

Southern Services, Inc. and Service Employees International Union, AFL-CIO, Local 679

The Coca Cola Company and Service Employees International Union, AFL-CIO, Local 679.

Cases 10-CA-24040, 10-CA-24090, and 10-CA-24092

December 31, 1990

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
CRACRAFT AND OVIATT

On September 29, 1989, Administrative Law Judge Marvin Roth issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs, and the Coca Cola Company and Southern Services, Inc. filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The issue in this case is the appropriate legal standard to be applied when employees who regularly and exclusively work on the premises of an employer other than their own distribute union literature to fellow employees at the worksite at a time when they are on the property pursuant to their employment relationship. Contrary to the judge, we find that the standard set forth in *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945), applies under such circumstances and that the standard set forth in *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), and defined by the Board in *Jean Country*, 291 NLRB 11 (1988), does not apply.

The judge found that Southern Services, Inc. (SSI) employees, who regularly and exclusively work on Coca Cola Company (Coke) property, were "non-employees" for the purpose of evaluating their right to distribute literature to fellow SSI employees on Coke property. The judge applied the standard set forth in *Babcock & Wilcox* and *Jean Country* and found that the General Counsel had not satisfied his burden of showing that the Union had no other reasonable means of communicating its message except by access to Coke property. Recognizing that under his decision SSI employees were denied the right to distribute union literature that is guaranteed to employees who work on their own employer's premises, the judge nevertheless recommended that the complaint be dismissed.

The General Counsel and the Union except, arguing that SSI and Coke violated Section 8(a)(1) of the Act

by prohibiting SSI employees from distributing union literature at the employees' Coke worksite. They allege that SSI employees have been invited to enter Coke property to work and that they should be regarded as employees for the purpose of their right to distribute union literature at that worksite. The General Counsel and the Union contend that under the standard set forth in *Republic Aviation*, supra, SSI employees may distribute union literature in nonworking areas on Coke property during nonworking time. We find merit in the General Counsel's and the Union's exceptions.

The factual basis of this case has been fully detailed by the judge in his decision. Briefly restated, Coke has a headquarters office located in a complex of buildings which covers a whole block in Atlanta, Georgia. The complex is surrounded by a fence. SSI is a subcontractor to Coke and regularly performs janitorial work at the Coke complex.¹ The SSI employees work exclusively at the Coke headquarters. Coke requires all SSI employees to enter and exit the complex through the Pine Street gate. All persons entering the Pine Street gate entrance by foot or by car must show the Coke guard, who is posted at the Pine Street gate guardhouse, a badge or receive permission to enter.² The SSI employees proceed through a service tunnel that leads into the complex.³

Coke maintains a no-solicitation/no-distribution policy with respect to nonemployees⁴ at its Atlanta complex.⁵ In 1987, the Union began an organizational campaign among janitorial employees in the Atlanta area. SSI employees and nonemployee union representatives distributed literature and talked to SSI employees outside the Pine Street entrance. Coke did not attempt to prevent such distribution.

Prior to reporting to work on April 14, 1989, Patricia Copeland, an SSI employee who worked exclusively at the Coke complex, and two other SSI employees distributed union leaflets to SSI employees outside the Pine Street gate.⁶ Copeland and a fellow SSI employee stopped distributing the leaflets in time to report to work and walked to the Pine Street gate with the union leaflets.

When Copeland passed through the security checkpoint, the Coke security guard stopped Copeland and told her that she did not want Copeland passing out leaflets on Coke property. Copeland replied that she

¹ It is not alleged that Coke is a joint employer of SSI's employees.

² SSI employees have badges that identify them as subcontractor employees who work on Coke's premises. Coke employees have different badges.

³ SSI employees who drive must park in an open lot adjacent to the tunnel.

⁴ Coke's policy provides as follows:

Persons who are not employees of the Company are not permitted on Company property either to solicit employees or to distribute material to Company employees at any time, and will be refused access for any such purpose.

