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A Survey of Recent Retail Facilities Nonemployee Access Decisions

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I. Introduction

The following is intended as a limited[1] survey of recent decisions of the National Labor Relations Board and various state and federal courts on the subject of nonemployee access to employer property in certain labor relations contexts.[2] To the extent that there is a thematic structure to the writing, it is that implied by interstices between the rationales of the Supreme Court decisions in *Hudgens v. NLRB*[3] and *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters (Sears I)*.[4] A brief description of those interstices is therefore an appropriate starting point.

II. Background

The 1956 Supreme Court opinion in *NLRB v. Babcock & Wilcox Co.*[5] is ordinarily understood to be the seminal decision on the question of non-

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1. The present discussion primarily concerns nonemployee access to retail facilities in organizational or area standards contexts, although some attention is also given to nonemployee access in primary economic strike contexts as well.

2. Portions of this article were presented in another form to the Annual Midwinter Meeting of the ABA Committee on the Development of the Law Under the National Labor Relations Act in March, 1980 by John H. Goffstein, with whom the author was then associated.

3. 424 U.S. 507 (1975).

4. 436 U.S. 180 (1978).

5. 351 U.S. 105 (1956).

employee organizational access to employer property. The employer in that action was a manufacturer located outside a moderately small community from within or near which practically all of its employees commuted by automobile. An employer-owned parking lot adjacent to the enclosed plant was connected to a public highway by a driveway across employer property.

Although distribution of union literature at the intersection between the driveway and the highway might have been effective, the Board found, in the course of ruling on a section 8(a)(1)[6] charge arising from the employer's refusal to permit leafleting by nonemployee union organizers on the parking lot, that traffic conditions at the intersection would have rendered such distribution "unsafe."[7] The employer asserted in defense of its refusal "that it had maintained a consistent policy of refusing access to all kinds of pamphleteering and that such distribution of leaflets would litter its property."[8] It was conceded that application of the policy had been nondiscriminatory and that other means of communication with employees individually, including mail and telephone contacts, were available and had in fact been used.

But because, in light of precedents including *Republic Aviation Corp. v. NLRB*,[9] the Board viewed the workplace as the most effective place for communication of information concerning labor relations, it found the flat prohibition of leaflet distribution on the parking lot, absent a showing of

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6. Section 8(a)(1) provides:

> (a) It shall be an unfair labor practice for an employer -
>
> (1) to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in section 157 of this title. . . .

National Labor Relations Act § 8(a)(1), 29 U.S.C. § 158(a)(1) (1976).

Section 157 provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in . . . this title.

29 U.S.C. § 157 (1976).

7. 109 N.L.R.B. 485, 494, 34 L.R.R.M. 1373 (1954).

8. 351 U.S. at 107.

9. 324 U.S. 793 (1945), adopting the rationale of Peyton Packing Co., 49 N.L.R.B. 828, 12 L.R.R.M. 183 (1943), *enforced*, 142 F.2d 1009 (5th Cir.), *cert. denied*, 323 U.S. 730 (1944). *See also* LeTorneau Co., 54 N.L.R.B. 1253, 13 L.R.R.M. 227 (1944); Ozan Lumber Co., 42 N.L.R.B. 1073, 10 L.R.R.M. 217 (1942); American Cyanamid Co., 37 N.L.R.B. 578, 9 L.R.R.M. 233 (1941); Weyerhauser Timber Co., 31 N.L.R.B. 258, 8 L.R.R.M. 137 (1941); Cities Serv. Oil Co., 25 N.L.R.B. 36, 6 L.R.R.M. 467 (1940), *enforced in part*, 122 F.2d 149 (2d Cir. 1941); West Ky. Coal Co., 10 N.L.R.B. 88, 3 L.R.R.M. 405 (1938), *enforced as modified*, 116 F.2d 816 (6th Cir. 1940).

special circumstances requiring such a rule in the interest of production efficiency or worker discipline, to be violative of section 8(a)(1). The employer was ordered to rescind its policy subject to reasonable regulations relating to production and discipline.

The Fifth Circuit denied enforcement[10] on the ground that the Board was without statutory authority "to impose a servitude on the employer's property where no employee was involved."[11] The Supreme Court affirmed,[12] reasoning that "if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution"[13] by nonemployees, an employer may not be required to open its property to nonemployee distribution of union literature. The analysis was described as an "accomodation" between organizational and property rights to be made "with as little destruction of one as is consistent with the maintenance of the other."[14] The distinction between employee and nonemployee communication was said to be "one of substance."[15]

Babcock & Wilcox has been criticized as a retreat from the endorsement in *Republic Aviation* of the right of employees to engage in organizational activities on employer property because the Court "assum[ed], without empirical support, that other available channels should be adequate to enable a union to reach employees with its message in virtually every instance, except where employees are inaccessible due to the location of a plant and the living quarters of employees."[16] It may at least be said that no analysis of the actual effectiveness of alternative means of communication available in the case at hand appears in the text of the decision, and that the "substance" of the distinction between employee and nonemployee communication is not clearly articulated.

