

**Beverly Enterprises-Hawaii, Inc. d/b/a Hale Nani Rehabilitation and Nursing Center and Buenaventura Moraga, Petitioner, and United Public Workers, AFSCME, Local 646.** Case 37-RD-302

August 26, 1998

DECISION AND CERTIFICATION OF RESULTS  
OF ELECTION

BY CHAIRMAN GOULD AND MEMBERS FOX, LIEBMAN,  
HURTGEN, AND BRAME

The National Labor Relations Board has considered objections to an election held on December 5, 1996, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 71 for and 84 against the Union, with no challenged ballots.

The Board has reviewed the record in light of the exceptions and brief, and has decided to adopt the hearing officer's findings and recommendations<sup>1</sup> only to the extent consistent with this Decision and Certification of Results of Election.

The hearing officer found that the Employer engaged in objectionable conduct warranting setting aside the election by maintaining an overly broad no-distribution rule. For the reasons set forth below, we disagree.

The following notice was posted at the entrances to the Employer's facility and at the main bulletin board:

NOTICE

Solicitation by an employee of another employee is prohibited while either person is on working time. Working time is all time when an employee's duties require that he or she be engaged in work tasks, but does not include an employee's own time, such as meal periods, scheduled breaks, time before or after a shift, and personal clean-up time. In addition, solicitation is prohibited at all times in immediate patient-care areas.

Employees are not permitted to distribute advertising material, handbills, printed or written literature of any kind at all times in immediate patient care areas or any other work areas of the facility.

Employees are not permitted access to the interior of the facility or outside work areas during their off duty hours.

Solicitation, distribution of literature, or trespassing by nonemployees is prohibited on these premises.

<sup>1</sup> In the absence of exceptions, we adopt pro forma the hearing officer's recommendations that Objections 3 through 13 be overruled. We also adopt, absent exceptions, the hearing officer's recommendations to overrule those portions of Objections 1 and 2 concerning the Employer's posted rule restricting access to the facility by off-duty employees, the solicitation rule in the Associate Handbook, the Employer's alleged refusal to allow the Union to post literature on the Union's bulletin board, and the Employer's alleged refusal to allow the Union equal access to employees at a company meeting.

The hearing officer found that the second paragraph of this notice was objectionable because it prohibits distribution in "any other work areas of the facility." The hearing officer stated that such restriction on distribution is overly broad and objectionable where the employer has not established that the prohibition was necessary to avoid disruption of health care operations or the disturbance of patients. The hearing officer noted that the Employer's distribution of literature by supervisors in the timeclock area indicates that the Employer did not view the distribution of literature in a working area to be detrimental to patient care or health care operations. In addition, the hearing officer relied on the employees' belief that they were restricted by the rule from distributing union campaign literature in working areas in the facility, while supervisors were allowed to pass out literature in their departments. Accordingly, the hearing officer recommended that Objections 1 and 2 be sustained and a new election held.

The Employer excepts, arguing, inter alia, that the posted rule against distribution in work areas is presumptively valid, and that an employer is not required to show that a presumptively valid rule is necessary to avoid disruption of health care operations or the disturbance of patients. The Employer also contends that the Employer's distribution of literature by supervisors in work areas does not invalidate a rule against distribution in those areas. The Employer further maintains that it did not enforce the rule disparately against union supporters, citing the fact that there is no evidence that any nonsupervisory employees were allowed to distribute literature in violation of the rule. Accordingly, the Employer argues that the Union's Objections 1 and 2 should be overruled. We agree with the Employer.

It is well settled that "[r]ules prohibiting distribution of literature are presumed valid unless they extend to activities during nonworking time and in nonworking areas." *St. John's Hospital*, 222 NLRB 1150 (1976), *enfd.* in part 557 F.2d 1368 (10th Cir. 1977). The Board has stated that an employer's prohibition against employee distribution in work areas at all times is presumptively valid. *Albert Einstein Medical Center*, 245 NLRB 140, 142 (1979).<sup>2</sup>

Here, the Employer's posted rule prohibits distribution in working areas only and does not restrict distribution in

<sup>2</sup> Recognizing inherent differences between solicitations and distributions, the Board permits greater restrictions on Sec. 7 distributions than on solicitations. "[S]olicitation, being oral in nature, impinges upon the employer's interests only to the extent that it occurs on working time, whereas distribution of literature, because it carries the potential of littering the employer's premises, raises a hazard to production whether it occurs on working time or nonworking time." *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615, 619 (1962). Thus, while a no-solicitation rule generally must be limited to working time, a no-distribution rule may properly extend to working areas even on nonworking time. *Eastex Inc.*, 215 NLRB 271, 274-275 (1974), *enfd.* 550 F.2d 198 (5th Cir. 1977), *affd.* 437 U.S. 556 (1978).

nonworking areas. Thus, the rule is presumptively valid. While an employer may justify a rule that is presumptively invalid on its face by showing that the rule is necessary to avoid a disruption of patient care or the disturbance of patients, it is not required to justify a presumptively valid rule. In recommending that Objections 1 and 2 be sustained because the Employer had “not provided a substantial justification for the restriction” on distribution in work areas, the hearing officer placed a burden on the Employer where no such burden exists under Board law.<sup>3</sup> Because the rule at issue here is presumptively valid, we find that the Employer did not engage in objectionable conduct by maintaining this rule during the critical period.<sup>4</sup>

We also conclude that the Employer did not engage in objectionable conduct when its supervisors handed out flyers in the timeclock areas<sup>5</sup> and in the dietary, housekeeping, and laundry departments, at a time when the Employer was enforcing its otherwise valid no-distribution rule against employees.<sup>6</sup> Our reasons for reaching this result are set forth in the attached separate opinions.

