OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: LECHMERE, INC., Petitioner v. NATIONAL LABOR RELATIONS BOARD

CASE NO: 90-970

PLACE: Washington, D.C.

DATE: Tuesday, November 12, 1991

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IN THE SUPREME COURT OF THE UNITED STATES

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LECHMERE, INC., :

Petitioner :

v. : No. 90-970

NATIONAL LABOR RELATIONS BOARD :

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Washington, D.C.

Tuesday, November 12, 1991

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:00 a.m.

APPEARANCES:

ROBERT P. JOY, ESQ., Boston, Massachusetts; on behalf of the Petitioner.

MICHAEL R. DREEBEN, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

(11:00 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 90-970, Lechmere, Inc., v. National Labor Relations Board.

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

ORAL ARGUMENT OF ROBERT P. JOY

ON BEHALF OF THE PETITIONER

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

This case comes to the Court on writ of certiorari from the First Circuit Court of Appeals. The question presented is whether an employer may legitimately bar nonunion -- nonemployee union organizers from trespassing on its private property to seek to organize its employees when reasonable alternative means of reaching them are available.

This Court, in NLRB v. Babcock & Wilcox, a unanimous opinion in 1956, held that an employer may, in those circumstances, preserve his private property rights and exclude the union. In this case, a divided panel of the First Circuit with a strong dissent endorsing a ruling of the National Labor Relations Board held to the contrary. We submit, Your Honors, that the First Circuit should be reversed, and in so doing this Court should

reaffirm its holding in NLRB v. Babcock & Wilcox.

Petitioner submits these principal arguments where Lechmere v. The National Labor Relations Board should be reversed.

First, the First Circuit endorsed the board's decisional model enunciated in Jean Country, which rests upon an erroneous legal foundation. By taking the threshold inquiry into whether reasonable alternative means of reaching employees through the usual channels of communication exist before trespass will be authorized and denoting that inquiry in the analysis to one of three factors of seemingly equal standing, the analytical regime fashioned by this Court in Babcock & Wilcox is dismantled and the private property rights of the employer are substantially diminished and oftentimes destroyed.

A second principal argument that we submit to the Court why the First Circuit should be reversed is that the First Circuit and the board, while paying lip service to the holding of Babcock & Wilcox that so long as there are reasonable alternative means available to the union to reach the employees, no trespass should be authorized, nonetheless allowed the union's effectiveness in persuading employees as opposed to reaching employees to become a factor in judging whether trespass is warranted.

Third, the First Circuit endorsed the board's

creation of an impermissibly low standard for establishing that the use of alternative communications methods is not reasonable. In Sears & Roebuck v. San Diego Council of Carpenters, this Court stated that the burden of proving that trespass is necessary is a heavy one.

In Lechmere, the First Circuit and the board, we submit, in addition to allowing unfounded inferences, conjecture, and partial facts to satisfy this heavy burden, has given strong indications that a new and impermissibly easy standard for unreasonableness of a communication method has emerged by describing accessibility to the work force in terms of whether a union can obtain the names and addresses of employees through an employer-furnished list or otherwise.

Briefly, the facts in this case are as follows, Your Honors. The petitioner Lechmere, a retailer, opened a store in Newington, Connecticut, employing 200 employees. It established a no-solicitation, no-access rule, and consistently and unfailingly enforced that rule by prohibiting all efforts at solicitation, including the Salvation Army bell-ringer during the holiday season, the Girl Scouts of America, Burger King, the American Automobile Association, and so on. On June 16, 198 --

QUESTION: Big hard-hearted employer, isn't it?

(Laughter.)

MR. JOY: Your Honor, I would respond by saying that it's an indication of just how strongly this employer has asserted its private property interest.

On June 16, 1987, the United Food and Commercial Workers began a campaign to organize the employees at Lechmere by first putting a full-page ad in the Hartford Courant newspaper, which is the largest newspaper in the area of daily circulation. The ad, by the way, was aimed directly at the employees. A copy of one is attached to the joint appendix. It was aimed directly at Lechmere employees, and it contained a clip-out authorization card with a self-addressed card for return.

Two days later, on June 18th, the union began a series of trespassory forays into the store and the parking lot of Lechmere, stuffing union literature inside merchandise and in the restrooms and handbilling in the parking lot, including the employee section of the parking lot, which was closest to a 46-foot-wide public grass strip that separated the parking lot from the Berlin Turnpike. Forty-two feet of that grass strip is public land, meaning that the union organizers were able to come within 4 feet of where the employees parked in that section of the parking lot.

The employees arrived one-half hour before the store opened, and they left one-half hour after the store

closed.

QUESTION: Is that true of all of them?

MR. JOY: It was true of most of them, Your Honor. The testimony in the record indicates that the union was aware that the employees generally parked in that section of the parking lot. In fact, may I quote the testimony of union organizer Lisa Meucci, who was asked this question by counsel for the general counsel of the National Labor Relations Board.

What steps did you take to ensure or attempt to ensure that leaflets reached the particular audience?

Answer: Arriving at the store between 9:15 and 9:30, making sure that people who parked their cars were employees. The stores opened at 10:00, so most people that arrived at the store between 9:30 and 10:00 were employees.

The testimony of the union itself.

There's no question but that the union was aware that the majority of the employees parked in that section, which was accessible within 4 feet by public land.

On June 20th, the organizers again made three intrusions into the parking lot and handbilled. The company's invocation of its no-solicitation rule against the union led to the --

QUESTION: Excuse me. So they knew that they

parked there.

MR. JOY: Yes, Your Honor.

QUESTION: But they still couldn't reach them there, right, unless -- unless they went onto the land?