In the 1972 decision of *Central Hardware Co. v. NLRB*,[17] the Supreme Court declined to extend the rationale of *Food Employees Local 590 v. Logan Valley Plaza, Inc.*[18] to a situation involving a free-standing retail establishment in a urban area.[19] In *Logan Valley*, the Court had held that, when a retail complex had in certain relevant respects, displaced the functions of a normal municipal "business block," enforcement of state

10. 222 F.2d 316 (5th Cir. 1955).
11. 351 U.S. at 108.
12. *Id.* at 105.
13. *Id.* at 112.
14. *Id.*
15. *Id.*
16. Bredhoff, *Labor Law Reform: A Labor Perspective*, 20 B.C. L. REV. 27, 28 (1978).
17. 407 U.S. 539 (1972).
18. 391 U.S. 308 (1968).
19. 407 U.S. at 547.

trespass laws against labor pickets engaged in activities within the complex "generally consonant with the use to which the property is actually put"[20] would infringe the pickets' first and fourteenth amendment rights. The Board in *Central Hardware* had found the employer's nonemployee no-solicitation rule to be overly broad in view of the character and use of the parking lots surrounding the store, and had held its enforcement against nonemployee organizers violative of section 8(a)(1).[21]

The Eighth Circuit had enforced the order, agreeing with the Board that *Logan Valley*, rather than *Babcock & Wilcox*, applied.[22] The Supreme Court reversed,[23] arguing that to find a dilution of the private property interest in every case in which a retail or service facility, "regardless of size or location,"[24] had opened its property to the public for an economic advantage would create "an unwarranted infringement of long-settled rights of private property protected by the fifth and fourteenth amendments."[25] The action was remanded to the circuit court for a determination whether on the record as a whole there was substantial evidence to support a finding that no reasonable alternative means of communication were available. Justices Marshall, Douglas, and Brennan, dissenting, would have remanded to the Board for initial consideration of the application of *Babcock & Wilcox* criteria to the facts.[26] In the companion decision of *Lloyd Corp. v. Tanner*,[27] the Court effectively overruled *Logan Valley* by holding that a communication unrelated to any purpose contemplated by the retail center and for which alternative channels were available was not protected by the first amendment.

Three years later, in *Hudgens v. NLRB*,[28] the Court pronounced the demise of *Logan Valley* and stated, in effect, that first amendment considerations would ordinarily be irrelevant to questions of competing communication and property interests in labor relations contexts.[29] The petitioner in *Hudgens* was the owner of an enclosed shopping mall in a suburban area who had excluded striking employees of one of the retailer lessees from carrying placards within the interior of the mall or on the surrounding parking lot. The Board had originally found a section 8(a)(1) violation on first amendment grounds,[30] and the mall owner had peti-

20. 391 U.S. at 320.
21. 181 N.L.R.B. 491, 73 L.R.R.M. 1422 (1970).
22. 439 F.2d 1321, 1328 (8th Cir. 1971).
23. 407 U.S. at 539.
24. *Id.* at 547.
25. *Id.*
26. *Id.* at 550 (Douglas, Brennan & Marshall, JJ., dissenting).
27. 407 U.S. 551 (1972).
28. 424 U.S. 507 (1975).
29. *Id.* at 520-21.
30. 192 N.L.R.B. 671, 77 L.R.R.M. 1872 (1971).

tioned for review. The Fifth Circuit had remanded[31] in light of *Central Hardware* and *Lloyd Corp.*, and the Board had in turn referred the matter to an administrative law judge for further findings under the criteria set out in *Babcock & Wilcox*.[32] The administrative law judge found that reasonable alternative means of communication did not exist, but made reference to *Logan Valley* in support of the finding.[33] The Board adopted the findings and recommendations,[34] but reasoned that the pickets were "within the scope"[35] of invitation to the public and that alternative means of communication with employees and customers of the struck employer "would invite secondary effects."[36] The Fifth Circuit enforced[37] the section 8(a)(1) order on the ground that the General Counsel had met a burden of preponderance, said to have been derived from *Lloyd Corp.*, on the question whether "other locations less intrusive upon [the relevant] property rights . . . were either unavailable or ineffective."[38] The Supreme Court, in an opinion by Justice Stewart, vacated[39] and remanded to the Board for further consideration under the *Babcock & Wilcox* criteria.[40] The Court noted that attention should be given to the effect that each of the following facts might have on the balance of section 7 rights versus property rights: (1) that economic strike activity, rather than organizational activity, was involved; (2) that the pickets were employees rather than nonemployees; and (3) that the property interests affected were not those of the employer but of its lessor.[41]

Justice Powell and Chief Justice Burger, concurring in the opinion,[42] and Justice White, concurring in the result,[43] asserted that *Logan Valley* had not been overruled in *Lloyd Corp.*[44] Justices Marshall and Brennan dissented,[45] arguing that it was unnecessary to address the constitutional question and that the statutory ruling of the Fifth Circuit should have been affirmed.[46] The adaptation of first amendment considerations to the