Accordingly, we shall overrule the Union’s Objections 1 and 2 and shall issue a Certification of Results of Election.

#### CERTIFICATION OF RESULTS OF ELECTION

IT IS CERTIFIED that a majority of the valid ballots have not been cast for United Public Workers, AFSCME, Local 646, and that it is not the exclusive representative of these bargaining unit employees.

MEMBERS FOX and LIEBMAN, concurring.

On the record in this case, we find, with Members Hurtgen and Brame, that the Employer’s maintenance of

<sup>3</sup> The cases relied on by the hearing officer are inapplicable because they do not involve restrictions only on distributions in working areas. *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 486 (1978), involved restrictions on solicitations and distributions in a hospital cafeteria and coffeeshop. *NLRB v. Baptist Hospital, Inc.*, 442 U.S. 773 (1979), involved a rule against solicitation in lobbies, gift shop, cafeteria, corridors, entrances, and sitting rooms. *Southern Maryland Hospital Center*, 293 NLRB 1209 fn. 2 (1989), aff’d. in relevant part 916 F.2d 932 (4th Cir. 1990), involved a rule against distribution at the hospital’s main entrance. *Heartland of Lansing Nursing Home*, 307 NLRB 152, 159–160 (1992), and *Health Care & Retirement Corp.*, 310 NLRB 1002, 1004 (1993), both involved rules against solicitation. *Fairfax Hospital*, 310 NLRB 299, 311–313 (1993), enf’d. 14 F.3d 594 (4th Cir. 1993), cert. denied 512 U.S. 1205 (1994), involved disparate enforcement of rules. *Baylor University Medical Center*, 247 NLRB 1323 (1980), enf. denied 662 F.2d 56 (D.C. Cir. 1981), involved a rule against solicitation and distribution in the cafeteria and vending areas.

<sup>4</sup> The rule has been posted at the facility’s entrances since the early 1980’s. Thus, there is no allegation that the rule was promulgated in response to union activity.

<sup>5</sup> We find it unnecessary to decide whether the timeclock areas were working areas. Likewise, we do not pass on the hearing officer’s statement that it must be assumed that the timeclock areas were considered by the Employer to be working areas.

<sup>6</sup> There is no evidence that the Employer permitted any nonsupervisory employees to violate the rule against distribution.

a rule prohibiting employees from distributing literature in working areas while allowing its supervisors to distribute antiunion literature in such areas did not constitute objectionable conduct warranting setting aside the election. We do not agree, however, that unless a union has no other means to communicate with employees, an employer has an absolute right to maintain such a rule regardless of whether it itself engages in conduct which, if engaged in by employees, would violate the rule. As the Supreme Court stated in *NLRB v. Steelworkers (Nutone)*, 357 U.S. 357, 364 (1958), rejecting just such a per se approach, “No such mechanical answers will avail for the solution of this nonmechanical, complex problem in labor-management relations.” We write separately to stress, as the Court did in *Nutone*, that there may be circumstances where the enforcement of a no-solicitation or no-distribution rule by an employer who is at the same time engaging in antiunion solicitation creates such an imbalance in opportunities for communication about unionization that enforcement of the rule is either objectionable or unlawful.

In *Nutone*, the Supreme Court was presented with “[t]he very narrow and almost abstract question” of whether an employer’s enforcement of an otherwise valid no-solicitation rule while itself engaging in antiunion solicitation “necessarily” constitutes an unfair labor practice, “regardless of the way in which the particular controversy arose or whether the employer’s conduct to any considerable degree created an imbalance in the opportunities for organizational communication.” 357 U.S. at 362. The Court ruled that it did not, stating that:

[f]or us to lay down such a rule of law would show indifference to the responsibilities imposed by the Act primarily on the Board to appraise carefully the interests of both sides of any labor-management controversy *in the diverse circumstances of particular cases* and in light of the Board’s special understanding of these industrial situations.

Id. at 362–363. (Emphasis added.) The Court also stressed, however, that by the same token, “[w]e do not at all imply that the enforcement of a valid no-solicitation rule by an employer who is at the same time engaging in antiunion solicitation may *not* constitute an unfair labor practice.” Id. at 364. (Emphasis added.) Stating that the question of whether the enforcement of such a rule is unlawful must be answered “in the circumstances of an individual case,” Id., the Court identified factors which, in its view, would be relevant to such a case-specific determination by the Board.