⁵ The complaint did not allege that Coke unlawfully promulgated or maintained its solicitation and distribution policy.

⁶ The fact that Copeland sought to distribute literature only to fellow SSI employees is undisputed.

could do so on her own time. The security guard answered that if Copeland and the other SSI employee were to pass out leaflets on Coke property it would be Coke's problem. Copeland and the SSI employee distributed leaflets as they proceeded to the SSI sign-in station at the Coke dock. At the dock, an SSI supervisor told Copeland that she could not distribute the literature because the Coke management would not permit it.

The Supreme Court and the Board have adopted two distinct analyses for determining whether solicitation on an employer's property is protected by Section 7 of the Act. The Court has made a distinction between the rules of law applicable to employees and those applicable to nonemployees. *Republic Aviation* governs solicitation and distribution by employees properly on company property pursuant to the employment relationship. In *Republic Aviation*, the Court found an employer could not prohibit its employees from distributing union literature in nonworking areas of its property during nonworking time unless the employer could show that the restriction was necessary to maintain production or discipline.⁷

By contrast, *Babcock & Wilcox*, supra, and *Jean Country*, supra, pertain to situations in which strangers to the employer's property trespass to facilitate activity covered by Section 7 of the Act. In *Babcock & Wilcox*, nonemployee organizers attempted to enter an employer's property to distribute union organizational literature. The Board applied the rule of *Republic Aviation*, but the Court disagreed, holding that there is a distinction "of substance" between "rules of law applicable to employees and those applicable to non-employees."⁸

The Court emphasized the distinction between *Republic Aviation* and *Babcock & Wilcox* in *Hudgens v. NLRB*, 424 U.S. 507 (1976). The Court stated that "[a] wholly different balance was struck [in *Republic Aviation*] when the organizational activity was carried on by employees already rightfully on the employer's property, since the employer's management interests rather than his property interests were there involved."⁹

Two years later, in *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978), the Court described the difference between the two cases in the following terms: "the non-employees in *Babcock & Wilcox* sought to trespass on the employer's property, whereas the employees in *Republic Aviation* did not."¹⁰ In *Eastex*, the Court also

reiterated the distinction set forth in *Hudgens* that is quoted above.

Applying the distinction set forth by the Supreme Court, we believe that the instant case falls under the *Republic Aviation* standard rather than the *Babcock & Wilcox* standard. SSI is a cleaning contractor retained to perform janitorial functions for Coke's benefit at its headquarters, and union solicitor Copeland is an SSI employee working on a regular and exclusive basis on Coke's premises. Thus Copeland, like her fellow SSI employees, has been invited to work at the Coke site on a continuing basis. On April 14, 1989, Copeland did not seek to "trespass" on Coke's property; she was reporting to work pursuant to her employment relationship. Thus, she was "already rightfully on [Coke's] property"¹¹ when the Respondents prohibited her from distributing union literature. She was a "stranger" neither to the property nor to the SSI employees working on the property whom she was soliciting. In these circumstances, it is reasonable to require Coke, as well as SSI, to treat SSI employees engaged in organizing activities among themselves under the *Republic Aviation* standard.¹²

Applying *Republic Aviation* to the instant case, we find that the Respondents have not shown that the SSI employees' distribution of union literature to fellow SSI employees during nonworking time in nonworking areas of the Coke worksite would interfere with maintaining production or discipline at the Coke worksite. Accordingly, we find that Coke and SSI violated Section 8(a)(1) of the Act by refusing to allow Copeland to distribute union literature in nonworking areas of Coke property during nonworking time.¹³

¹¹ *Hudgens*, supra, 424 U.S. at 521 fn. 10.