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31. 424 U.S. at 510.
32. *Id.* at 511.
33. 205 N.L.R.B. 628, 631, 84 L.R.R.M. 1008, 1009 (1973).
34. *Id.* at 628, 84 L.R.R.M. at 1008.
35. *Id.* The quoted phrase is from the text of the Supreme Court decision. 424 U.S. at 511.
36. 205 N.L.R.B. at 628, 84 L.R.R.M. at 1008.
37. 501 F.2d 161 (5th Cir. 1974).
38. *Id.* at 169.
39. 424 U.S. at 507.
40. *Id.*
41. *Id.* at 522-23. *See* note 6 *supra* for the text of section 7, 29 U.S.C. § 157 (1976).
42. *Id.* at 523 (Burger & Powell, JJ., concurring in the opinion).
43. *Id.* at 524 (White, J., concurring in the result).
44. *Id.* at 523 (Burger & Powell, JJ., concurring), 524 (White, J., concurring).
45. *Id.* at 523 (Brennan & Marshall, JJ., dissenting).
46. *Id.* at 526.

section 7 question apparent in the decision of the Board was attributed by the dissenters to a concern that first amendment litigation not become an alternative to procedure before the Board.[47]

On remand, the Board reaffirmed its original order under a modified *Babcock & Wilcox* analysis.[48] With respect to the potentially significant factual differences that had been identified by the Supreme Court, the Board concluded: (1) that economic activity "deserves at least equal deference"[49] to that accorded organizational activity; (2) that employee pickets were entitled to "at least as much protection"[50] as nonemployee organizers; and (3) that under the circumstances the lessor's property rights must yield to protected primary economic activity.[51] Because the intended audience included potential customers of the struck employer, many of whom could be identified only at the interior entrance to the store, the Board found that "meaningful" communication could not occur on public sidewalks some distance from the building.[52] Safety considerations[53] and the likelihood of enmeshing neutrals[54] were also mentioned. The theory that the pickets were within the scope of public invitation was reiterated,[55] and the Board noted a community of interest between the lessor and the lessee in profits maximization,[56] together with an identifiable property interest of the lessee employer in walkway accessiblity,[57] which rendered the sharing of the section 7 intrusion less objectionable.

In *Sears I*,[58] the respondent union had set up a picket line on a private sidewalk and parking lot adjoining the employer's freestanding retail facility. It was not clear whether the picketing was recognitional or work assignment related, and thus subject to section 8 limitations and sanctions, or informational, and thus protected by section 7. An employer representative demanded that the picket line be removed from Sears' property. The demand was refused, and the employer instituted an action in state court for an injunction against a continuing trespass. Upon issuance of a temporary restraining order, the pickets were removed to public sidewalks bordering the parking lot. The trial court heard argument on the question whether the picketing was protected by state law or federal con-

47. *Id.* at 531.
48. 230 N.L.R.B. 414, 95 L.R.R.M. 1351 (1977).
49. *Id.* at 416, 95 L.R.R.M. at 1353.
50. *Id.*
51. *Id.* at 417, 95 L.R.R.M. at 1354.
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.* at 418, 95 L.R.R.M. at 1355.
57. *Id.* at 417, 95 L.R.R.M. at 1355.
58. 436 U.S. 180 (1978).

stitutional provisions, and entered a preliminary injunction. The state appeals court affirmed,[59] holding that the trespass at issue came within the exception to the pre-emption criteria enunciated in *San Diego Building Trades Council v. Garmon*[60] for conduct touching interests "so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction,"[61] federal pre-emption could not be inferred. The California Supreme Court reversed on the ground that the picketing was both arguably protected by section 7 and arguably prohibitied by section 8, so that *Garmon* required deference to the exclusive competence of the Board.[62]

In the course of its opinion reversing the decision of the state court, the Supreme Court, in a opinion by Justice Stevens,[63] stated with respect to the arguable section 8 pre-emption that the "critical inquiry" was not "whether the state is enforcing a law relating specifically to labor relations" but "whether the controversy presented to the state court is identical to . . . or different from . . . that which could have been, but was not, presented to the Labor Board."[64] If Sears had filed an unfair labor practice charge, the Court observed, the question presented to the Board would have been "whether the picketing had a recognitional or work assignment objective,"[65] while in the state court action for an injunction the only issue was whether a trespass had occurred.