MR. JOY: They -- they could not walk up and touch them, Your Honor, but they certainly, within 4 feet, a distance greater than separates you and I, could beckon them to come over, all the while saying, I have a piece of literature here that you should be interested in. Please come over and talk with me further about it.

I suggest to you that that short 4 feet distance should not rise to the level of making them inaccessible. Indeed, Your Honor, there were other --

QUESTION: Every car was 4 feet from this --

MR. JOY: No, Your Honor, but the -- the length of property that bordered on Berlin Turnpike was several hundred feet in length, and the employees, while they all didn't, in one single line, up against that section of public land, park, nonetheless, I think that the testimony indicates that there may have been only two or three rows of cars, but certainly that first row of cars was within 4 feet.

And by the way, Your Honor, that's not the only method of reaching the employees that was available to the employees in this case.

QUESTION: I do hope you will expound the alternatives that were available.

MR. JOY: Yes, Your Honor, and I will do that now. The employees, for the next month and a half after the organizational campaign began, gathered the names and addresses of license plates of -- gathered the names and addresses of employees through the taking down of license plate numbers, and going down the street a few miles to the Connecticut Division of Motor Vehicles, which -- it would give them the names and addresses of those to whom the car was registered. That was public information in the State of Connecticut.

The union employed that method to obtain the names of 49 employees. It determined after speaking with an employee, with the help of an employee of Lechmere, that 8 of those 49 employees were supervisors. Thus, they plugged the names of 41 of the 200 Lechmere employees into their computer, and then generated four pieces of mailing to each of those homes.

Those mailings included a stamped self-addressed envelope. Each of those mailings exhorted the Lechmere employees, if they had an interest in improving their wages and benefits in terms of conditions of employment, to return that clip-out.

In addition, there was testimony in the record

that none of those mailings were returned to the union addressee unknown. There was no indication that these four mailings did not get through to these employees.

In addition to the mailings, the union made roughly 10 telephone calls to employees, and they made only two home visits. The union doesn't explain why they only attempted two home visits. They placed five more ads in the newspaper, four of them full-page ads and one half-page ad, one in the New Britain Herald and the other in the Hartford Courant.

In addition, for a month straight, this union picketed again on that grass strip, which allowed them to come within 4 feet of the employees' section of the parking lot, picketed for a month straight, and then for the next 6 months intermittently -- now, that picketing switched its target from the organization of the employees to an area standards kind of a picket, but nonetheless, the employees every day when they came saw those pickets for a month and then intermittently for 6 months.

QUESTION: Mr. Joy --

MR. JOY: Yes, Your Honor?

QUESTION: The -- the board found, I gather, that there were no feasible and effective alternatives to going on the property.

MR. JOY: That's correct, the board so found,

Your Honor, and I would submit to you that they applied an erroneous legal standard in defining what reasonable alternative means were.

We submit that what the board was saying and -- and applying here was a standard under which the -- the union must be effective, must have reasonable alternative means which are effective in persuading the employees, as opposed to effective in merely reaching them, and the Babcock command, the command that this Court gave in NLRB v. Babcock & Wilcox in 1956 was that the available methods need only be effective in reaching employees, not persuading employees.

Indeed, Your Honor, the Court in Babcock denied enforcement of a board order, and the underlying board decision found that there were no reasonable alternative means of communication because the methods of communication in the board's Babcock case were not -- were in -- were not as effective as placing the employees -- the union organizers, I should say, on the employer's property.

The Court, while stating that the trespass that was authorized in Babcock was minimal and not unreasonable, nonetheless rejected the board's interpretation of that rule of law and said that more effective means isn't the issue. The issue is whether or

not reasonable alternative means are available by the usual methods of communication, and the Court cited as the usual methods of communication telephone calls, home visits, advertised meetings, and the like, and it appears in footnote 1, I believe, of the Babcock Supreme Court decision.

It -- it also referred in Babcock not just to the usual methods of communication but the usual ways of imparting information. In this case, the board and the First Circuit endorsing the board, I believe, has misunderstood that rule of law that was enunciated respecting reasonable alternative means.

It -- indeed, in the board's own brief to this Court on page 11, it talks about the paraphrasing -- or, I should say it paraphrased Babcock & Wilcox by talking about the effectively engaging in organizational activity. That connotes to me that the definition, the interpretation, is one where they are convinced that the effectiveness means effectiveness in persuading and not reaching. The summary dismissal of mass media by the board in Jean Country, endorsed by the First Circuit, where the board says, only in the exceptional case will we consider mass media to be an appropriate available method of communication.

And as Judge Torruella said in his dissent, in

one clean swoop the board and the First Circuit have eliminated the very tools used by the entire advertising and political industry to reach its targeted audience, and without any evidence on the record in this case that the employees were not reached by these mass media attempts, the board summarily dismisses the very same method of communication that the union began its campaign with, and --

QUESTION: Did the board explain, Mr. Joy, why it dismissed the mass media as a possible means of communication?

MR. JOY: It said, Your Honor, that in most cases it will be considered expensive or ineffective, and I believe that's further indication that they misconstrue the word effective to mean, effective in persuading as opposed to effective in reaching. They also placed an expense component on it, and I submit to you that in this case the union certainly did not apparently consider that method of communication expensive. Indeed, as I said, it utilized that method six times.

Your Honor, I would like to speak to the first argument that I mentioned, and that is that by relying on the Jean Country test the -- the Supreme -- the First Circuit relied on a legal erroneous foundation which fails to follow the applicable law.