The Court noted that no attempt had been made in either of the cases at issue to make a showing that the no-solicitation rules “truly diminished the ability of the labor organizations involved to carry their messages to the employees”—a consideration that would be “highly relevant” in determining whether an otherwise valid rule has

been fairly applied. *Id.* at 363. Where the union's opportunities for effectively reaching the employees with a pronoun message are "at least as great" as the employer's ability to promote its antiunion views, the Court said, there is no basis for finding a violation. Thus, the presence or absence of "alternative channels" available to unions to communicate with employees would also be relevant to such a determination. *Id.*

The Court also pointed out that in the cases at issue, there was evidence that the employers in the past had made exceptions to their no-solicitation rules to allow charitable solicitations. Thus, the Court considered it relevant that there was no evidence as to whether the employees, or the union on their behalf, had asked the employer to make an exception to allow pronoun solicitation.

Analyzing the facts of the instant case in light of the factors which the Court in *Nutone* deemed to be relevant, we are unable to conclude that the Employer's maintenance of its no-distribution rule constituted objectionable conduct. Here, as in *Nutone*, no attempt has been made to show that the inability of union supporters to distribute pronoun literature in the areas where the Employer's supervisors were allowed to distribute significantly diminished the ability of the Union to get its message to employees, or that the Employer's enforcement of its rule "to any considerable degree created an imbalance" in the relative abilities of the Union and the Employer to communicate with the employees. *Id.* at 362. Thus, as in *Nutone*, "the concrete basis for appraising the significance of the employer's conduct is wanting." *Id.* at 364. What evidence there is in the record on these points shows that the employees were able to distribute literature on the Employer's premises except in immediate patient care areas or other working areas.<sup>1</sup> In addition, although there is nothing in the record to suggest that the Employer would have made an exception to its no-distribution rule to permit pronoun distributions, there is also no evidence that the Union or the employees requested such an exception or of their reasons for not making such a request.<sup>2</sup> Thus, while we do not adopt

<sup>1</sup> Contrary to the suggestion of our dissenting colleague, the record reflects that employees were allowed to solicit on the Employer premises during nonworking times, except in immediate patient care areas. In finding to the contrary, our colleague relies on the testimony of a single employee that she herself did not talk to anybody about the union while she was working because "[w]e knew we were not supposed to." Unlike our colleague, we do not agree that this testimony, without more, establishes that the Employer in fact maintained or enforced a rule against talking about unions. The Employer's written no-solicitation policy does not prohibit talking about unions and there is no evidence that any employee was ever told by any representative of management that they could not talk about unions. The fact that an employee may have believed that the Employer prohibited talking about the Union does not mean that the Employer in fact had such a policy.

<sup>2</sup> We agree with our dissenting colleague that, as the Court suggested in *Nutone*, even though there is no evidence that any such request was

their reasoning, we agree with Members Hurtgen and Brame that on this record, the Employer has not been shown to have engaged in conduct that would require the election to be set aside.

Our dissenting colleague argues that rules restricting employees from communicating in the workplace about unionization can be justified only where necessary to maintain production and discipline, and that once an employer has allowed its own supervisors to engage in conduct that "violates" such rules, it has effectively conceded that the rules are not necessary to serve its legitimate interests. Were we writing here on a clean slate, we would find force to that argument. However, as we read it, this aspect of our colleague's position is essentially the position taken by the U.S. Court of Appeals for the D.C. Circuit in its decision in the *Nutone* case itself.<sup>3</sup> Since the Supreme Court reversed the circuit court's decision and rejected its reasoning, we believe the Board is precluded from finding the Employer's conduct in this case to be objectionable on that ground.

We also cannot agree, however, with Member Brame's assertion that under *Nutone*, an employer's enforcement of a no-solicitation or no-distribution rule against its own employees can never be unlawful unless the employees are "inaccessible" to the union through other means of communications. The inaccessibility standard was used by the Court in *Babcock & Wilcox*, 351 U.S. 105 (1956), to delimit an employer's right to post his property against nonemployee distribution of union literature. However, as the Court there made clear, restrictions on union activity by employees on company property involve different considerations than restrictions on access to company property by nonemployee union organizers. 351 U.S. at 112-113. This case and *Nutone* involve the former, not the latter. Like the Board itself in *Babcock*, Member Brame has "failed to make a distinction between rules of law applicable to employees and those applicable to nonemployees." *Id.*<sup>4</sup>

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made in this case, it would be open to the Board to find, "as a matter of industrial experience," that such a request would not have been granted. 357 U.S. at 363. However, even if we were to join in such a finding, it would not change our conclusion that the Employer's maintenance of the no-distribution rule has not been shown to have had such an impact on "the opportunities for organizational communication" *Id.* at 362, as to constitute objectionable conduct.

<sup>3</sup> *Steelworkers v. NLRB*, 243 F.2d 593, 600 (1956). The court found that the employer had unlawfully prohibited employees from distributing union literature on plant property because by its own action in distributing literature it had "demonstrated the absence of a valid reason for such a prohibition."