With respect to arguable section 7 pre-emption, the Court noted that the "primary jurisdiction" rationale enunciated in *Garmon* "justifies preemption only in situations in which an aggrieved party has a reasonable opportunity either to invoke the Board's jurisdiction himself or else to induce his adversary to do so."[66] The bringing of a trespass action, said the Court, was calculated to induce a section 7 charge. And it was the only available course of action through which an orderly resolution of the section 7 question could be obtained.[67] Finally, the Court addressed the question "whether under *Babcock & Wilcox* the trespassory nature of the picketing caused it to forfeit its protected status."[68] The Court said that, according to experience, it is a rare situation in which the question of whether trespassory union activity is protected is debatable. Moreover, "a

59. 52 Cal. App. 3d 690, 125 Cal. Rptr. 245 (1975).
60. 359 U.S. 236 (1959).
61. 52 Cal. App. 3d at 695, 125 Cal. Rptr. at 248, *quoting* 359 U.S. at 244.
62. 17 Cal. 3d 893, 553 P.2d 603, 132 Cal. Rptr. 443 (1976).
63. 436 U.S. 180 (1978).
64. *Id.* at 197.
65. *Id.* at 198.
66. *Id.* at 201.
67. *Id.* at 202.
68. *Id.* at 204-05.

trespass is far more likely to be unprotected than protected."[69] Thus, the Court concluded, to permit "state courts to evaluate the merits of an argument that certain trespassory activity is protected does not create an unacceptable risk of interference with conduct which the Board, and a court reviewing the Board's decision, would find protected."[70]

Justice Blackmun, concurring in the opinion,[71] noted that the Board as amicus curiae had taken the position "that an employer's mere act of informing nonemployee pickets that they are not permitted on his property 'would constitute a sufficient interference with rights arguably protected by section 7 to warrant . . . issu[ance of] a Section 8(a)(1) complaint.' "[72] Thus, when the union declines to file an unfair labor practice charge, "pre-emption cannot sensibly obtain because the 'risk of an erroneous state court adjudication . . . is outweighed by the anomalous consequence of a rule which would deny the employer access to any forum in which to litigate either the trespass issue or the protection issues.' "[73] As a logical corollary, however, Justice Blackmun stated that when the union does file a charge, state court jurisdiction is pre-empted until either the General Counsel declines to issue a complaint or the Board, applying *Babcock & Wilcox* standards, finds the picketing to be unprotected.[74] Justice Blackmun went on to observe that in labor-management relations contexts "it is critical that the state court provide a prompt adversary hearing, preferably before any restraint issues and in all events within a few days thereafter, on the merits of the § 7 protection question."[75]

Justice Powell, concurring in the opinion,[76] took exception to the "logical corollary" advanced by Justice Blackmun, arguing that preliminary relief may be necessary when the trespassory picketing is particularly obstructive and the Board response to a section 8(a)(1) charge may be less than expeditious.[77] Justices Brennan, Stewart, and Marshall, dissenting,[78] characterized the decision as a departure from *Garmon* creating "an exception of indeterminate dimensions"[79] and a greatly increased risk that protected activities would be enjoined.[80]

While the action was on appeal, the California legislature enacted the

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69. *Id.* at 205. No data were cited in support of this proposition.
70. *Id.*
71. *Id.* at 208 (Blackmun, J., concurring).
72. *Id.* at 208-09.
73. *Id.* at 209, quoting from the majority opinion at 206-07.
74. *Id.*
75. *Id.* at 212.
76. *Id.* (Powell, J., concurring).
77. *Id.* at 213-14.
78. *Id.* (Brennan, Stewart & Marshall, JJ., dissenting).
79. *Id.* at 215.
80. *Id.* at 217.

"Moscone Act,"[81] limiting the equity jurisdiction of state trial courts to enjoin certain labor practices. The limiting provisions were to be construed "in accordance with existing law governing labor disputes."[82] On remand, the California Supreme Court in *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters (Sears II)*[83] interpreted this language to refer to controlling state decisions, notably *Schwartz-Torrence Investment Corp. v. Bakery & Confectionery Workers*[84] and *In re Lane*,[85] which had established as a matter of state labor law that unions could picket on private sidewalks outside a store. The employer argued that the phrase, "in accordance with existing law . . . "[86] referred also to such federal decisions as *Hudgens* and *Central Hardware*. This argument was rejected on the ground that those cases dealt merely with the question whether the action of the landowner in ejecting persons from his property was state action for fourteenth amendment purposes. The contention that under *Babcock & Wilcox* the employer had a federally protected right to forbid nonemployee picketing under the circumstances presented was met with the argument that that decision does not require a state court to enjoin protected picketing and that the proper forum for litigating an assertion that the picketing was not protected would be the Board. The purpose and effect of the Moscone Act, "the elimination of unnecessary judicial intervention into labor disputes,"[87] was found to bear a reasonable relationship to legitimate state objectives, so that the employer's property interest in enjoining trespass was not taken without due process. Thus, the order granting a preliminary injunction was reversed.