As I mentioned, this was a unanimous opinion by eight Justices in 1956, and it construed the act and fashioned the legal rule that governs nonemployees seeking to trespass on an employer's property as distinguished from employees, and that rule prohibited trespassing except where the target employees were inaccessible and beyond the reach of less intrusive nontrespassory means.

We -- I submit to you, Your Honor, that the Babcock Court placed a sentinel at the boundary of the private property, and that sentinel was a threshold inquiry -- improve to me you have no reasonable available other means before I must let you by onto my property. By reducing that inquiry to a relative contest among three of coequal status, the board and the First Circuit endorsing the board has taken that sentinel off his post guarding the property.

I -- perhaps, if I may mix my metaphors, a little historical context of this most recent test enunciated by the board is helpful. Two years prior to Jean Country -- and by the way, Jean Country was decided in 1988 -- 2 years before that, in Fairmont Hotels, the board enunciated a test for access by nonemployees onto employers' private property, and in that test in Fairmont the board said, we're going to -- going to balance the property rights on the one hand against the section 7

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right on the other hand, and only if they are in equipoise will we then look to reasonable alternative available means.

Jean Country came along 2 years later, and the board apparently recognized its error and resurrected the threshold inquiry in Babcock from its obscurity and brought it up to a factor to be considered equally with the other two. In essence, then, what the board did was it took the horse from behind the cart and put it into the cart, and that's what the First Circuit adopted by endorsing the board's order in this case.

Now, the -- the Supreme Court decisions since Babcock have bolstered rather than diminished the vitality of the rule of law enunciated in Babcock.

QUESTION: And what rule of law do you say has been violated by the board?

MR. JOY: The -- the board has taken the -- mandated the required threshold inquiry into whether reasonable alternative means are available to reach the intended audience before we have to consider when and how much trespass is necessary. The board has removed that threshold inquiry, that protection against unnecessary trespass, and that threshold inquiry, that decisional regime, was dictated by this Court in Babcock & Wilcox, I submit, Justice White.

QUESTION: Would -- would you agree that because the word reasonable is in there, it's perfectly appropriate for them to consider the strength of the property right and consider the particularity of the section 7 right acquired? You just think they're giving it an undue prominence, and in effect promoting those two inquiries to the level of a test as opposed merely to being factors to be considered, is that true?

MR. JOY: Our proposition, Justice Souter, is that before any analysis of the strength of the property right versus the strength of the section 7 right in question is to be engaged in, the threshold inquiry must first be asked and answered.

QUESTION: Yeah, but the word reasonable is in there, and what are they supposed to consider when they -- when they -- when they inquire about reasonableness? It seems to me that what you're saying is that -- that they're really -- that you're reading the word reasonable out of there, and it seems to me that you're saying as long as there is any other means of communication, any other means of reaching, that that's the end of the inquiry, but you've got to do something with the word reasonable.

MR. JOY: Your Honor, allow me to respond by saying that we read the word reasonable in that context to

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mean reasonable in light and in the context of the remainder of the opinion -- excuse me.

And the language in the remainder of the opinion says, but when the plant and the living quarters are isolated and rendered inaccessible, then reasonable alternative means may not be available. So in that context of looking at the isolation of the plant and the living quarters, such as your lumber camps, your S&H Grossinger's Hotel, where the employees live on the premises, your Husky Oil, where employees of Husky Oil were up in Camp Lonely, 600 miles on the North Slope, north of Anchorage, in those contexts -- contexts is -- is reasonable alternative means intended to be read, and the word reasonable intended to be read?

So that I'm not suggesting to you that no -- in no case would there be a situation where access would be required. I'm using the language in the context of Babcock to define what is reasonable and what is not.

QUESTION: And you'd -- you'd say expense has some bearing as to reasonable. I mean, if the only way to get to them is to hire private detectives to find out where they live and one by one approach them in that fashion, that might not be reasonable.

MR. JOY: I'm not submitting to the Court, Justice Scalia, that as an absolute rule expense is

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prohibited from consideration, but using an objective reasonable standard as applied to facts such as you present, certainly cost may be one factor. But again --

QUESTION: Mr. Joy, in -- in Textile Workers v. Darlington Company, a case decided here after Babcock, I don't find a recitation of the structure that you say Babcock established, that you have to determine initially whether there are reasonable alternatives before you can weigh the business justification against the section 7 rights.

Darlington spoke of just going right ahead and -- and weighing the section 7 rights against the employer's business justification.

MR. JOY: I don't believe, Your Honor, that Darlington involved the situation where nonemployees were part of the factual scenario of the case, but let me cite you to Sears & Roebuck, and the quotation appears on page 18, and this follows up to your comment on my earlier comment that subsequent decisions have tended to bolster rather than diminish the vitality of Babcock & Wilcox.

On page 18 of our brief, we cite the language in Sears which states as follows, if I may.

While there are unquestionably examples of trespassory union activity that might be protected under section 7, experience under the act teaches that such

situations are rare, and that a trespass is far more likely to be unprotected than protected.

Experience with trespassory organizational solicitation by nonemployees is instructive in this regard. While Babcock indicates that an employer may not always bar nonemployee union organizers from his property, his right to do so remains the general rule. To gain access, the union has the burden of showing that no other reasonable means of communicating its organizational message to employees exists, or that the employer's access rules discriminate. The burden is a heavy one, and has rarely been in favor of trespassing organizational --

QUESTION: Do you think the board has changed the test from whether there are reasonable alternatives to whether there are reasonable and effective alternatives?