<sup>4</sup> Member Brame is incorrect in his assertion that the Supreme Court has "adopted the *Babcock* inaccessibility test to identify the limited circumstances in which employers may be required partially to surrender their property rights to pronoun employee campaign activity." (Emphasis his.) In *Lechmere Inc. v. NLRB*, 502 U.S. 527 (1992), its most recent decision in this area, the Court again emphasized the "critical distinction" between the organizing activities of employees and nonemployees, noting that while *Babcock's* inaccessibility test applies to access to employer property by nonemployee organizers, "[n]o

As the Tenth Circuit Court of Appeals has stated, *Nutone* “does not hold that an employer is in all circumstances free to engage in distribution which is prohibited to its employees so long as it enforces against its employees equally the ‘no distribution’ rule. Rather, it simply states that such distribution by the employer does not automatically mean that such strict enforcement of the prohibition against employees constitutes an unfair labor practice.” *Head Division, AMF, Inc. v. NLRB*, 593 F.2d 972 (10th Cir. 1979).<sup>5</sup> Thus, although we find that the facts here do not support a conclusion that the Employer engaged in objectionable conduct, we will, in accordance with *Nutone*, continue to take a case-by-case approach to this issue which takes into account the “actualities of industrial relations,” 357 U.S. at 364, as they affect opportunities for employees to communicate in the workplace about unionization.<sup>6</sup>

MEMBER HURTGEN, concurring.

The issue debated by my colleagues is whether the Employer engaged in objectionable conduct by forbidding employees to distribute union literature in the Employer’s work areas. Of course, the extant law is that an employer is privileged to prohibit that distribution. The asserted reason for taking away that privilege here is that the Employer, through its supervisors, itself engaged in such distribution. However, as will be seen, the extant law is that this is *not* a basis for taking away the privilege.

Indeed, for almost 40 years, the law has been that an employer’s valid rule against *employee* distribution is not rendered unlawful simply because *the employer* chooses to use its own premises to engage in its own distribution.<sup>1</sup> My dissenting colleague would reverse this precedent. I would not do so.

I note initially that no party seeks this significant departure from precedent. Thus, the issue has not been litigated or briefed. In these circumstances, quite apart from the legal fallacy of the new proposition, I would not

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restriction may be placed on the employees’ right to discuss self-organization *among themselves*, unless the employer can demonstrate that a restriction is necessary to maintain production or discipline.” 502 U.S. at 533 (emphasis in original) (quoting *Babcock*, supra, at 113).

<sup>5</sup> Contrary to Member Brame’s assertion, this interpretation of *Nutone* does not contradict 40 years of Board law on this subject. See, e.g., *Head Division, AMF*, 228 NLRB 1406, 1416 (1977), enfd. on other grounds sub nom. *Head Division, AMF, Inc. v. NLRB*, supra; see also the discussion of *Nutone* in *G.H. Bass & Co.*, 258 NLRB 140, 144 fn. 12 (1981). Suffice it to say, we have a disagreement with Member Brame over the definition of the circumstances under which—or the precise contours of the standard that must be met before—prounion employees may be found, under *Nutone*, to have solicitation and distribution rights, notwithstanding an otherwise valid rule banning such conduct. But, this is not the case to resolve that issue.

<sup>6</sup> Member Brame criticizes this case-by-case approach as a “trackless swampland.” We can only reply that we are merely following the Supreme Court’s instruction that we take into account “the diverse circumstances of particular cases” in making determinations in this area. 357 U.S. at 363.

<sup>1</sup> *NLRB v. Steelworkers (Nutone, Inc.)*, 357 U.S. 357 (1958).

embrace it without thorough briefing by the parties and by interested amici.<sup>2</sup>

Second, I believe that the Board should be extremely cautious about such a departure from well-settled principles. There are values in having laws that are stable, predictable and certain. In my view, these values should be jettisoned only upon the clearest showing that extant precedent is manifestly unjust. That showing is not made here.

The dissent asserts that this case “is not about proscribing employer free speech on employer private property.” I disagree. Concededly, the dissent does not directly condemn an employer’s free speech as unlawful. However, because of an employer’s exercise of free speech, its otherwise lawful conduct (regulating employee distribution) is condemned as unlawful. Thus, the dissent does indirectly what it cannot do directly, i.e., it interferes with the right to express one’s own opinion on one’s own private property.<sup>3</sup>

I do not agree that there are new “actualities” which necessitate a new rule. Under extant law, and on the facts of this case, employees have ample opportunity to engage in activities in support of their union. They can distribute literature on the employer’s premises, except in certain designated areas. They can distribute literature, outside the employer’s premises, anywhere they wish. They can solicit, on the employer’s premises, during nonwork times. They can solicit, away from the employer’s premises, any time or place they wish. In light of the foregoing, and on the facts of this case, there is no showing of a lack of reasonable opportunities for communication.<sup>4</sup>

In sum, there is no necessity for proscribing the employer from using its own property to express its own views about unionization. Phrased differently, there is no basis for the Government to proscribe employer free speech on employer private property. As it relates to

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<sup>2</sup> The dissent asserts that “the Board has, on many occasions in the past, overruled past precedent without having the issue briefed by the parties or amici.” To the extent that the Board has done so, I oppose the practice. It seems to me that considerations of justice, fair play, and intelligent decision-making all point to one elementary principle: a court or other tribunal should not overturn long-established and significant precedent unless it first hears from those who have a stake in the outcome and from those who have “real world” experience with industrial practices. Thus, I disagree with the dissent’s apparent view that it is prudent to reverse precedent without this input. Member Brame has responded at length to the dissent and to the Fox-Liebman concurrence. I agree with much of what he says, and I applaud his scholarship. However, in view of the fact that the issue has not been litigated or briefed, I consider it unnecessary to endorse that opinion in its entirety.

