. ALLEN: Well, Mr. Chief Justice, it's hard to --

QUESTION: -- do you think that's protected?

MR. ALLEN: -- it's hard to speculate without knowing all of the circumstances, and what the literature relates to, and I wouldn't want to say what the Board would decide.

QUESTION: Well, it's supporting a candidate running for public office at that time.

MR. ALLEN: If in, for example, a union newspaper, one column out of a five-page newspaper said "Vote for Joe Smith"; I don't think the employer, if the rest of the newspaper was substantially devoted to relevant Section 7 materials, we're not suggesting that --

QUESTION: Then you would get into a word count?

MR. ALLEN: Well, that's right. But the Board's position in this case is designed to avoid a word count.

QUESTION: And you don't want censorship.

MR. ALLEN: That's right, Mr. Justice Marshall.

In a case like this where the employer is charged with having restrained his employees from the exercise of their Section 7 rights, we agree with petitioner that essentially the analysis presents two issues.

The first issue is whether the activity of the employees was an activity that comes within the scope of Section 7. If not, then the case is over, and the employer hasn't committed any unfair labor practice by restraining the activity.

If, however, the activity is within the scope of Section 7, a second issue is presented, namely whether the employer has shown some special management or property interest that would justify some restrictions by him on the manner in which the Section 7 rights are exercised.

QUESTION: Why do you phrase the issue that way, Mr. Allen? The employer must shown some special -- is that on the basis of Republic?

MR. ALLEN: That is on the basis of Republic Aviation and its progeny, including NLRB vs. Magnavox most recently.

QUESTION: But do you not concede that the Board might rationally adopt a different rule for the peripheral matter included under Section 7, "or other mutual aid or protection", than it did for organizational materials, such as was involved in Republic?

MR. ALLEN: The Board has not made any such distinctions, we contend that the Board has reasonably not made any distinctions; whether it could or not, I don't know. Although I can think of many difficulties between trying to decide -- trying to make categories among Section 7 rights, as to which are more important and which are less important in the balance that Republic Aviation requires.

QUESTION: Well, one of my difficulties here was that Republic Aviation, the opinion of the Court sets out at great length the Board's reasoning for concluding that organizational material was the kind of distribution to which the employer's property rights had to yield. And all I see in this -- in the Board's treatment of this case is that the- rather summarily affirmed the findings of the Administrative Law Judge.

MR. ALLEN: Well, Mr. Justice Rehnquist, it is the Board's position, and we contend that legally it's a correct position, that the distribution -- that the news bulletin here came within the scope of Section 7, that it related to matters involving -- it was a concerted activity for mutual aid or

protection that is protected by Section 7. And the Board has adopted, in cases involving employer restraint on Section 7 activities, the general rule of Republic Aviation, that unless the employer has come up with some special interest in production or discipline, he may not lawfully prohibit the distribution by employees of Section 7 material on non-working time and in non-working areas.

QUESTION: Is there any particular Board decision that says Republic Aviation should be carried over to "or other mutual aid or protection" and why it should be?

MR. ALLEN: Well, I can't think of any Board decision specifically making that point, although I would submit that NLRB vs. Magnavox does so implicitly. To the extent that -- well, excuse me a second. According to petitioner's definition that would be an organizational activity. But --

QUESTION: Well, don't -- you won't have much time to argue your case.

MR. ALLEN: I'm sorry, I can't think of one offhand, although --

...

QUESTION: This case isn't of that mood, is it?

MR. ALLEN: Pardon me, Mr. Justice White?

QUESTION: This might be the first case?

MR. ALLEN: Well, each case depends on its facts. This is the first case that involves the minimum, the Texas right-to-work law. It's different than -- it's different.

But it's fully within the general and well-established principles that the Court and the Board have articulated under Section 7.