MR. JOY: Effective in persuading, Your Honor, and I would cite to you the board's own language in Jean Country, which says that, most significantly, in determining the factors that we will look at in assessing reasonable alternative means, most significantly, Your Honor, is the extent to which exclusive use of the nontrespassory alternatives would dilute the effectiveness of the message. The --

QUESTION: Well, the whole purpose of the communication is -- is to -- is to persuade --

MR. JOY: Correct, your Honor.

QUESTION: -- and it -- it seems to me not a stretch at all to say that reasonableness and an evaluation of reasonableness includes an assessment of how effective the communication is going to be. If you have a voice shouting in the wilderness, it just is -- is not what this whole -- the whole purpose of the organizers.

MR. JOY: Your Honor, I would in response to your question say that the Babcock command which struck this construction of the act and erected this analytical regime required that only reaching -- only whether the alternative means was effective in reaching the audience.

Now, someone who is using your hypothetical, crying in the wilderness, is not likely to be reaching the audience, and no consideration of persuasion should fall into that calculus.

Finally, let me say, Your Honors, that the board and the First Circuit rely on language from Hudgens v. the NLRB as its essential cornerstone in justifying the Jean Country analytical model, and that language states that the locus of that accommodation between property rights and section 7 rights may fall at differing points along the spectrum depending on the nature and strength of the respective section 7 right and the private property rights asserted in any given context.

We submit that this dictum may not be lifted out of context and used as a springboard for circumventing the Babcock analytical model. As I've earlier stated, Hudgens falls in the middle of the line of Supreme Court cases reaffirming the Babcock formula. It comes before Sears and the language I read.

The plain language in the Sears opinion informs that language in Hudgens. The Hudgens language speaking of accommodation between property rights and section 7 rights and placing the locus on the spectrum is to be read as the board's function after the threshold inquiry commanded by Babcock has been answered in the negative, and that's what that language is intended to mean, and if it's interpreted that way, it fits. If it's interpreted the way the board asserts, it circumvents the intention of Babcock & Wilcox and does not fit neatly into the line of cases I have identified.

Your Honors, we in conclusion request that the Court reaffirm the holding of Babcock & Wilcox. Restore the sentinel of reasonable alternative means to its post, protecting private property against unnecessary trespass by nonemployee union organizers, and reverse the First Circuit's endorsement of the order of the board.

Mr. Chief Justice, I would like to reserve the remainder of my time for rebuttal.

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QUESTION: Very well, Mr. Joy.

Mr. Dreeben, we'll hear from you.

ORAL ARGUMENT BY MICHAEL R. DREEBEN

ON BEHALF OF THE RESPONDENT

MR. DREEBEN: Thank you, Mr. Chief Justice, and may it please the Court:

The issue in this case is whether the National Labor Relations Board has reasonably accommodated competing section 7 rights and property rights. The board found in this case that petitioner's denial of access to its parking lot for organizational handbilling violated section 8(a)(1) of the act, which makes it an unfair labor practice for an employer to interfere with, restrain, or coerce employees in their section 7 rights.

The board's interpretation of this general language is a reasonable one, and it should be upheld. The petitioner's argument here today makes clear that its entire reliance is placed on the Babcock & Wilcox decision and inferences that petitioner draws from that decision.

But the board's rule that's under review today, however, is consistent with Babcock & Wilcox. First, the central principle of Babcock & Wilcox is that the board must make an accommodation between private property rights and section 7 rights when the two conflict, and that accommodation must be obtained with as little destruction

of one as is consistent with the maintenance of the other. I would suggest that that formulation itself implies that the board should consider weighing the impact on respective rights before reaching the appropriate accommodation.

QUESTION: Well, Mr. Dreeben, you're talking about an abstract proposition, which of course you have to talk about in a case like this, but there is a remarkable similarity to the layout, it seems to me, of Babcock & Wilcox and to the layout of this particular organization, yet in Babcock & Wilcox this Court said the board could not require nonemployee access, and in this case the board says yes, we can require nonemployee access.

MR. DREEBEN: Well, Chief Justice Rehnquist, the facts in Babcock were quite different than the facts in this case, despite the fact that both cases involve parking lots and both cases involve organizational activity. From there, the cases fairly significantly diverge.

First of all, the property in Babcock was fenced property that was surrounding an employer's industrial plant, and it was entirely closed to the public. There were no means of getting into -- for any members of the public. In this case, in contrast, the property is a parking lot that is essentially open to the public for

anyone to come in and park and --

QUESTION: I think the Court in Babcock emphasized that condition of the property. They emphasize the availability of alternative means of communicating.

MR. DREEBEN: No, the Babcock decision itself does not discuss the weight to be accorded to the property interest because of its characteristics --

QUESTION: Yes.

MR. DREEBEN: But I think that would be a mistake for this Court to read Babcock as having decided every possible case that could come before the board in the future without regard to significant factual distinctions. This Court in Hudgins v. NLRB recognized that there are going to be --

QUESTION: Well, do you think the board would be making a mistake under Babcock if they said it doesn't make any difference whether the media are available, or whether the telephone is available, or anything like that?

MR. DREEBEN: Yes. I think that the board does not have the freedom to say what it said in Babcock, which is that it doesn't matter whether nonemployees have alternative means. What the board --

QUESTION: Well, they -- even, even if going on the property would be more effective?

MR. DREEBEN: That's right. The board -- the

board cannot simply make that judgment. That's what the Court rejected in Babcock. I think it's important to look at what Babcock actually decided.

The board in Babcock had equated the right of nonemployees to enter for purposes of engaging in organizational communications with the right of employees to engage in that form of communication, and this Court reversed that determination, and the central principle that the Court articulated was that the balance is different when you have nonemployees. The employer has a right to maintain the privacy of the property if there are not reasonably effective -- if there are reasonably effective alternatives available to the nonemployees.