Justices Clark and Manuel, dissenting,[88] contended that the reliance in both *Schwartz-Torrence* and *Lane*, on first amendment principles derived from *Logan Valley* had been "discredited" and that the phrase "existing law" was not in any event intended to "freeze judicially declared law"[89] but to structure its development. Justices Richardson and Clark, also dissenting,[90] argued that the interpretation subscribed to by the majority would render the Moscone Act unconstitutional under controlling Supreme Court decisions, specifically *Babcock & Wilcox, Hudgens,* and

81. CAL. CIV. PROC. CODE § 527.3 (West 1975).
82. *Id.*
83. 25 Cal. 3d 317, 599 P.2d 676, 158 Cal. Rptr. 370 (1979).
84. 61 Cal. 2d 766, 394 P.2d 921, 40 Cal. Rptr. 233 (1964).
85. 71 Cal. 2d 872, 457 P.2d 561, 79 Cal. Rptr. 729 (1969).
86. *See* text accompanying note 82 *supra.*
87. 25 Cal. 3d at 332, 599 P.2d at 686, 158 Cal. Rptr. at 380.
88. *Id.* at 334, 599 P.2d at 688, 158 Cal. Rptr. at 382 (Clark & Manuel, JJ., dissenting).
89. *Id.* at 336, 599 P.2d at 689, 158 Cal. Rptr. at 383.
90. *Id.* at 337, 599 P.2d at 690, 158 Cal. Rptr. at 383 (Richardson & Clark, JJ., dissenting).

Central Hardware, which protect private property from unnecessarily trespassory labor activities.

A petition for certiorari to the Supreme Court was denied on June 23, 1980.[91] It may be supposed, particularly in view of the decision two weeks previously in *PruneYard Shopping Center v. Robins*,[92] that the questions whether the Moscone Act, as construed by the California court, intrudes into areas pre-empted by federal labor policy or deprives the employer of a property right without due process of law have been impliedly resolved in the negative.[93]

Appellees in *PruneYard* were a group of high school students who had set up a card table within the appellant retail complex and begun distributing handbills and asking passersby to sign petitions opposing a United Nations resolution condemning "Zionism." A security guard had asked the students, pursuant to a uniformly enforced policy of the complex forbidding publicly expresive activity not directly related to its commercial purposes, to remove their activities to a public sidewalk at the perimeter of the complex. The trial court denied the students an injunction to forbid the PruneYard from excluding their activity, expressly finding that "adequate, effective" alternative means of communication were available, and the appeals court affirmed.[94] The California Supreme Court reversed, holding that the California Constitution protects reasonable expressive activity in privately owned shopping centers. The court rejected the argument that this result interfered with federally protected property rights.[95]

The Supreme Court, in an opinion by Justice Rehnquist, affirmed,[96] reasoning as follows: (1) that the decision in *Lloyd Corp.* did not limit the authority of a state to provide in its own constitution "individual liberties more expansive than those conferred by the federal constitution;"[97](2) that appellants had not demonstrated that a right to exclude others was "so essential to the use or economic value of their property" as to make its limitation a "taking" for fifth amendment purposes,[98] or that the relation between access to private property and the asserted state interest in promotion of expansive speech rights was so insubstantial as to deprive appellants of their property without due process of law;[99] and (3) that appellants' asserted first amendment right not to submit their property to

91. 100 S. Ct. 3038 (1980).
92. 100 S. Ct. 2035 (1980).
93. *See* summary of petition for certiorari, 48 U.S.L.W. 3420 (1980).
94. 100 S. Ct. at 2039.
95. 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979).
96. 100 S. Ct. at 2035.
97. *Id.* at 2040.
98. *Id.* at 2042.
99. *Id.* at 2042-43.

use as a forum for the expressions of others had not been infringed, as it was unlikely under the circumstances that any such expressions would be identified with the property owners, and there was no discrimination on the part of the state in favor of any particular message.[100]

Justice Blackmun concurred except as to a single sentence in the argument on "taking" to the effect that the federal government has no "residual authority . . . to define 'property' in the first instance."[101] Justice Marshall, concurring,[102] reiterated his belief, expressed in his dissent in *Hudgens*, that the modern retail complex had replaced the state "with respect to such traditional First Amendment forums as streets, sidewalks, and parks"[103] and that enforcement of the common law of trespass against persons undertaking expressive activity within the complex was therefore state action for fourteenth amendment purposes.[104] He then stated, with respect to the "taking" argument, that the state must have some latitude to modify various aspects of the common law — here, of trespass — provided that "core" common law rights are not abrogated "without a compelling showing of necessity or a provision for a reasonable alternative remedy."[105] Justices White and Powell, concurring in part and in the judgment,[106] emphasized that the decision was limited to "public or common areas in a large shopping center"[107] and noted that there might be situations "in which a right of access to commercial property would burden the owner's First and Fourteenth Amendment right to refrain from speaking."[108]

III. The Interstices

It is not at all certain that Justice Blackmun's concurring dicta in *Sears I*[109] reflect the views of other members of the Court.[110] The question therefore remains whether the filing of a section 8(a)(1) charge should itself pre-empt the jurisdiction of the state court to hear an action in trespass, or whether pre-emption might more appropriately occur at a