¹² The judge relied on a footnote in *Fabric Services*, 190 NLRB 540 (1971), in support of his conclusion that the standard set forth in *Babcock & Wilcox* was appropriate. *Fabric Services* involved a situation in which a repairman employed by Southern Bell was required to remove union insignia while working on the property of Fabric Services, a customer of Southern Bell. In finding a violation, the judge, affirmed by the Board, applied that part of *Republic Aviation* that deals with the wearing of union insignia rather than employee solicitation, the other issue in *Republic Aviation*. In dicta, the judge stated that *Babcock & Wilcox* would have been applicable if the repairman had attempted to organize the employees of the property owner. *Fabric Services*, supra, 190 NLRB at 541 fn. 11. We find that the judge's reliance in this case on the *Fabric Services* dictum is misplaced, because the hypothetical situation referred to in the footnote is different from the circumstances here. SSI employees have not attempted to distribute literature to Coke employees.

The judge also found support for his position in certain language in *Jean Country*, supra. However, the sentence quoted by the judge did not address the question before us here; it was directed at the entirely different issue of whether in applying the *Babcock & Wilcox* standard the factor of reasonable alternative means must always be considered. The Board described its analysis there as applicable to those persons whom the property owner "has not invited to enter." *Jean Country*, supra. In short, *Jean Country* did not address the distinction between the *Republic Aviation* and *Babcock & Wilcox* standards set forth in the Supreme Court's decisions in *Hudgens* and *Eastex*.

¹³ Although Coke is not the direct employer of the SSI employees, we find that it violated the Act when it prohibited SSI employee Copeland from exercising her Sec. 7 rights at her only place of employment. See, e.g., *Fabric Services*, 190 NLRB at 541-542.

⁷ *Republic Aviation*, 324 U.S. 793 at 803.

⁸ *Babcock & Wilcox*, 351 U.S. at 113. In *Babcock & Wilcox*, the Court struck a balance between Sec. 7 rights and an employer's right to keep strangers from entering its property. The Court held that the employer could prevent "nonemployee distribution of union literature [on the employer's property] if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message." Id. at 112.

⁹ *Hudgens v. NLRB*, 424 U.S. at 521 fn. 10.

¹⁰ *Eastex, Inc. v. NLRB*, 437 U.S. at 571.

CONCLUSION OF LAW

By refusing to allow Patricia Copeland to distribute union leaflets to fellow SSI employees in nonworking areas of Coke property during nonworking time, the Respondents have violated Section 8(a)(1) of the Act.

REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, we shall order them to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

ORDER

The National Labor Relations Board orders that

A. The Respondent, The Coca Cola Company, Atlanta, Georgia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to allow SSI employees working on its premises to distribute union leaflets to fellow SSI employees in nonworking areas of Coke property during nonworking time.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its Atlanta, Georgia facility copies of the attached notice marked "Appendix A."¹⁴ Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

B. The Respondent, Southern Services, Inc., Atlanta, Georgia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to allow its employees working on Coke property to distribute union leaflets to fellow Southern Services, Inc. employees in nonworking areas of Coke property during nonworking time.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its Atlanta, Georgia facilities copies of the attached notice marked "Appendix B."¹⁵ Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

MEMBER OVIATT, concurring.

I agree with my colleagues that the Respondents violated Section 8(a)(1) of the Act by preventing Southern Services employee Patricia Copeland from distributing union leaflets during nonworking time in nonworking areas of Coca Cola headquarters, where she was employed. I write separately to emphasize the importance to my decision of the particular circumstances in which Copeland found herself.

Coca Cola had a facially valid rule that prohibited "[p]ersons who are not employees of the Company" from going on company property "either to solicit employees or to distribute material to Company employees." See *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956). Copeland was not "an employee of the Company" but of the cleaning subcontractor. Because she was "distribut[ing] material to Company employees" on company property, Coca Cola enforced its rule against her.

Copeland, however, was not a stranger seeking to use the Company's premises. Her employer, SSI, had a contract with Coca Cola to perform janitorial work, and Copeland was there to perform that work. Significantly, Copeland had no other workplace where she could reach her fellow SSI employees with her message. She was employed by SSI only for the Coca Cola headquarters' job. In these particular circumstances, and despite what I find to be Coca Cola's strong property interests, I am willing to apply the *Republic Aviation* standard in this case. See *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803 (1945). I would be cautious, however, about extending *Republic Aviation* to other situations involving union solicitation or distribution of union literature by a subcontractor's employees.