QUESTION: Well, is the board's position that the instruments of the mass media are less effective means of communication today than they were when Babcock was decided in 1956?

MR. DREEBEN: Well -- well, in Babcock this Court never adverted to the availability of mass media as an alternative means. The Court was -- was looking at a small-town setting in which it spoke of meetings with employees on the streets of the community, visits at their home which were easily arranged, telephone calls -- they were speaking of the kinds of personal contact that I think is not uncommon to be able to arrange in a

small-town setting, particularly in that era in that part of the country.

The Court was not speaking of -- of the kinds of suburban/urban setting that was present in this case, where the employees are widely dispersed and one newspaper is available that has a circulation that's perhaps 10 percent of the entire population.

It would be, I think, extremely different, and this Court never confronted the problem of whether mass media is effective in this setting.

QUESTION: No, but in this -- in this setting, Mr. Dreeben, the -- on the -- the people who are standing on the grassy strip could have held up a big sign saying there's going to be an organizational meeting at the legion hall on a given night at a given time.

They could have communicated that message certainly effectively as communication, and they could then have had just as much opportunity to meet with people on a person-to-person basis as they would have on the streets of the small town, except for one thing, and that is the people who went to the meeting would have to go to it because they wanted to go to it and not because they got buttonholed on the street.

Now, if that is an effective means of communication, then the only distinction between the two

situations is that it may be a less effective means of persuasion, because it is a less effective means of getting less than willing employees before you. Isn't that the only distinction?

MR. DREEBEN: No, I don't think that it is, Justice Souter, but from the outset, the point here is that the section 7 rights that are being protected are the rights of the employees. The Court has recognized that employees are not going to be capable of -- of exercising those rights in a meaningful way unless they are provided with the information that enables them to make a choice.

QUESTION: Yes, but you're not talking, though, about information, you're talking about effectiveness in persuading them to get to a place where the information can be given if they want to receive it, isn't that fair to say?

MR. DREEBEN: Well, I -- I don't think that it's fair to say that the board looks at whether the -- the information that the employees receive is persuasive to them. A sign that's held up that merely announces a meeting doesn't really provide the employees with any information, doesn't provide them with -- with much more than the knowledge that a union exists and would like to talk with them. The --

QUESTION: And will talk with them at a specific

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time and place if they are willing to go there.

MR. DREEBEN: Well --

QUESTION: That's more than just the picketing did. I -- you may feel they characterize the picketing, but that would be a fair characterization of my organizational meeting hypo.

MR. DREEBEN: Well, I don't think that this Court had in mind, even in Babcock, that the only thing the union had to be able to do was announce its existence. There's a recognition that the employees need to have a more sustained opportunity to hear from the union organizers before they're even going to want to come.

QUESTION: Even if they don't want to, you say that they must be given this information, even if they don't want the information?

MR. DREEBEN: Well, with the --

QUESTION: Even though it's only employees' rights -- as you say, section 7 is only rights of employees. It does not give rights to nonemployees, it does not give rights to organizers. The only thing we're talking about here are rights of employees to receive information.

MR. DREEBEN: That's correct, Justice Scalia.

QUESTION: And you say that they have a right -- a right to receive information, even information

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they don't want to receive, and we're going to sort of force-feed them. I -- that's a very strange right to me.

MR. DREEBEN: Well, it's not clear that they don't want to receive the information.

QUESTION: Well, yes, it is. They see the sign. It says, there's a meeting for this information. They say, I don't want to go to the meeting. I don't want to go to the meeting. You say that's not adequate.

MR. DREEBEN: No, I don't think that it is adequate, because it doesn't allow them to have any opportunity, it doesn't allow them to be confronted with the facts that may influence --

QUESTION: Which they don't want to hear.

MR. DREEBEN: Well, they may ultimately not want to hear it, even if the employees simply get the opportunity to receive the information from the union. They can reject it at that point, and there's no -- the board is not saying here that -- that nothing is effective short of persuading the employees that they ought to join a union, but what the board is saying is that the employees should be given the information so that they have the opportunity to make a decision.

QUESTION: It seems to me if we're talking about employee's rights -- and that's how the statute reads. It talks about the right of employees. Why isn't that

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adequately satisfied so long as the employer is not keeping employees from obtaining information that they want to receive, and it seems to me that's adequately done when he allow -- you know, he's not blocking off the pickets so that they couldn't see those signs on the -- on the grassy strip.

MR. DREEBEN: Well, this Court has recognized that it is a literal interference with the employees' ability to get information if the employer prevents someone from handing them a handbill.

I mean, Babcock & Wilcox itself recognizes that there is a violation of section 8(a)(1) by the employer's denial of access, so I don't think that there's any question that the language of the act read literally applies to an employer's attempt to keep the employees from getting the information.

In this case, the employer's representatives actually pulled a handbill out of the hands of the employees, and I would suggest that is a literal interference with the right to get information.

QUESTION: Because it -- because it had been delivered through -- through trespass, because the people who passed it out had no right to be on the -- on the property.

MR. DREEBEN: Well, that -- that's the issue in

this case, whether they had a right to --

QUESTION: Of course it is.

MR. DREEBEN: Federal law does give the employees the right to organize, and this Court has recognized that in order meaningfully to exercise that right there's a need for the employees to be addressed by organizers. They are not likely to have the information on their --

QUESTION: Well, Mr. Dreeben -- Mr. Dreeben, I take it if the -- let's assume the employer said, I will distribute to every single one of my employees this notice of the union meeting and the purpose of the meeting. I take it that you would say that that's wholly inadequate.