<sup>3</sup> In the instant case, the Employer expressed its opinions through the distribution activities of its supervisory agents.

<sup>4</sup> Employee Domingo testified as to his understanding that he could not solicit at all on the Employer’s property. His understanding is contrary to the Employer’s rule, and he was never told that he could not solicit at all on the Employer’s property. His subjective understanding is not sufficient to establish a violation. Indeed, there is no contention that solicitation was banned in such an overly broad manner.

organizing activity, the workplace is not a neutral site. It is the employer's premises. Concededly, that reality must give way to certain organizational and solicitation rights and access rights on those premises. However, it goes too far to now claim that the employer must have its hands tied concerning otherwise unobjectionable written communication to its employees on its premises.

My colleague contends that my view is based on the principle that "the king can do no wrong." The contention is in error. My legal precepts are based on principles of private property and free speech. In our society, one need not be a king to enjoy these rights. Indeed, we fought a revolution to be free of the king and to enjoy those very rights. Further, to the extent that the quotation is relevant, I fail to see how it is somehow "wrong" to express one's own views while standing on one's own property. To the contrary, if there be a "wrong," it is governmental proscription of these rights of free speech and property.

My colleague also makes certain assertions about *Lechmere, Inc v. NLRB*, 502 U.S. 527 (1992). In the first one, he finds it "curious and ironic that dissenting members of the Board have voted to circumvent *Lechmere*" in certain prior cases. I do not understand how that observation applies to me. The majority opinion in those cases upheld *Lechmere*, and dismissed the complaints. I adhere to those cases upholding *Lechmere*, and I see no inconsistency in upholding, in the instant case, the property rights on which *Lechmere* is based.

I agree with my colleague that *Lechmere* reaffirms the proscription against discrimination. However, the term "discrimination" means the treatment of similar groups in a disparate fashion. Thus, for example, if an employer permits some employees to engage in antiunion activity, and forbids other employees to engage in comparable prounion activity, that would constitute discrimination.<sup>5</sup> However, "discrimination" does not mean that the employer must treat different groups the same way. Thus, an employer can treat its own managerial and supervisory agents differently from its employees.

My colleague also suggests that rules for employees must be the same as rules for employer agents (managers and supervisors). However, there is nothing under NLRA law that requires such identical treatment. Thus, for example, if an employer chooses to be very strict as to employees' "clocking in" for work on time, and yet chooses to be more lenient as to upper management in this respect, I do not see how this would violate the Act.

My colleague asserts that I am placing employers above the law. I disagree. All persons are subject to the same laws. In the context of the instant case, all persons are free to use their property to exclude outsiders. The

<sup>5</sup> It was this kind of discrimination among employees that was the basis for the violation found in *Head Division, AMF, Inc. v. NLRB*, 593 F.2d 972, 978 (10th Cir. 1979).

employer can exclude union agents from its facility (*Lechmere*), and the union can exclude the employer from its facility. Indeed, to the extent that there are restrictions on property rights, those restrictions pertain to the employer, not the union. That is, the employer must permit employees to solicit and distribute at certain times and places, and it must give access to nonemployees in "isolated" circumstances. However, neither of these restrictions is at issue here. What is at issue is whether there should be a new restriction, one that restricts employer efforts to protect working areas of its own property. The law does not go this far, and neither would I.

The dissent argues that the Employer's conduct of allowing supervisory distribution in a work area undermines the justification for proscribing employee distribution in that area. The argument has no validity. Under the dissent's view, the employer cannot treat employees and supervisors in a disparate fashion. Thus, the employer must give employees the same opportunities for distribution as it gives to its supervisors. Accordingly, the amount of, and time for, distribution would essentially be doubled. In addition, the Employer would have to monitor closely the situation, lest it unintentionally gives one group more leeway than the other. In my view, these concerns are legitimate and substantial. These concerns do not constitute a "red herring." An employer can limit all employee distribution and can thereby avoid all problems. But, under my colleague's view, if the employer chooses to engage in its own distribution activities (through its supervisors) it faces the problems set forth above.

In sum, an employer does not forfeit its right to prohibit employee distribution in working areas simply because the employer exercises its right to engage in free speech on its own property. Therefore, I do not agree with the views of my dissenting colleague.<sup>6</sup>

I do not agree with the rationale of concurring Members Fox and Liebman. They suggest that the case turns on the extent to which there is "an imbalance in the relative abilities of the union and the employer to communicate with the employees." I do not agree that the cases turn on whether the opportunities of the two parties are in balance, i.e., whether there is equality of opportunity for the two sides. Rather, in accommodating Section 7

<sup>6</sup> My colleague, at one point, argues that *NLRB v. Steelworkers (Nutone)*, 357 U.S. 357 (1958), is to be confined to its facts. However, that decision has consistently been interpreted to stand for the proposition that "no-solicitation, no-distribution rules are not binding on employers." *St. Frances Hospital*, 263 NLRB 834, 835 (1982), enf. 729 F.2d 849 (D.C. Cir. 1984). Indeed, *Nutone* itself recognizes that the Act does not command that employees "are entitled to use a medium of communication simply because the employer is using it." Apparently, my colleague recognizes this principle, for he seeks to overrule those cases which espouse it.