100. *Id.* at 2044.
101. *Id.* (Blackmun, J., concurring).
102. *Id.* (Marshall, J., concurring).
103. *Id.* at 2045.
104. *Id.*
105. *Id.* at 2046-47.
106. *Id.* at 2048 (White & Powell, JJ., concurring in part and in the judgment).
107. *Id.*
108. *Id.* at 2051.
109. "[I]f the union, once asked to leave the property, files a § 8(a)(1) charge, there is a practicable means of getting the issue of trespassory picketing before the Board in a timely fashion without danger of violence." 436 U.S. at 209 (Blackmun, J., concurring).
110. *See* 436 U.S. at 212 (Powell, J., concurring).

later stage of the section 8(a)(1) proceeding[111] — upon issuance by the General Counsel of a complaint, upon entry by an administrative law judge of a finding of interference, upon adoption by the Board of that finding (or reversal of a contrary finding), upon issuance by a federal appeals court of an enforcement order, or upon disposition of an application for certiorari to the Supreme Court. If, as the majority opinion suggests, the filing of a trespass action in state court is designed to trigger the filing of a section 8(a)(1) charge,[112] there is the further difficulty that the Board has taken the position that pursuit of an injunctive remedy is not itself a section 8(a)(1) interference.

After, *PruneYard,* it is fairly clear that there is an area, limited on one extreme by the intersection of first and fourteenth amendment freedoms of expression with fifth and fourteenth amendment private property rights sketched in *Hudgens* and on the other by an intersection of state regulatory authority with "core" property rights,[113] within which various state and federal policies may operate to balance the interests of free expression against those of property. The decision in *Hudgens* suggests that federal labor policy may set the balance at different points, depending upon whether employees or nonemployees are engaged in organizational, area standards, or economic strike activity on property of the employer, its lessor, or a stranger.[114] It may be supposed that each of these points of balance lies significantly to one side of the point at which a "deeply rooted" local interest in protection of private property from violent or obstructive trespass will be fixed.[115] But, as *Sears II* may be taken to illustrate, a "deeply rooted" local interest in protection of expressive activity may set a point of balance between speech and property interests somewhere within the range of the points of balance of federal labor policy suggested in *Hudgens.*

IV. Recent Decisions

These considerations have, not surprisingly, emerged in recent administrative and judicial decisions concerning nonemployee access and preemption in retail facilities contexts.

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111. Note the discussion in *Wiggins & Co. v. Retail Clerks Local 1557,* treated in the text accompanying notes 122-24 *infra.*

112. 436 U.S. at 202.

113. The concept is articulated in *PruneYard,* 100 S. Ct. at 2046-47 (Marshall, J., concurring). *See* text accompanying note 105 *supra.*

114. 424 U.S. at 521-22.

115. *See, e.g.,* Shirley v. Retail Store Employees, 225 Kan. 470, 592 P.2d 433 (1979); State *ex rel.* Retail Store Employees Local 655 v. Black, 603 S.W.2d 676 (Mo. App. 1980), discussed in the text accompanying notes 142-54 *infra.*

A. The Giant Foods Litigation

In *Giant Food Markets, Inc.*,[116] the Board found a section 8(a)(1) violation in a situation in which the property owner, its lessee, and the employer sublessee had demanded that area standards pickets be removed from a private sidewalk directly in front of the employer's store in a small shopping center in an urban area. Chairman Fanning and Members Jenkins and Truesdale reasoned: (a) that although the picketing was designed to benefit primarily employees other than those employed at the employer's store, some benefit was likely to accrue to those employees as well; (b) that the primary intended audience — potential customers — could be readily identified only at the entrance to the store; (c) that removing the pickets to a public sidewalk some distance from the store would dilute the message and possibly enmesh neutrals; and (d) that there was nothing to indicate that the picketing was a nuisance.[117] The panel also emphasized that the demand that the pickets leave, unaccompanied by any threat of arrest or similar threat, was in itself a violation.[118] The obtaining of a temporary restraining order and the seeking of an injunction were described as "permissible conduct under the Act."[119] A petition to the Sixth Circuit for review of the order was denied.[120]

The chronology of the *Giant Foods* litigation is instructive.[121] Prior to the filing of the section 8(a)(1) charge, respondents had obtained a temporary restraining order against the picketing in state chancery court. A temporary injunction pending trial on the merits of the trespass action was issued after the filing of the Board charge. The court later found that its jurisdiction had been pre-empted and dismissed the trespass action. Plaintiffs appealed, and the state appeals court postponed its consideration of the matter until the Supreme Court had announced its decision in *Sears I*. The General Counsel some months later issued a complaint on the section 8(a)(1) charge, and more than a year after the filing of the trespass action in state court an administrative law judge dismissed the charge. The General Counsel filed exceptions and, almost two years later, the Board reversed the decision of the administrative law judge. This occurred only shortly after the Tennessee appeals court had reversed the decision of the trial court, reinstated the injunction, and remanded the action for trial. A petition to the state appeals court for rehearing in view

116. 241 N.L.R.B. No. 105, 100 L.R.R.M. 1598 (1979).

117. 100 L.R.R.M. at 1600.