MR. DREEBEN: Well, I don't think that --

QUESTION: Yes or no.

MR. DREEBEN: Well, I'm not sure what the board would say about that question.

QUESTION: You don't? Well, what do you think the board would -- should say?

MR. DREEBEN: I think that the board should look at the actual facts of the situation, but I don't think --

QUESTION: Well, the fact is, the employer makes sure every single employee knows what -- that there's a meeting and that the union wants to give them some information about how valuable it is to belong to a union.

MR. DREEBEN: Well, I don't think that the act contemplates that the employer should be the vehicle for this --

QUESTION: I know, but it just so happens the employer is willing to do that just to avoid a lot of hassle.

MR. DREEBEN: Well, that is not likely to be a way that the employees are going to receive the undiluted message of what the union has to say.

QUESTION: So you say that would not be enough, the board would be entitled to say that that is not a reasonably effective alternative way of communicating.

MR. DREEBEN: I -- I'm not sure what the board would say about that. I do not think that if --

QUESTION: Well, what would you say if the employer went a little step farther and said look, I'm going to -- I'm going to distribute to every single employee a notice of this meeting, and then I'm going to add to it a little paragraph that the union will write for me about how great it is to be a member of the union. He hands -- that's all out, now.

Do you think the -- do you think there has to be some reasonable way of the union contacting the employees in person?

MR. DREEBEN: I think that that's a very

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significant component of what the board is looking at. I don't think it's --

QUESTION: Well, your answer is yes, I guess. Your answer is just plain yes. There has to be some reasonably effective way of actually communicating in person.

MR. DREEBEN: In an organizing setting, either in person or by the -- over the telephone would likely be a necessity. The employer would always have the option of giving the union a list of the employees and allowing the contact --

QUESTION: No, not if the employees said, don't do it.

MR. DREEBEN: Well, there's -- there's certainly -- this is not -- this doesn't raise the case in which the employee said, don't do it. There have been cases in which the employer has distributed a list of the employees and the board has found that to be a satisfactory alternative under these particular circumstances, so there are alternative ways for the employer to deal with this.

QUESTION: And calling to them from a grass strip is not in person? Hello, I want to talk to you about the union, and the person says, I don't want to hear it, that is not in person?

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MR. DREEBEN: Well, that is -- there's nothing in the record to show that that actually happened in this case. What the employer did was attempt to eject the union from the public property itself and called a policeman to do that. The policeman then informed the union that they had a 10-foot strip of public property that they could stand on.

QUESTION: That might -- right, but I mean that might have been an unfair labor practice. We're not talking about that, to try to eject them from public property. But assuming that they're on public property and can -- we know the distances here -- could shout at the people getting out of the cars, we want to talk to you about the union. That would not constitute a personal contact? I mean, what does it take to constitute a personal contact?

MR. DREEBEN: Well, I -- I think a personal conversation does constitute one.

I think, Justice Scalia, that what your question goes to essentially is whether there was substantial evidence to support the board's finding in this case.

QUESTION: I -- I think what it goes to is -- I do think you're saying what the board desires, and that is that there be more than just an opportunity afforded to the employee either in person or by advertisement to get

information that the employee wants.

I think, as you say, the -- the information must be given to the employee, whether the employee wants to hear it or not, and unless there's some opportunity for that, you just simply don't think it's adequate access. Is that -- is that an unfair characterization?

MR. DREEBEN: I think that -- that whether there is or isn't adequate access is something that depends on particular facts, and -- and it could well be that in a particular case the board would find that access from public property to the employees was certainly good enough.

QUESTION: Well, that isn't the point, whether it's access from public property. The point is whether it is enough access to give the employee the clear notice that the information is available and let him say that he wants to receive it or doesn't want to receive it. Is that enough access?

MR. DREEBEN: I don't think that's what this Court said was enough access, even in the Babcock case. In the Babcock case, the Court talked about the union communicating directly with the employees through visual methods such as telephone calls, visits on streets, home visits, and those -- those were part -- that was part of what the Court thought would constitute a reasonable way

for the union to be able to get in touch with the employees.

QUESTION: But communicating what? Communicating, I'd like to talk to you about the union, and if the employee said, you know, to the person at the door or on the street, I don't want to hear it --

MR. DREEBEN: Sure. That -- that is certainly all that's required by the act. The employees are not required to accept the message. As the board --

QUESTION: So that presumably would work from the parking lot as well. I want to talk to you about the union, and the person says, I don't want to hear it. You say that -- that would be enough.

MR. DREEBEN: If the -- if the union actually has the opportunity to talk to the employees.

QUESTION: Holding up a sign, though, I want to talk to you about the union, and the person says, I don't want to hear it, that -- that's -- that doesn't work.

MR. DREEBEN: Well, I think the board has the right to make the judgment that that's not going to be a reasonably effective way for the employees to even understand what the union wants to talk to them about, and that is, after all, what the board's mission is in this case, and when the Court spoke of the accommodation of interests in the Hudgens case, it had in mind that the

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board would take into account the character of the property and the kind of section 7 right and question in deciding whether there was adequate protection of the section 7 right in question.

QUESTION: Mr. Dreeben, do you think that Babcock & Wilson stands for the proposition that it is a two-tier inquiry, that you first have to determine whether there are reasonable alternatives to the trespass in order to contact the employees, and only if the answer to that is no would you go on?

MR. DREEBEN: I don't think, Justice O'Connor, that Babcock structures the inquiry so that the board is precluded from doing what it does here, which is considering the reasonableness of alternatives in conjunction --

QUESTION: As part of the overall balance.