The *St. Francis* principle may be subject to a narrow exception where the employer distributes in work areas and forbids employees to do so, and the employees have no other reasonably effective means of communication. See *Babcock & Wilcox*, supra.

rights with property rights, the law requires only “reasonable” opportunities to communicate. For employees, these reasonable opportunities include solicitation rights on the Employer’s property at certain times, and distribution rights on that property in nonwork areas.<sup>7</sup> For non-employees, the rules are more restrictive, but there is a guarantee of reasonable opportunities to communicate.<sup>8</sup>

In short, the Supreme Court and the Board have promulgated rules which strike the balance between property rights and Section 7 rights to communicate. With respect to the latter, reasonable opportunity, not equal opportunity, is the guarantee. My colleagues, in pursuit of equality of opportunity, would rewrite these rules. I would not do so.

Members Fox and Liebman cite *AMF Inc.*, supra, in connection with their argument that *Nutone*, supra, does not necessarily privilege an employer to permit its supervisors to distribute in work areas and refuse permission to employees who request equal treatment. The case does not support the argument. The employer in *AMF, Inc.*, discriminated between *employee* McSherry and *employee* White. Further, the administrative law judge (affirmed by Board) said that such discrimination was a continuation of the discrimination found unlawful in a prior case (*Head Ski Division, AMF, Inc.*, 222 NLRB 161 (1976)). That prior case involved discrimination between *employees*. Finally, the enforcing court made clear that the discrimination was between *employees*. Concededly, the administrative law judge and the court commented upon the meaning of *Nutone*, supra. However, inasmuch as the case involved discrimination between employees, such comments are dicta in the classical sense, i.e., unnecessary to the disposition of the case.

MEMBER BRAME, concurring in the result.

Today, in the language of recognizing free speech rights in the workplace, our dissenting colleague seeks to shackle noncoercive employer speech with chains the Board and courts struck off decades ago. This position threatens not only constitutionally protected speech, but also employer property rights, along with the concomitant management prerogative to maintain production, order, and discipline. Under the dissent’s view, employers must finance union organizational activities by surrendering their employees’ working time for prounion solicitation and distribution or forego any representation election campaign of their own. This atavistic impulse would lead the Nation perilously far back along the road to the years preceding enactment of the Taft-Hartley Act, when, under the euphemism of “strict neutrality,” the Board deprived employers of the right to communicate with their workers about unionization.

<sup>7</sup> *Republic Aviation v. NLRB*, 324 U.S. 793 (1945); *Nutone*, supra.

<sup>8</sup> *Lechmere*, supra; *NLRB v. Babcock & Wilcox*, 351 U.S. 105 (1956).

Members Fox and Liebman, in their concurrence, go far toward accepting Chairman Gould’s views, even though differing with him on the significance of the facts presented in this proceeding. As a result, they would also upset long recognized employer free speech and property rights, and expose every noncoercive employer election campaign to uncertainty and litigation.

Because Chairman Gould and Members Fox and Liebman have cast in doubt decades of settled Board and court law, their opinions must be carefully analyzed against existing precedent and its historical development.

#### I. THE HEARING OFFICER’S REPORT

This case comes before the Board in the context of objections filed by an incumbent union to a decertification election held December 5, 1996, involving a unit essentially of service and maintenance employees at a Hawaiian nursing home.<sup>1</sup> The union lost the election by a vote of 84 to 71, with 2 void ballots.

The only issue we are called upon to decide is whether the hearing officer properly recommended that the election be set aside because the Employer maintained an overly broad *no-distribution* rule.<sup>2</sup> That question, in turn, hinges upon the hearing officer’s interpretation (in light of certain employer conduct) of the following notice that the Employer posted at both facility entrances and on its main bulletin board:

#### NOTICE

Solicitation by an employee of another employee is prohibited while either person is on working time. Working time is all time when an employee’s duties require that he or she be engaged in work tasks, but do not include an employee’s own time, such as meal periods, scheduled breaks, time before or after a shift, and personal clean-up time. In addition, solicitation is prohibited at all times in immediate patient-care areas.

Employees are not permitted to distribute advertising material, handbills, printed or written literature of any kind at all times in immediate patient care areas or any other work areas of the facility.

Employees are not permitted access to the interior of the facility or outside work areas during their off duty hours.

Solicitation, distribution of literature, or trespassing by nonemployees is prohibited on these premises.

<sup>1</sup> The unit had been covered by a collective-bargaining agreement between the Employer and the Union for about 20 years.

<sup>2</sup> The Union also alleged that the rule was discriminatorily enforced in that, as discussed below, supervisors handed out campaign literature in employees’ work areas, while denying the same opportunity to union supporters. The hearing officer did not find merit in this contention, however, and the Union filed no exceptions. The hearing officer rejected other union claims of discriminatory enforcement of the Employer’s rules, to which no exceptions were filed.