The principal issue in this case is the first issue, whether the activity comes within the scope of Section 7. That's an issue that goes beyond the particular facts of this case, because if, as petitioner quite clearly contends, Section 7 does not cover or bear on the distribution of the news bulletin because of its content, then nothing in the National Labor Relations Act would prohibit an employer from restraining employees by any means, including discharge, for distributing the bulletin either on or off the premises.

Mr. Abercrombie has made that quite explicit today, in connection with Mr. Chief Justice's remarks. It is clear, Mr. Chief Justice, that Section 7 does apply to distribution of material off the premises, on the sidewalk.

If, for instance, this material was being distributed on the sidewalk and the employer discharged the employee for doing that, then we would contend that the employer has violated Section 8(a)(1) of the National Labor Relations Act, because he has interfered with the exercise of Section 7 rights of his employees.

Now, petitioner contends that the distribution of the news bulletin is not covered by Section 7 at all, because, in its view, Section 7 only applies to -- at least as it stated

in its brief, and I quote from page 13 of its brief, "activities which are related to a specific dispute with the employer over an issue which the employer has the right or power to control."

Today, in oral argument, Mr. Abercrombie advanced additional reasons for its contention that the distribution of the news bulletin was not covered by Section 7, namely, that it involved what he termed to be political matters, and also because it allegedly did not involve organization.

QUESTION: How do you term those materials, Mr. Allen?

MR. ALLEN: I term those materials, Mr. Chief Justice, as materials that are within the scope of the mutual aid or protection clause of Section 7; they are materials that are directly related to the very significant concerns of the employees in this plant; they are also materials that are related to the concerns of employees generally, which we submit was one of the purposes of the mutual aid or protection clause of Section 7.

And we would submit that also it was, in a very real sense, part of the union's organizational efforts.

QUESTION: What if they were advocating high tariffs on all products of Japan, on the grounds that the Japanese were guilty of unfair competition and lower labor --

MR. ALLEN: And was affecting their jobs?

QUESTION: Yes.

MR. ALLEN: I think the Board might have a very reasonable basis in a case like that for contending that it was within the scope of Section 7.

QUESTION: But you seem to agree then that there must be some kind of a reasonable connection with the employee's job for this particular employer.

MR. ALLEN: Well, not exactly, Mr. Justice White. It's difficult --

QUESTION: So it needn't have any connection with it? What about --

MR. ALLEN: It needn't have a connection --

QUESTION: What about circulars urging the employees to join other employees in a boycott of a certain supermarket chain, hasn't got anything to do with the employer's business.

MR. ALLEN: That seems to me clearly under the cases would be protected by Section 7. The cases, for example, --

QUESTION: But even though it has no connection with the job at all.

MR. ALLEN: That's correct, Your Honor. It is well established and the cases recognize that, for instance, refusals of employees of one employer to cross the picket line of employees of another employer is protected by Section 7, although that has nothing to do with the employees -- refusing employees jobs or their relationship with their employer.

QUESTION: Well, that isn't done on the employer's

premises.

MR. ALLEN: Well, but the first question we have to isolate is whether or not the activity is within the scope of Section 7. Once we --

QUESTION: Well, then I'll ask the next question: how about that boycott literature distributed on the employer's premises?

MR. ALLEN: It would seem to me that under the established rules that the distribution of that literature by employees in non-working areas on non-working time was an activity protected by Section 7 unless the employer came up with some kind of reason as to why he had an interest of any kind in prohibiting it. The rules are too well --

QUESTION: Well, you said the cases recognize, Mr. Allen, what cases are you referring to?

MR. ALLEN: Well, the cases we've cited to them in our brief are the cases that --

QUESTION: What are they, Court of Appeals cases?

MR. ALLEN: Well, there are many Court of Appeals cases and Supreme Court cases as well that recognize that Section 7 is not limited to matters which affect the employees' relationship with their employer, or -- and that involve matters over which the employer has any right or power to affect.

QUESTION: But that wasn't the basis on which the Court of Appeals in this case proceeded.