MR. DREEBEN: That -- that's correct.

QUESTION: That is what the board does.

MR. DREEBEN: That is what the board does. The board will not order access if there are reasonable alternatives available.

QUESTION: But it doesn't consider that first or separately.

MR. DREEBEN: It does consider it separately in the sense that if there are reasonable alternatives

available, that's the end of the case, but the board does not view that as a factor in isolation from other factors, and I would suggest that's exactly what this Court recognized that the board might do in Hudgens v. NLRB, where it spoke of the accommodation as falling as -- on points along a spectrum.

There's nothing to suggest in that case that the Court's language should be read as -- as saying that the board can only look at the section 7 right and property right after it looks at alternative means, and Babcock should not be read so as to restrict the board's latitude in interpreting the act in that fashion.

QUESTION: Well, I -- under Jean I would think that it may be that alternatives would be reasonable, considered reasonable in one case and unreasonable in another, depending on the degree of intrusion on the property?

MR. DREEBEN: That's correct. The -- the purpose of that inquiry is to fulfill what the board spoke of in Babcock.

QUESTION: So you are balancing the reasonableness against the degree of intrusion.

MR. DREEBEN: What the board is balancing is how much section 7 rights will suffer against how much property rights will suffer.

QUESTION: Mr. Dreeben, in the -- the board's order here required, as I understand it, the employer to allow access to the parking lot for the purpose of distributing handbills and leaflets to the employees. Is it possible to tell from the board proceedings whether they had in mind personal contact when the material was distributed, or whether it was thought it was just going to be left on the windshields of cars or stuck in the seats?

MR. DREEBEN: Well, I think that there's -- there's aspects of both.

QUESTION: Because one -- one would think that if -- if your requirement that it be a personal contact is uppermost in the board's mind, that putting it on the windshield or sticking it in somebody's seat is not certainly most people's definition of that sort of personal contact.

MR. DREEBEN: Well, what the board is doing is deciding whether there was an unfair labor practice with respect to the employer's conduct in this case. What the union did in this case was attempt to place handbills on the windshields of cars. They handed them to the employees who they saw.

The employer's unfair labor practice was in barring the union from doing that. The board is not

insisting that there be a particular kind of contact or interaction between employees --

QUESTION: Or even a personal contact, as you earlier spoke of.

MR. DREEBEN: It's not insisting that that be the case at all. What it is requiring is that the union be permitted to do that which the act entitles it to do, measured against the union's actual conduct in -- in this case.

QUESTION: Well, it -- it seems to me that if -- if we affirm the board here, in effect there will be a general rule that absent some special circumstances union organizers always have access to an employer's parking lot.

MR. DREEBEN: No, I don't think that -- that the rule, Justice Kennedy, would be absent special circumstances. The question would be, are there reasonable alternatives to access under the --

QUESTION: Well, in most cases it's going to advertising, telephone, and I don't see how the run-of-the-mill case would really be much different than what we have here. Isn't that a fair assumption?

MR. DREEBEN: No it isn't, because many kinds of facilities will have public property where the employees enter, and there will be an opportunity for the union to

make contact with the employees before they get on the employer's property.

QUESTION: But it seems to me that in almost any conventional suburban shopping mall or shopping center context that the general rule would have to be that there's access to the parking lot, even if the employer owns it and controls it.

MR. DREEBEN: Well, I --

QUESTION: I just don't see how to -- I'm not saying that's an unreasonable rule, but it seems to me that that's the necessary thrust of this decision.

MR. DREEBEN: I think the thrust of this decision is that the board is entitled to take into account the fact that a parking lot is essentially open to the public and that the infringement on the employer's property interest in allowing a small amount of peaceful, quiet organizational activity is not a substantial infringement.

QUESTION: I -- I agree that that's a fair assessment of what the board has done here.

MR. DREEBEN: And -- and what the board --

QUESTION: Mr. Dreeben, may I -- Justice Kennedy may not think it's not -- it's not an unreasonable rule, but hasn't the Court suggested that it would be an unreasonable rule in the -- in the language from Sears

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that your colleague referred us to, where -- where we did seem to establish -- it's dictum, to be sure, but it reflects our understanding of Babcock & Wilcox.

We did seem to say that you don't weigh the reasonableness of access together with the degree of infringement on property rights. It seemed to be a preliminary inquiry. We said, to gain access the union has the burden of showing that no other reasonable means of communicating its organizational methods exists. The burden is a heavy one and has rarely been in favor of trespassory organizational activity.

That statement could certainly not be made if we accept the board's action in the present case. You could certainly --

MR. DREEBEN: No, Justice Scalia, I don't --

QUESTION: -- not say that the burden is rarely in favor of trespassory activity.

MR. DREEBEN: Well, I don't think that what the Court was doing in Sears was attempting to foreordain how the board might apply the act in future cases. What the Court was doing in Sears was summarizing certain language from Babcock and stating what it had understood the board's practice to be, and that's what the Court meant when it said the balance has rarely been struck in favor of access.

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Justice Blackmun pointed out in his concurrence in that case, I believe, that the board's experience had been comparatively limited in applying Babcock, because for several years there had been First Amendment holdings of this Court that recognized shopping centers as essentially forums protected by the First Amendment, and the board had not gained as much experience in developing and applying the law, so what the Court did in Sears was look to the existing state of the law and summarize it.

I don't believe that it purported to change it. I certainly don't believe that it purported to overrule the statement in Hudgens, which was an access case, where the Court said that there are a spectrum of various accommodations that depend upon the character and strength of the property interest and the section 7 interest in any given case.