The hearing officer faulted as overbroad the no-distribution requirement set forth in the notice's second paragraph, because the Employer failed to present evidence that extending the prohibition to "any other work areas of the facility" was "necessary to avoid disruption of health care operations or the disturbance of patients." He buttressed this finding by noting that, on November 18, 2 weeks before the election, the Employer's supervisors and managers handed out a four-page antiunion leaflet in a question-and-answer format "in the working area where [nursing department] employees punch out, near each of the three time clocks," while the employees were on working time.<sup>3</sup> From this, the hearing officer inferred that the Employer did not regard distribution in working areas as "detrimental to patient care or health care operations."

He also cited the testimony of Matauage Liato, the union's shop steward, to the effect that she believed distribution of prounion campaign literature was prohibited while employees punched out. According to the hearing officer, Liato testified credibly that, "They [management] are passing out fliers when we were punching out from work. We are not allowed to do that for the Union." Finally, the hearing officer credited testimony by Venica Domingo, the Union's contract unit secretary, that she did not talk to employees about whether to vote for the Union on working time because, "we were working and we were not supposed to. We knew we were not supposed to because we were on the facility. That is the way its [sic] always been."

Thus, the hearing officer found that unit employees "had a basis to believe, based on the Employer's Posted Notice [,] that they were not able to distribute Union campaign literature in any working area's [sic] of the facility." He also noted that the Employer's administrator, Norma Monte, confirmed that employees were not permitted to distribute literature in work areas.

The hearing officer concluded that the Employer had not provided "substantial justification," based on the necessity for avoiding disruption of health care operations or disturbance of patients, for restricting literature distribution by employees in work areas of its facility. Accordingly, he recommended sustaining the Union's objections because the Employer's no-distribution rule was overbroad, and overturning the first, and directing a second, election.<sup>4</sup>

<sup>3</sup> The hearing officer also found that a separate distribution of literature occurred on the same day, when supervisors passed out identical material to unit employees in working areas of the dietary and house-keeping departments. There is no contention that the content of the literature was objectionable.

<sup>4</sup> In the course of his report, the hearing officer also found that the incumbent union's campaign included 15 mailings to unit employees, including 1 that announced a meeting to be held a few days before the election. In addition, the hearing officer found:

The collective bargaining agreement between the parties provides that the Employer will give the Union[,] each year a list of

## II. ANALYSIS OF THE HEARING OFFICER'S REPORT

The hearing officer misconstrued existing law and found significance in irrelevant facts. A rule prohibiting distribution of literature at all times in working areas of a facility is presumptively valid, regardless of the type of facility. See *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615, 618-621 (1962). To rebut the presumption, a party must show that the rule was promulgated for a discriminatory purpose, or that it was discriminatorily applied. *Stoddard-Quirk*, supra, at 621 fn. 8; see, e.g., *Ward Mfg.*, 152 NLRB 1270, 1271 (1965) (promulgation 1 day after filing of representation petition); and *NLRB v. S.E. Nichols Co.*, 862 F.2d 952, 958-959 (2d Cir. 1988), cert. denied 490 U.S. 1108 (1989) (rule enforced only against dissemination of union literature). The presumption may also be rebutted in the rare circumstance where "inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate through the usual channels." *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956); accord: *NLRB v. Steelworkers (Nutone, Inc.)*, 357 U.S. 357, 363 (1958) (extending inaccessibility standard to employees where they seek extraordinary rights to campaign on employer time and property); *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 537-541 (1992) (reaffirming *Babcock* and emphasizing Board may balance employer property and employee organizational rights only after first finding that reasonable access is infeasible).

Here the employer's no-distribution rule conformed to *Stoddard-Quirk* requirements, and thus was presumptively valid. The Union did not contend that the rule was discriminatorily promulgated nor, since the record shows it to have been posted since the early 1980s, could the Union have done so. Likewise, no evidence was presented that the rule was enforced discriminatorily, i.e., disciplining employees for handing out union literature while permitting them to distribute other printed material, and the hearing officer made no such finding. Accordingly, the rule was unobjectionable in scope and no cause for setting aside the election.

The hearing officer's contrary decision springs from two errors.

First, he mistakenly concluded that a health care employer must demonstrate special justification to support what would be a presumptively valid rule in any other industry. To the contrary, not only is a health care employer entitled to make rules presumptively valid under *Stoddard-Quirk*, it may promulgate broader rules where it can show sufficient justification in the interest of patient care. See *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 507 (1978). This Employer, however, sought only

employees['] names, addresses and other information. The uncontraverted [sic] testimony of Assistant Administrator Kalani was that the Employer gave the Union a monthly update of all cha[n]ges of names, addresses or classifications for the bargaining unit employees during the time the contract was in effect.

to ban distribution in work areas of its facility, the same right it would have if it were engaged in any business other than health care.