¹⁴If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

¹⁵See fn. 14, *supra*.

On the facts of this case, and because the Respondents have not shown that preventing Copeland's distribution of union literature was necessary to maintain production and discipline, I concur in the majority's 8(a)(1) finding.

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to allow Southern Services, Inc. employees working on Coca Cola Company property to distribute union leaflets to other Southern Services, Inc. employees in nonworking areas of Coca Cola Company property during nonworking time.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

THE COCA COLA COMPANY

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

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- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to allow our employees working on Coca Cola Company property to distribute union leaflets to fellow Southern Services, Inc. employees in nonworking areas of Coca Cola Company property during nonworking time.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

SOUTHERN SERVICES, INC.

Susan Pease Langford, Esq., for the General Counsel.
Edward Katze, Esq., of Atlanta, Georgia, for Respondent Southern Services, Inc.
Joseph H. McLure Jr., Esq., and *William J. Bernstein, Esq.*, of Atlanta, Georgia, for Respondent Coca Cola.
Robert S. Sarason, Esq., of Atlanta, Georgia, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARVIN ROTH, Administrative Law Judge. These consolidated cases were heard at Atlanta, Georgia, on June 28, 1989.¹ The charges were filed by Service Employees International Union, AFL-CIO, Local 679 (the Union), on March 24 and April 18. The consolidated complaints, which issued on May 16 and 17, allege in sum that Southern Services, Inc. and The Coca Cola Company (respectively SSI and Coca Cola and collectively Respondents) violated Section 8(a)(1) of the Act. The gravamen of the complaints is that Respondents allegedly unlawfully told SSI employees that they could not distribute union leaflets on Coca Cola property. Respondents' answers deny commission of the alleged unfair labor practices.

All parties were afforded full opportunity to participate, to present relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. General Counsel, SSI, and Coca Cola each filed a brief. On the entire record in this case, and from my observation of the demeanor of the witnesses, and having considered the briefs submitted by the parties, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENTS

Coca Cola, a Delaware corporation with an office and place of business in Atlanta, Georgia, is engaged in the business of manufacturing, marketing, and distributing soft drink concentrates, soft drink syrups, and citrus and fruit juice products. In the operation of its business, Coca Cola annually ships goods valued in excess of \$50,000 directly from its Atlanta, Georgia operations to customers located outside of Georgia. SSI, a Georgia corporation with an office and place of business in Atlanta, provides cleaning services for commercial customers. In the operation of its business, SSI annually purchases and receives and sells and ships goods valued in excess of \$50,000 directly from suppliers or to customers located outside of Georgia. I find as admitted by the respec-

¹ All dates herein are for 1989 unless otherwise indicated.

tive Respondents, that each is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

Coca Cola's world headquarters are located in a complex of buildings covering a tract of land about the size of a city block, approximately 1 mile from downtown Atlanta. The complex includes the 26-story North Avenue tower, the 20-story Coca Cola USA building, an 11-story technical center, a multistory engineering development building, a flavor manufacturing building, and 3 parking garages each with 7 levels. The complex is surrounded by a fence, except for the main, or "plaza" entrance. There are three other entrances located respectively on Marietta, Luckie, and Pine Streets. The complex is surrounded by double width public sidewalks. Some 3000 Coca Cola personnel regularly work in the complex. Additionally, some 1400 persons employed by contractors or subcontractors, regularly perform services at the complex. Including visitors and deliveries, an average of 5500 persons and 4000 to 5000 vehicles are daily on the premises.