MR. ALLEN: Well, the Court of Appeals in this case --

QUESTION: They proceeded on the basis that this particular distribution was reasonably related to these particular employees in their jobs.

MR. ALLEN: The Court of Appeals adopted that standard, and we think that that standard is well within the standard, boundaries of Section 7; and we think the Court of Appeals accurately found that the distribution of this news bulletin did affect the employees themselves in their jobs.

QUESTION: What about literature --

MR. ALLEN: And we think that the cases establish that that's not a necessary requirement.

QUESTION: What about literature which urges them to vote against a given Congressman or Senator on the grounds that he favors right-to-work laws?

MR. ALLEN: Well, that is essentially what we have in this case.

QUESTION: Yes. Well.

MR. ALLEN: Though the Congressman was not --

QUESTION: Well, let me give you an easy one. Urging the workers to support ERA and to oppose airplanes to the Arab countries.

MR. ALLEN: Oppose sales of airplanes to the Arab countries?

QUESTION: And to support the ERA.

MR. ALLEN: With respect to the first part of that, I can't really see how it would affect the employees' interest as employees, unless perhaps they were employees of the aviation industry.

QUESTION: But you don't think there would be a little argument?

MR. ALLEN: A little argument on behalf of the employees?

QUESTION: Yes. You don't think all of them would agree one way or the other, do you?

MR. ALLEN: Oh, I think there would be dispute among the employees, as to --

QUESTION: Right. And don't you think the employer would prefer not to have dispute among his employees?

MR. ALLEN: Well, I was just saying, Justice Marshall,--

QUESTION: My whole point is, do we have to say that this is wide open?

MR. ALLEN: No, it's not wide open.

QUESTION: And then you say, who decides the boundaries.

MR. ALLEN: Well, it's not -- it's certainly not wide open, and we want to emphasize that it is not, the very scheme of the National Labor Relations Act suggests that Section 7 activities have to relate somehow to the employees' status as employees under the statute. But we suggest that petitioner is erroneous in contending that that is -- those matters have to

relate specifically to their disputes with the employer. We suggest that the cases clearly establish it.

QUESTION: What is the boundary? That's what I'm trying to get.

MR. ALLEN: Where is it bounded?

QUESTION: Yes, sir.

MR. ALLEN: That's difficult to say. And the Board has not -- it's difficult to articulate a standard other than the language of Section 7 itself, to describe the outer boundaries of Section 7. As I suggested --

QUESTION: What is the boundary, and, as my brother Marshall asked, who determines it?

MR. ALLEN: Well, --

QUESTION: Is the union leadership, does it have unreviewable discretion to decide in this gray area what is for the mutual protection and benefit of employees such as, let's take environmental legislation. Now, one can argue on either side, whether that's good or bad for employees of a particular plant, or employees generally.

MR. ALLEN: No, Mr. Justice --

QUESTION: Or the economy generally.

MR. ALLEN: No. The answer to that question, Mr. Justice Stewart, is that the union does not have the unreviewable question.

QUESTION: Well, let's say that this particular union,

head of the local is a very strong environmentalist, and he is convinced that proposed environmental legislation in the State of Texas is going to be very good for the employees of this plant as well as employees generally. Can he just have literature distributed along those lines?

MR. ALLEN: Well, if in fact his opinion is unreasonable, I don't think that he's entitled to an unreasonable --

QUESTION: Oh, no, it's perfectly reasonable and so would an opposite opinion be perfectly reasonable.

MR. ALLEN: Well, I think the Act vests in the Board the ultimate determination of whether or not the activity is within the scope of Section 7.

QUESTION: And does it depend upon whether it's reasonable?

MR. ALLEN: Yes, I think it would. Though I think if the employer -- if the union had one view as -- if the union's view was that, "Well, we think this literature about environmental legislation is protected", and the Board said, "no, we don't think so"; then, under the Act, the Board has the ultimate say.

QUESTION: Why? Because the Board --

MR. ALLEN: Because the Board --

QUESTION: -- has the opposite view about the environmental legislation?