118. *Id.*

119. *Id.* at 1599.

120. *Appeal denied*, No. 79-4248 (6th Cir. Feb. 5, 1981).

121. The chronology is presented in the text of *Wiggins & Co. v. Retail Clerks Local 1557*, note 122 *infra*.

of the decision of the Board was denied.

The Tennessee Supreme Court reversed in *Wiggins & Co. v. Retail Clerks Local 1557*,[122] stating that when the Board "has actually entertained and sustained on their merits unfair labor practice charges, the point of pre-emption ha[s] obviously been reached."[123] Arguments that the court should withhold its decision or leave the injunction in force until the Sixth Circuit had acted upon the petition for review were rejected.[124]

B. Meijer, Inc.

In an advice memorandum in *Meijer, Inc., Sagebrush Division*,[125] issued after the Board's decision in *Giant Foods*, the General Counsel recommended dismissal of a section 8(a)(1) charge against a store owner who had threatened the arrest of nonemployee pickets conducting informational activities at the customer entrance to its retail facility, freestanding in a shopping center, with regard to certain items that had been advertised in a newspaper with which the pickets had a primary labor dispute. The General Counsel noted that, because of the "limited presence"[126] of the primary employer (through the advertisement) at the site of the picketing, it was "less reasonable to expect that the . . . picketing can have its most impact at this location,"[127] that the affected property interests were those of a neutral employer, and that there were alternative means of communication such as picketing on a grassy public easement near an entrance to the parking lot.[128]

C. Hutzler Brothers

In *Hutzler Brothers Co.*,[129] Board Chairman Fanning and Members Jenkins and Truesdale found a section 8(a)(1) violation in a case in which the employer had excluded nonemployees from organizational handbilling at a below street-level employee entrance to its freestanding retail facility, despite the absence of a showing that the union had attempted other means of communication. The absence of alternative attempts was said to create a potential insufficiency of evidence on the question whether available alternatives were in fact inadequate, but not to go to the essence of

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122. 595 S.W.2d 802 (Tenn. 1980).
123. 595 S.W.2d at 804.
124. *Id.* at 804-05.
125. 243 N.L.R.B. No. 109, 101 L.R.R.M. 1529 (1979).
126. 101 L.R.R.M. at 1531.
127. *Id.*
128. *Id.*
129. 241 N.L.R.B. No. 141, 101 L.R.R.M. 1062 (1979).

the action.[130] Various alternatives, for example, advertising in local newspapers and broadcast media or identifying and approaching employees at nearby stores and restaurants during staggered lunch intervals, were described as prohibitively costly or otherwise impractical.[131] The Board noted that the employer had foreclosed mail or telephone contact by refusing to supply to the union a list of the names and addresses of its employees.[132]

The Fourth Circuit in an opinion by Judge Sprouse, denied enforcement[133] on the ground that, under the circumstances, absent any serious effort on the part of the union to explore alternative means of communication, it could not be inferred that none of the alternatives was reasonable. The court noted, however, that under other circumstances "where the combination of physical location, type of work, and employer activity make it apparent that reasonable alternative methods do not exist . . . it would not be necessary to prove the futility of attempting alternative means . . . by active efforts. . . . "[134]

D. Seattle-First National

In *Seattle-First National Bank*,[135] the Board found a section 8(a)(1) violation when the owner of an office building located in an urban area had threatened to cause the arrest of individuals, mostly nonemployees, who were engaged in leafleting and similar primary strike related expressive activities in the forty-sixth floor foyer area adjoining the struck lessee restaurant during the lunch and dinner hours.[136] Chairman Fanning and Members Jenkins and Murphy reasoned that the intended audience included, apart from nonstriking employees, potential customers who could be identified only as they entered the restaurant itself and many of whom would enter the restaurant "hours after passing the pickets on the sidewalk" below,[137] perhaps without having been aware at the time they entered the building for other purposes that the restaurant existed or otherwise not having planned to eat within the building, so that "restraining the strike-related activity to the public sidewalks would excessively hinder . . . efforts to communicate a meaningful message."[138]

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130. *Id.*
131. *Id.*
132. *Id.*
133. 630 F.2d 1012 (4th Cir. 1980).
134. *Id.* at 1017.
135. 243 N.L.R.B. No. 145, 101 L.R.R.M. 1537 (1979).
136. 101 L.R.R.M. at 1538.
137. *Id.*
138. *Id.*

The Ninth Circuit, in an opinion by Judge Sneed, remanded[139] with instructions to revise the order to restrict the number and conduct of persons who might engage in the forty-sixth floor activity, although no charge had been filed with respect to these matters and it was acknowledged that no more than two pickets had been present on the floor at any time and that nothing "inappropriate" had occurred.[140] Judge Fletcher, dissenting,[141] argued that the Board was without authority to modify its order in the manner proposed, as there had been no charge filed against the pickets.