That is what the board is attempting to implement in this case. What the board is doing is not inconsistent with Babcock, because the board does look to reasonable alternatives in every case. Whether or not every decision is supported by substantial evidence is not a question that goes to the merits of the board's general approach, and the board's approach is fully consistent with the statutory language. I think on that basis it is entitled to be upheld.

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The -- the question of mass media was raised by petitioner as being a panacea, as a form of access in all cases. I think the board's answer to that is a quite reasonable one. If you're attempting to reach 200 employees who live in a fairly large metropolitan area, the expense and the unlikeliness that the newspapers will actually convey the organizational message is a powerful reason for rejecting mass media as an alternative in every case.

Similarly, in this case the board looked at -- at what the union had available for contacts with the employees at their homes through tracing license plates and concluded that that was not effective either. The reason is that the union attempted to trace license plates over several months, and it obtained less than a fifth of the names of petitioner's employees.

That is not going to get the message about the union's existence and the programs that it supports to four-fifths of the work force, and I think the board was fully entitled to reject that.

QUESTION: May I ask you, on the newspapers, does the record show whether these were home-delivered papers, or were they suburban papers that are delivered in large blocks to different places like stores?

MR. DREEBEN: The record doesn't show that. I

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think that the Hartford Courant is a general circulation daily newspaper, so that it would be delivered to homes and subscribers. Of course, some of the newspapers actually --

QUESTION: What were the other two papers? Are they the same character, do you know?

MR. DREEBEN: I don't know, and I'm not sure that the record shows that.

QUESTION: You don't know whether they're even -- they're throw-aways, or there was a -- you know, they had to pay for them. Does the record show that?

In other words, I notice there were bunches of newspapers at the stores, and the store took out the advertisements by the union from the ones they had at the store.

MR. DREEBEN: Yes. That's precisely my point, Justice Stevens. The -- to the extent that we knew that there were newspapers that the employees might be exposed to, the employer did everything it could to prevent the employees from seeing it, so this is a far cry from any case where the employer was cooperating in communicating information to the employees for that purpose.

QUESTION: Mr. Dreeben, make sure I -- is this an unfair characterization of what I think the board is saying? Let's assume that through various means union

organizers can reach 60 percent of the people in the shop they're trying to organize.

As I understand the board, the board is saying that that can be reasonably effective access to those employees in some cases, namely where the employer does not have a building open to the public, but that is not reasonably effective access to the employees in another case -- 60 percent is good in one case and not good in the other.

MR. DREEBEN: In essence, Justice Scalia, that is correct. The board does balance the impairment of the interests at stake, so the question is, how much have the section 7 rights suffered in a particular case by the denial of access versus how much have the property rights been injured in a particular case by access, and so it does matter what kind of property is at issue.

QUESTION: This is hardly the way Babcock reads, is it?

MR. DREEBEN: Well, I --

QUESTION: You would think under Babcock there was just some concept of reasonable alternative ways of communicating, which you talk about, and it's a constant.

MR. DREEBEN: I don't think that Babcock can be read as answering all of the questions that the board --

QUESTION: Well, I agree with that, but I take

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it you disagree with my characterization of Babcock in this respect.

MR. DREEBEN: Yes, I do. I think that Babcock was a specific application of -- of the Labor Act to a particular set of facts, and it cannot and should not be read as foreordaining what the board has to do in future cases.

It's a widely shared consensus in the law that open property is of a different character than closed property. This Court's Fourth Amendment cases treat the home and its curtilage far differently than open fields are treated.

California affords a right of access to shopping centers as essentially public places where it's appropriate to engage in expressive activity, and this Court upheld that against constitutional challenges.

Thank you, Mr. Chief Justice.

QUESTION: Thank you, Mr. Dreeben.

Mr. Joy, you have 2 minutes remaining.

REBUTTAL ARGUMENT OF ROBERT P. JOY

ON BEHALF OF THE PETITIONER

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

With regard to the last point made by my colleague, let me simply state that the -- the Court did not intend, it seems to me, that by exercising its right

to invite, that a commercial retailer suffers a self-inflicted wound to the most essential property right in the bundle of property rights, the right to exclude, and by relying on this openness of property argument and trying to establish that a retailer, particularly, by inviting people to shop somehow has given away his right to exclude, I believe is misplaced.

QUESTION: And he excluded every other kind of a --

MR. JOY: Indeed he did, Your Honor.

QUESTION: Of a --

MR. JOY: He excluded every other trespasser who came on to his property to engage in activity inconsistent with its commercial use.

Let me finally, if I may, refer you to the administrative law judge in this case, who found that reasonable alternative means did exist in this case. He said, I would state that the facts herein convince me that reasonable alternative means were available. The employees were easily recognizable here. They parked in specific areas and arrived at predictable times.

Then he went on to state a distinction between availability and reaching an availability and persuading by saying, even if union representatives were unable to converse with them prior to entering the store, the union

could and did utilize the procedure of writing down license plates, and went on to say that Fairmont does not require the union to be successful in its contacts with employees, only that it have reasonable means of communicating with them.

QUESTION: Do you have any courts of appeals that agree with you?

MR. JOY: Your Honor, I can distinguish the courts of appeals cases that --

QUESTION: But the answer is no.

MR. JOY: The answer is no, Your Honor, but Jean Country, if I may, has never been squarely challenged as has been done in the Lechmere case. In all of the courts of appeals decisions up till now, Jean Country -- there's been no challenge launched against Jean Country.

Thank you, Your Honors.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Joy.

The case is submitted.

(Whereupon, at 11:58 a.m., the case in the above-entitled matter was submitted.)

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BY alan friedman

(REPORTER)