MR. ALLEN: No, the Board has the function not of determining the merits of the environmental legislation, but determining the scope of Section 7.

QUESTION: Well, that's the question, of course, in this case.

MR. ALLEN: And I'd like to emphasize in that connection, Mr. Justice Stewart, that, as this Court has recognized many times, the Board's determination or the question of whether -- of the scope of Section 7 and how it applies to particular fact situations, is a question that the Board's determination should, we believe, be given a large measure of latitude. And the reason for that is that the field of labor-management relations obviously involves an infinite variety of situations. And the Board has to deal with these situations every day, and it has to make distinctions that are sometimes difficult but that are, nevertheless, necessary to make.

QUESTION: Mr. Allen, all I find that the Board hs said in this case is on 24a and 25a of the Petition for Certiorari, four paragraphs, simply a boilerplate affirmance of the findings of the Administrative Law Judge.

I would be more persuaded by your argument if I could find somewhere where the Board had reasoned the thing through and said this outer bound of section 7 does include this kind of action. But certainly the Board's order in this case doesn't do it.

MR. ALLEN: You're referring to the Board's order of adopting the decision of the Administrative Law Judge?

QUESTION: Yes.

MR. ALLEN: Well, the decision of the Administrative Law Judge, Mr. Rehnquist, has to be deemed to be incorporated into the Board's order.

QUESTION: Well, then you say, in effect, that the discussion ultimately is not necessarily lodged in the Board but in the Administrative Law Judge?

MR. ALLEN: Not at all, the Board has power to review and reverse the Administrative Law Judge.

But with respect to your broader point that the Board has not articulated a reason, well, we believe that the Administrative Law Judge, whose opinion was incorporated by the Board, adopted by the Board, made quite clear the reasons for it.

But, in any event, the Board has throughout the administration of Section 7 articulated standards that have quite clearly indicated, and relied in this case on former decisions that have quite clearly indicated that activity of this kind is activity -- that it's activity that can be, in some sense, deemed to be political, is an activity that is protected by Section 7, if it is reasonably related to the interests of the employees as employees under the statute, and there's a long and well-established history.

QUESTION: Let me come back to the last answer you gave me and see if you still want to stand on it. My hypothesis was that the literature distributed was simply a list of candidates they should vote against, because these candidates were against the right-to-work law. And you said that was all right. That's protected.

Now, do you still want to stand on that?

MR. ALLEN: Well, I --

QUESTION: You said that's this case; but it's not this case.

MR. ALLEN: Well, this case, this case urged the -- the paragraph, the bulletin in this case urged its employees to -- urged the members of the union to vote for legislators who would support minimum wage legislation.

QUESTION: Yes, but that's not my hypothesis.

MR. ALLEN: Your hypothesis is different because it specifically sets out a list of candidates.

QUESTION: And then nothing else, no union message at all.

MR. ALLEN: Well, in your hypothesis I think it might well be open to the Board to determine that that kind of purely political solicitation in the context of a political campaign was -- I'm saying I think it might be open, though I'm not, of course I can't predict how the Board would find; but I think it might be open to the Board to determine that that kind of

activity was sufficiently removed from the interests of the employees as to not merit Section 7 protection.

QUESTION: Well, what would be an example of political activity that in your opinion would not be subject to Section 7 protection?

MR. ALLEN: Well, the one case we cite in our brief was a decision by the Board in the Ford Motor Company case, cited in our brief at page 30, where the Board held that an attempt by the union to distribute a newspaper, which I believe was a Socialist Workers Party newspaper, was not activity that was protected by Section 7 because, as the Board said, it was purely political propaganda.

QUESTION: Can there be anything more political than supporting a candidate for office, or opposing another candidate? That's the essence of politics.

MR. ALLEN: That's right. But --

QUESTION: I'm not saying that --

MR. ALLEN: But the Board's position is not that because it is political it is protected. That's certainly not the Board's position.