E. Shirley v. Retail Store Employees

In *Shirley*,[142] the owner of a small shopping center located in a non-urban area and his lessee, the employer grocery store, brought an action in state court to enjoin primary strike picketing on a private sidewalk directly in front of the employer's store.[143] The trial court found that some incidental occurrences of sidewalk congestion and other "annoyance and inconvenience" to customers of the struck employer did not constitute "significant" interference with the relevant property interests, that to compel the pickets to remove to a public sidewalk some distance away would "effectively hinder" the attempted communication, and that therefore *Logan Valley* required that an injunction not issue.[144] The Kansas Supreme Court, in an opinion by Justice Prager, affirmed[145] on the ground that *Garmon* had placed the question of whether trespassory primary strike activity, absent any evidence of "a threat of immediate violence or some actual obstruction to ingress and egress,"[146] was protected by section 7 within the pre-emptive jurisdiction of the Board.

A petition for certiorari to the United States Supreme Court was granted, the judgment vacated, and the cause remanded for further consideration in light of *Sears I*.[147] On remand, the Kansas court, again in an opinion by Justice Prager, modified its earlier opinion[148] in order to clarify, in view of *Sears I*, that Kansas courts might enjoin trespassory picketing when the employer had requested the pickets to leave but the union

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139. 105 L.R.R.M. 3411 (9th cir. Nov. 25, 1980).
140. *Id.* at 3415.
141. *Id.* (Fletcher, J., dissenting).
142. 222 Kan. 373, 565 P.2d 585 (1977), *vacated*, 436 U.S. 924 (1978), *on remand*, 225 Kan. 470, 592 P.2d 433 (1979).
143. 565 P.2d at 587.
144. *Id.* at 588.
145. *Id.* at 592.
146. *Id.* at 591.
147. 436 U.S. 924 (1978).
148. 225 Kan. 470, 592 P.2d 433 (1979).

had not filed a section 8(a)(1) charge or when although the union had filed a charge, "there is shown to be actual violence or a threat of immediate violence or some obstruction to the free use of property by the public that immediately threatens public health and safety or that denies to an employer or his customers reasonable ingress and egress. . . ."[149]

F. State ex rel. Retail Store Employees Local 655 v. Black

In *Black*,[150] the owner of a moderately large shopping center located in a non-urban area and its lessee, the employer grocery store, had threatened the arrest of primary strike pickets on a private sidewalk directly in front of the employer's store. The pickets were removed to a parking lot entrance, and the union filed an unfair labor practice charge with the Board, on which a complaint subsequently issued. Pickets were again placed on the private sidewalk. The employer and its lessor brought an action in state court to enjoin the picketing, alleging obstruction of customer and delivery access to the store.[151] The court issued a temporary restraining order, and the union sought a writ of prohibition in the state appeals court to prevent enforcement of the order.[152] The Missouri appeals court, in an opinion by Judge Gunn, quashed its preliminary writ and remanded,[153] reasoning that the allegation of obstruction took the matter outside the scope of arguable section 7 protection, and that because obstruction of customer rather than nonstriking employee access was alleged, the activity was not arguably prohibited by section 8. On remand, the trial court was instructed to amend the injunction to restrain obstruction only, rather than the picketing itself.[154]

V. CONCLUSION

The approach to pre-emption taken by the Kansas court in *Shirley* and by the Missouri court in *Black* seems an appropriate response to the decision in *Sears I* — to some extent adopting the rationale of Justice Blackmun's concurrence.[155] The unfortunate situation in *Wiggins* might have been averted had the Board filed a section 10(j)[156] action to protect its

149. 592 P.2d at 437.
150. 603 S.W.2d 676 (Mo. App. 1980).
151. *Id.* at 678.
152. *Id.*
153. *Id.* at 676.
154. *Id.* at 682.
155. 436 U.S. at 209 (Blackmun, J., concurring).
156. Section 10(j) provides;

> The Board shall have power, upon issuance of a complaint as provided in . . . this section charging that any person has engaged in or is engaging in an unfair

jurisdiction. And it bears noting that the Board has taken the position,[157] reiterated in passing in *Giant Foods*,[158] that the filing of a trepass action in state court to enjoin protected picketing is not itself a section 8(a)(1) interference. One may suppose a set of facts under which this position would lead to an anomaly under the pre-emption doctrine of *Sears I*.

Whether the denial of enforcement in *Hutzler* has any substantive significance, or whether it simply represents a judicial reluctance to find interference in cases in which there is no serious organizational or informational effort with which to interfere remains to be seen. *Seattle-First National* and *Meijer, Inc.* may be seen as current expressions of the *Babcock & Wilcox* balancing approach as modified by the variables suggested in *Hudgens*.

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labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

29 U.S.C. § 160(j) (1976).

157. Clyde Taylor Co., 127 N.L.R.B. 103, 45 L.R.R.M. 1514 (1960), adopting the rationale of Chairman Herzog's dissent in W.T. Carter & Brother, 90 N.L.R.B. 2020, 2029, 26 L.R.R.M. 1427, 1433 (1950).

158. 100 L.R.R.M. at 1600.