SSI performs cleaning services at the complex pursuant to a contract with Carter and Associates, which has a contract with Coca Cola, i.e., SSI is a subcontractor to Coca Cola. SSI has some 165 personnel who work exclusively on the Coca Cola premises, including a supervisory staff headed by Project Manager Waymon McCauley. The complaint does not allege, nor does General Counsel contend that Coca Cola is a joint employer of SSI's employees. SSI's employees are not represented by a labor organization. Some SSI employees work an 8-hour shift. However most work a 5-day week from 5:30 to 9:30 p.m., without any formal breaks. SSI employees are required by Coca Cola to enter and exit the complex by the Pine Street gate, which is located on the south side of the complex. SSI employees have badges which identify them as contractor or subcontractor employees who work on the premises (Coca Cola employees have a distinctly different badge). All persons entering the complex must show a badge or otherwise obtain permission to enter. SSI employees wear a distinct smock, although they may change on the premises. As they enter the complex, whether by car or on foot, SSI employees show their badge to a Coca Cola guard who is posted at a guard house at the Pine Street gate. They then proceed through a service tunnel which leads into the complex. Those who drive must park in an open ground level lot adjacent to the engineering development building. They then walk through the tunnel. The Pine Street entrance is also used by other service personnel, commercial vehicles, and Coca Cola transport vehicles. The open lot is used, in addition to SSI employees, by engineering development personnel, contractors, some service vehicles, and oversize vehicles. The lot is about 200 feet from the Pine Street entrance. About one-third of the SSI employees drive to and from

work, and the others walk.² Most SSI employees usually arrive at work between 5 and 5:30 p.m., and most Coca Cola employees leave work between 5 and 6 p.m. Consequently there is usually heavy traffic at the Pine Street gate during this period of time, and traffic may be backed up in either or both directions.

Beginning in October 1987 the Union, under the slogan of "Janitors For Justice," commenced an organizational campaign among janitorial employees in the Atlanta area. The Union distributed literature at various locations, including downtown Atlanta. SSI employees and nonemployee union representatives, including the Union's attorney, distributed literature and talked to SSI employees at the Pine Street entrance, outside the fenced area, both on public and Coca Cola property. (The property line begins about two car lengths before the gate, and therefore some of the roadway and sidewalk on both sides are on Coca Cola property.) Coca Cola made no effort to prevent such distribution. Assistant Vice President Semrau testified that Coca Cola has never prohibited distribution of literature outside the gate. However Coca Cola prohibits distribution of literature by non-Coca Cola employees within the complex. Coca Cola maintains a no-solicitation/distribution policy which provides as follows with respect to nonemployees:

Persons who are not employees of the Company are not permitted on Company property either to solicit employees or to distribute material to Company employees at any time, and will be refused access for any such purpose.

Patricia Copeland, who was employed by SSI and worked at the Coca Cola complex from April 1987 until early June 1989 testified in sum as follows: On April 14, before reporting to work, she and two other persons distributed Janitors for Justice literature outside the Pine Street gate. She and one of the others, who was also an SSI employee, then proceeded to enter the complex, carrying some of the literature with them. Project Manager McCauley told Copeland that Security Officer Reed wanted to see her. Reed told Copeland that she didn't want Copeland passing out leaflets on Coke property. Copeland answered that she could do so on her own time. Reed responded that if they were to pass out leaflets on Coke property it would be Coke's problem. The two SSI employees proceeded into the complex, distributing literature as they went. SSI Supervisor Odell Richardson stopped them, saying that they couldn't distribute the literature because Coke management wouldn't permit it. Copeland insisted that she could distribute the literature on her own time. Security Officer Reed testified that as Copeland entered the complex with a stack of leaflets, she told Copeland that she was now on company property and was no longer allowed to hand out or solicit her flyers, and that Copeland answered that she was

²I credit the testimony of Respondents' witnesses in this regard. Former SSI employee Patricia Copeland, who was General Counsel's only witness, testified that most SSI employees drive to work. She did not explain how she arrived at this estimate. Copeland herself walked to work. The Coca Cola assistant vice president and director of employee and industrial relations, Michael Semrau, Coca Cola security officer, Rachel Reed, who was posted at the Pine Street entrance; and SSI project manager, McCauley, testified in sum that on the basis of their personal observation (and in the case of Semrau, also on the basis of the number of authorized vehicles), that only about one-third of the SSI personnel drove to work.

not going to pass out anymore anyway. Supervisor Richardson was not presented as a witness in this proceeding. SSI Project Manager McCauley testified that he would enforce Coca Cola's rule. I credit Reed, who generally impressed me as a credible witness who had no particular axe to grind in this proceeding. However I credit Copeland's uncontroverted testimony concerning her exchange with Richardson. I find that notwithstanding her assurance to Reed, Copeland attempted to distribute union literature within the complex, but was stopped by Richardson.