QUESTION: Well, that's not the --

MR. ALLEN: The Board's position is that it is protected if it reasonably relates to the interests of the employees. But if it happens also to be something that can be characterized as political advocacy, the Board submits that that doesn't

remove it from the protection of Section 7.

QUESTION: In a general election, let's assume that all that was distributed was a list of the candidates with some biographical data, saying these are friends of labor. And nothing else.

MR. ALLEN: Well, that's the hypothesis that the Chief Justice gave me, and I was suggesting that, in those circumstances, it might be open to the Board to determine that this was not a bona fide --

QUESTION: Just might be open.

MR. ALLEN: It might be open. I don't know how the Board would decide it, and I would not blush at defending the Board's conclusion that that was protected by Section 7. After all, the phrase "concerted activities for mutual aid and protection" is, by its very terms, an extremely broad phase. And the history of the Act indicates that it had a broad intent.

And I think that perhaps Judge Learned Hand in the Peter Cailler Kohler case most eloquently explained the reason for that. He explained that the very notion of mutual aid and protection is the notion that when employee A assists employee B with respect to employee B's problem, that serves both of their mutual interests. And the reason, as he stated, was that -- I can't find it directly; but essentially that when A's turn comes, he knows that B is going to help him. That's the very

concept of mutual aid and protection. It is a concept that has consistently not been limited to what the Court of Appeals called the battlefield of employer-employee relations, it is a broader concept, in terms of Section 7 --

QUESTION: If your quotation of the Ford case is accurate, and I assume it is on page 30, I don't think you'd have to either defend the Board or blush at defending them. My hypothetical was drawn from that precise case in the Board, and it concluded by saying, "This is wholly political propaganda which does not relate to employees' problems and concerns qua employees."

Now, why do you think the Board might change -- do you think the Board might change its mind?

MR. ALLEN: With respect to your hypothetical?

QUESTION: Yes. Well, not my hypothetical, the Board's own decision in the Ford case.

MR. ALLEN: No, I think the Board stands by that decision.

QUESTION: Well, then you wouldn't have to worry about defending them, because -- unless they change their position.

MR. ALLEN: Well, I'm not sure that that decision would necessarily --

QUESTION: They're saying this is political and not protected.

MR. ALLEN: -- foreclose the Board from determining

that in your hypothetical -- I'm suggesting that the Board could reasonably decide it either way; but I don't think it would foreclose the Board from determining that a message to union employees, "Vote for A, B, C, friends of labor" was something that fell outside the scope of Section 7, I think the Board is --

QUESTION: Your point, I gather, Mr. Allen, is that it is the Board's position that whether or not literature is or is not political is not a relevant test under Section 7.

MR. ALLEN: That is correct.

QUESTION: That it may be political and protected under Section 7, --

MR. ALLEN: That is correct.

QUESTION: -- and may be nonpolitical and unprotected under Section 7.

MR. ALLEN: And you raise a very good point. The term "political" is a term that is hard to define.

QUESTION: But it's not a relevant test for Section 7, in your submission, as I understand it.

MR. ALLEN: That is correct. That is correct. The relevant test for Section 7 is to the extent we can paraphrase the language of Section 7, "matters that affect the interests of employees as employees" and not, as for example, football fans or connoisseurs of fine wine, but as employees. That's the purpose of Section 7.

QUESTION: Well, what's the basis for the presumption that's applied? It's presumptively invalid if you bar -- what's the basis for that?

MR. ALLEN: Well, the basis for that is a long line of decisions, starting with the Republic Aviation --

QUESTION: I don't want the decisions; what's the reason for the presumption?

MR. ALLEN: Well, the reason for the presumption is that when employees are engaged in Section 7 activity on the employer's plant -- the particular activity being the distribution of literature on the employer's plant, where they have a legitimate right to be on non-working time and in non-working areas, for the employer to flatly prohibit that is an activity that --

QUESTION: But you're saying that the employer -- you're saying that this presumption applies even to distribution that has very little to do, if anything, with the employer's business and his relationship with the union. That's your position and the Board's position. And that -- why --

MR. ALLEN: That's correct. Let me give you an example.

QUESTION: Well, let me -- I might be able to understand the basis for the presumption where the distribution does affect the relationship between the employer whose property is being used for the distribution and his employees. Why -- what's

the basis for the presumption where that reason for imposing on the employer isn't there?

MR. ALLEN: The question might be best answered by the converse question: If the activity is something that Congress intended to protect when it passed Section 7, what is the reason for allowing the employer to prohibit that activity when the employees are already on his plant and when they are not on working time and not invading any working areas?

QUESTION: The reason is his property right, I guess. He doesn't like what they're distributing, on his property. And it has nothing to do with his relationship with the union.

MR. ALLEN: But the scheme of the National Labor Relations Act --

QUESTION: So why shouldn't he be able to get it off?

MR. ALLEN: -- is that his property rights -- the premise of the National Labor Relations Act is that his naked property rights have to yield to the rights of employees under the --

QUESTION: Well, not without limit.

MR. ALLEN: Not without limit.

QUESTION: No, it's only a presumption.

MR. ALLEN: Not without limit. There is a requirement that there be a proper accommodation. The Board has

determined that in cases where all the employer alleges, which is this case right here, is a naked property right; that accommodation, the proper resolution of that accommodation is to allow the employees to engage in their Section 7 activities.

QUESTION: Well, let me ask you again the question that I think was included in what Brother Rehnquist asked you, do you know what case it is, if there is any, where the Board itself or a Hearing Examiner or Administrative Law Judge has addressed the question of why the -- why a protected literature that has nothing to do with the job must be allowed to be distributed on an employer's property?

MR. ALLEN: Well, I'm not sure what you mean by "nothing to do with the job". The literature in this case had some --

QUESTION: Well, you say it doesn't have to have anything to do with the job.

MR. ALLEN: Well, it doesn't have anything to do with the job directly.

QUESTION: All it has to do is that you just -- you can --

MR. ALLEN: Well, yes. So we would cite you the General Electric case, for example, where the activity there was activity by employees in the parking lot, collecting, soliciting support for and I believe funds for support of the American Farm --

QUESTION: The grape workers.

MR. ALLEN: The grape workers. And I think the Board expounded its rationale in that case.

Well, I don't want to take the Court's time by -- but I would cite you to that case and also the Kaiser case, where the activity being engaged in was writing --

QUESTION: But the grape workers never went to the Court of Appeals.

MR. ALLEN: Yes, it did.

General Electric, 411 F 2d 750, enforced by the Ninth Circuit.

QUESTION: 411?

QUESTION: Well, what would happen if in the AB Furniture Factory they pass out leaflets saying "In the XY Furniture Factory they have a better working contract, therefore we urge all of the workers in this plant to buy their furniture from the competitor"? He couldn't protect himself from that?

MR. ALLEN: Yes, I think he could, Mr. Justice Marshall, if the activity was simply a disparagement of your employer's product. This Court has held in Local 1229 --

QUESTION: It wasn't disparaging the product, it was just taking the money out of his pocket.

MR. ALLEN: Well, in a sense your hypothetical seems to me to disparage his product, by saying somebody else has got

a better one.

QUESTION: I said that they have a better working contract over there.

MR. ALLEN: Oh, better working contract; so buy their products?

QUESTION: Yes.

MR. ALLEN: Well, I'm afraid you have -- I'm not terribly familiar with the rules under 8(b)(4), but --

QUESTION: Well, I'd hate to see an employer --

MR. ALLEN: -- I think that answers your question.

QUESTION: -- to have to pay for that.

MR. ALLEN: Well, I think -- I'm not familiar with those rules, but --

QUESTION: Well, the whole point, as I said before, I mean, I think you are in a place where the lines are very smoky. For lack of a better word.