B. Analysis and Concluding Findings

An employer rule which prohibits employees from engaging in union solicitation during nonworking time, or distribution of union literature during nonwork time and in nonwork areas, is presumptively unlawful in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline. *NLRB v. Magnavox Co. of Tennessee*, 415 U.S. 322 (1974). See also *Tri-County Medical Center*, 222 NLRB 1089 (1976), cited with approval in *NLRB v. Pizza Crust Co.*, 862 F.2d 49 (3d Cir. 1988). A different standard applies to nonemployee union organizers. "An employer may validly post his property against non-employee distribution of union literature 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." *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112-113 (1956). In the present case, General Counsel contends that the employees of SSI who worked on Coca Cola's premises enjoyed the status of "employees" for the purpose of distribution rights, and therefore that Respondents violated Section 8(a)(1) by prohibiting them from distributing union literature on Coca Cola's parking lot during their nonworking time. (The complaint does not allege that Coca Cola unlawfully promulgated or maintained its solicitation/distribution policy.) This case presents the question of whether employees who report to and regularly and exclusively work on the premises of an employer other than their own, are "employees" or "non-employees" for the purpose of their right if any to distribute union literature on the premises where they work. This is the principal, and as will be discussed, decisive issue in this case. The parties have not cited to me, nor have I been able to locate, any Board decision which directly addresses this question in its factual context.³ However, related Board decisions make clear the Board's view with respect to this question. In *Jean Country*, 291 NLRB 11, 12 (1988), the Board defined the *Babcock & Wilcox* rule in the following language:

Babcock thus holds that where persons other than employees of an employer that owns or controls the property in question are concerned, "alternative means" must always be considered: a property owner who has

³*Sylvania Electric Products*, 174 NLRB 1067 (1969), dealt with the validity of Servomation's "neutrality role," which required its employees to maintain neutrality with respect to union activity among employees of its customers, including Sylvania, when they worked on the customers' premises. The Board found that Servomation could lawfully enforce its rule. The case did not involve organizational activity among Servomation's own employees on Sylvania's premises.

closed his property to nonemployee communications, on a nondiscriminatory basis, cannot be required to grant access where reasonable alternative means exist, but in the absence of such means the property right must yield to the extent necessary to permit the organizers to communicate with the employees. [Emphasis added in part.]

In essence, the Board said that where the persons seeking to distribute literature are not employees of the employer who owns or controls the property in question, their status is that of nonemployees, and therefore, *Babcock & Wilcox* governs.

In *Jean Country*, the Board reconsidered and revised its previously stated method of applying *Babcock & Wilcox*, as set forth in *Fairmont Hotel*, 282 NLRB 139 (1986). I do not believe that the Board was careless or inadvertent in defining the scope of cases covered by *Babcock & Wilcox*. Moreover, in prior cases the Board has used similar language in defining the distinction between employee and nonemployee distribution. In *Fabric Services*, 190 NLRB 540 (1971), on which General Counsel principally relies, the Board dealt with the question of whether Fabric Services and Southern Bell violated Section 8(a)(1) by requiring Smoak, Southern Bell's installer repairman, to remove his union pocket protector while performing work at Fabric Services' plant. The Board held that the employers acted unlawfully. However Trial Examiner Arthur Leff added as follows:

*My view of this case would have been different had it involved a prohibition against employee solicitation or other organizational activity, instead of a prohibition against the wearing of union insignia. As a corollary to its right to bar outside organizers from coming on its property (N.L.R.B. v. Babcock & Wilcox Co., 351 U.S. 105), Fabric Services could have legitimately insisted, without any showing of special circumstances, that Smoak as an invitee on its property for a limited purpose confine himself to the purpose for which he had been allowed to enter its premises and refrain from attempts to organize its employees. Correspondingly, Southern Bell, whether or not requested by Fabric Services to do so, could have legitimately required Smoak to refrain from union solicitation or organizational activities among Fabric Services' employees while on the latter's property. See *Sylvania Electric Products Co.*, 174 NLRB No. 9. This case is distinguishable from *Sylvania* because it is concerned only with the question of whether Smoak's right to wear a union insignia while working was unlawfully infringed, there being no claim that his wearing of the insignia was in any way associated with any attempt on his part to organize Fabric Services' employees. As emphasized above, the wearing of a union insignia stands in a different category than employee solicitation. It is regarded as a form of employee self-expression protected by Sec. 7, rather than a form of employee solicitation, and under the law as developed is lawfully subject to restrictive regulation only when compelling special circumstances are shown to require it in the interest of maintaining employee discipline or production. [Emphasis added.]*

Judge Leff did not use words carelessly. The Board could have disavowed the above language as dicta. However the Board did not. It is evident that the Board concurred in

Judge Leff's analysis. In *Stoddard-Quick Mfg. Co.*, 138 NLRB 615, 616 (1962), as was pointed out in *Sylvania Electric Products*, supra, 174 NLRB at 1070, the Board described the rights of employee union solicitation and distribution of union literature as defined in *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801–803 (1945), and *Peyton Packing Co.*, 49 NLRB 828, 843–844 (1943), as applying “when these activities occur on property subject to the employer’s ownership and dominion.” Therefore, other cases relied on by General Counsel (*Scott Hudgens*, 230 NLRB 414 (1977), and *Peddie Buildings*, 203 NLRB 265 (1973), revd. sub. nom. *NLRB v. Viseglia*, 498 F.2d 43 (3d Cir. 1974)), are not in point on this issue, because in each case the employer of the employees involved was the lessee and occupant of the premises in question. In the present case, SSI is simply a business invitee on Coca Cola’s premises. I recognize that as a consequence of this distinction, employees who do not work on or report to the premises of their employer, but work on the premises of another employer, may enjoy lesser rights of distribution and solicitation than those who do work on their employer’s premises. However a line of Board decisions has made clear the distinction.

As the present case is governed by the standards of *Babcock & Wilcox*, it follows that in light of the facts the complaints should be dismissed. General Counsel does not have a fallback position. General Counsel and the Union contend that alternative means of communication are irrelevant in this case, and the Union objected to Respondent’s introduction of evidence on this matter. In cases involving nonemployee distribution, General Counsel has the “heavy” burden of showing that the Union has no other reasonable means of communicating its message except by access to the employer’s

property, or that the employer’s access rules discriminate against union solicitation. *Sabine Towing Co. v. NLRB*, 599 F.2d 663 (5th Cir. 1979). Here, Respondents took the initiative in presenting evidence on these matters. Both sides invoke substantial rights. The Union has a right to organize SSI’s employees, and Coca Cola has a substantial property right, particularly in view of the fact that its complex is not open to the general public. See *Jean Country*. The Union plainly has alternative means of communicating its message to SSI’s employees, without distributing literature within the Coca Cola complex, and has made use of such means. The Union can and has distributed its literature at the entrance to Coca Cola’s complex, including the sidewalks and roadway which are on public and Coca Cola property. The Union has even posted its literature on Coca Cola’s fence. The Union has also distributed its literature and otherwise communicated with SSI employees at other locations. Coca Cola and SSI have not prohibited SSI employees from discussing union activity on their free time, either within or outside the premises. Rather Coca Cola has only prohibited distribution of literature within the complex. Therefore I am recommending that the complaint be dismissed.

CONCLUSIONS OF LAW

1. Respondents are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondents did not violate the Act as alleged in the complaint.

[Recommended Order omitted from publication.]