MR. ALLEN: Well, the Board frequently faces those smoky lines, Your Honor, and it has to do the best it can.

QUESTION: Mr. Allen, doesn't the statute impose any limit on the employer -- say you have union political propaganda that's distributed, is there any statutory restriction on the employer's right to distribute literature expressing a countervailing political point of view?

MR. ALLEN: The only one that I know of is one alleged by the Chamber of Commerce in their brief, the Federal Elections

Campaign Act; and I don't think that would apply to distribution in his plant. As far as I know, there is none.

QUESTION: Okay.

QUESTION: What about -- you mentioned only the naked property right, I think you put it that way -- what about the interest of the employer in not having his employees get into a big argument, fist fights or less, if they are arguing over the Panama Canal or the right to work; isn't that a factor in keeping this off?

MR. ALLEN: It would be a factor, Your Honor, it might well be a factor if the employer advanced such reasons. The cases establishing that, --

QUESTION: Well, does it --

MR. ALLEN: -- the Board has recognized that if he can show that that's going to disrupt his working environment, there can be accommodation of the rights; but the petitioner here has made no such showing -- made no such claim.

QUESTION: Well, if you had people advocating the Panama Canal Treaty on the one hand and opposing it on the other, a subject that was as heated as that, --

MR. ALLEN: I can't see why the Panama Canal Treaty would be related to the interests of the employees as employees.

QUESTION: So he could forbid it, couldn't he?

MR. ALLEN: Yes, I believe he could.

QUESTION: By the way, Mr. Allen, I think some day

you might look at the enforcement per curiam in the General Electric case.

QUESTION: And the Ford Motor case.

MR. ALLEN: Yes. Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Abercrombie.

REBUTTAL ARGUMENT OF JOHN B. ABERCROMBIE, ESQ.,

ON BEHALF OF THE PETITIONER

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

The Board's focus in this argument is wrong. We are not talking about Section 7 as a whole, we are only talking about non-fundamental rights under the other mutual aid or protection language of Section 7.

The suggested rule, which we have advanced in our brief, has application only in this context. And I would respond to Mr. Justice Rehnquist's question, there was no discussion in the Administrative Law Judge's opinion of the basis for his decision. He simply cited the presumption of invalidity by the -- because of the limited distribution or the limitation on distribution of this material on the employer's premises.

The Board and the Court below have placed the cart before the horse on the matter of accommodation of Section 7 property rights -- Section 7 rights to property rights. I note Mr. Allen's reference to our "naked property right", we're

quite proud of that "naked property right", and believe that we have a right to enforce it under the Constitution and the laws of this country, except in those instances where they would amount to an unreasonable impediment to the organization of employees on the employer's premises.

The Board would adopt a presumption of right for any Section 7 right, presumably including the right to picket on the employer's premises, in the absence of a showing by the employer of special circumstances.

Certainly no balancing was undertaken in this case. The presumption alluded to by the Board only relates to distribution of fundamental -- affecting fundamental Section 7 rights, particularly the right to organize.

This Court has never said that the presumption is applicable to any union distribution, regardless of its content. The distinction between what is distributable in a plant is one of substance, in the same sense as that issue was addressed in Babcock & Wilcox. There the Board made the same assertion that it did here, that Republic Aviation established a presumption of the right of a non-employee organizer to enter the employer's premises for the purposes of organizing.

The Court held that there was no such presumption, that only by a showing of special need to do so could a non-employee enter the employer's premises.

We suggest that there has been no accommodation made

in this case, but that because of the nature of the literature that is being distributed, political in nature, that the accommodation must necessarily follow on the right of the employer to prohibit such distribution in the exercise of his property rights, and that, as a matter of law, the distribution of political material on the employer's premises is and cannot be allowed under the provisions of Section 7 of the National Labor Relations Act.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 2:37 o'clock, p.m., the case in the above-entitled matter was submitted.]

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