The second error flows from the first. The hearing officer adduced certain record evidence, which he believed reinforced his conclusion that the Employer had failed specially to justify its no-solicitation rule. All this evidence was beside the point. Thus, the testimony of Union Steward Liato that employees were not permitted to distribute union literature when punching out from work is consistent with the Employer's rule; so is that of Administrator Monte that employee distribution of printed material in working areas was not allowed. The statement of Union Secretary Domingo that employees were forbidden from soliciting on working time is consistent with the Employer's presumptively valid *no-solicitation* rule,<sup>5</sup> *Stoddard-Quirk Mfg. Co.*, supra, 138 NLRB at 617, which the hearing officer did not find overbroad and to which finding no exceptions were filed. Finally, the hearing officer himself did not deem independently objectionable the Employer's literature distribution on working time in working areas, while refusing to permit similar opportunity to employees, and no exceptions were filed. Rather, the hearing officer merely cited evidence of such supervisory distribution of antiunion literature as undermining the special justification that he mistakenly believed the Employer had to show to support its rule.

### III. THE DISSENT'S POSITION

Despite the hearing officer's finding that the no-distribution rule was overbroad, not that it was discriminatorily applied, the Chairman would, nevertheless, find the Employer guilty of "disparate enforcement," because the Employer authorized supervisors to hand out anti-union literature in work areas while prohibiting employees from similarly disseminating pronoun material.<sup>6</sup> The Chairman refers to the uncontradicted evidence (including testimony from Administrator Monte) that 2 weeks before the election, supervisors distributed anti-Union leaflets to nursing department employees as they punched out from work areas near the timeclocks, as well as to employees in work areas of the dietary and house-keeping departments, and that employees were not permitted similarly to hand out union material.<sup>7</sup>

<sup>5</sup> See fn. 7, *infra*.

<sup>6</sup> Thus, curiously, the dissent finds it "unnecessary to address" the rule's facial validity, which is before the Board, but reaches the claim of disparate enforcement, in which the hearing officer did not find merit and to which no exceptions were filed.

<sup>7</sup> In addition, the dissent incorrectly relies upon testimony from Union Secretary Domingo as evidence that the Employer forbade employees from even talking about the Union on company premises. The Chairman states that "[e]mployee Venica Domingo testified that '[w]e knew we were not supposed to [talk about the union] because we were on the facility. That is the way its [sic] always been.'" The record, however, supplies important qualifications missed in the hearing officer's summary relied on by the Chairman:

After a rhetorical flourish,<sup>8</sup> the dissent confronts, as it must, the Supreme Court's decision in *Lechmere, Inc. v. NLRB*, supra, 502 U.S. 527 (1992), which it describes as the "high water mark for employer property rights" under the Act, and which it contends "burdens the ability of employees to communicate at the workplace." In *Lechmere*, the Supreme Court upheld a company rule<sup>9</sup> barring

Q. . . . Did you talk to anybody about the Union while you were working?

A. No.

Q. Why not?

A. Because we are working and we are not supposed to.

Q. Why did you know you weren't supposed to?

A. We was in the facility.

Q. That's the way it's [sic] always been, right?

A. Um-hmn.

Q. Yes?

A. Yes.

While less than pellucid, the most logical construction of this testimony is that employees were not permitted to solicit during working time at the Employer's facility, which is perfectly consistent with the company's valid no-solicitation rule. *Our Way, Inc.*, 268 NLRB 394 (1983); and *Stoddard-Quirk Mfg. Co.*, supra, 138 NLRB 615, 617 (1962).

Standing against this fragment of Domingo's testimony are the plain terms of the no-solicitation rule, posted prominently in three places (two entrances and the main bulletin board) at the facility since the early 1980s. The notice not only states that solicitation is forbidden only on "working time," but defines working time and contrasts it with "an employee's own time, such as meal periods, scheduled breaks, time before or after a shift, and personal clean-up time," when solicitation is allowed. The employee handbook contains a similar rule. Thus, *documentary* evidence contradicts the dissent's strained interpretation of Domingo's testimony. Finally, at another point in his opinion, our dissenting colleague states that "employees Leiato [sic] and Domingo testified that the Respondent [sic] would not permit employees to distribute materials in the areas in which the supervisors distributed anti-union flyers." (Emphasis added.) Domingo testified only regarding *solicitation*, not *distribution*, however.

In any event, Domingo's testimony is subjective in character. The Board does not find such evidence to be probative. See, e.g., *Emerson Electric Co.*, 247 NLRB 1365, 1370 (1980), *enfd.* 649 F.2d 589 (8th Cir. 1981) ("[T]he subjective reactions of employees are irrelevant to the question of whether there was, in fact, objectionable conduct."); accord: *Picoma Industries*, 296 NLRB 498, 499 (1989); *Crane Co.*, 281 NLRB 979, 980 fn. 7 (1986); cf. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 608 (1969) ("We . . . reject any rule that requires a probe of an employee's subjective motivations as involving an endless and unreliable inquiry."). Rather, the test is whether the alleged objectionable conduct reasonably tended to interfere with the election. *G. H. Hess, Inc.*, 82 NLRB 463 fn. 3 (1949).

To rely on subjective testimony to impeach an otherwise valid rule, opens the door for an employer to present evidence that employees "understood" a *presumptively invalid* rule in a way that would convert it into a valid rule. Under existing Board law, an employer may not even present objective evidence that a *presumptively invalid* rule has not been enforced to escape a finding that its mere maintenance was bad. See, e.g., *J. C. Penney Co.*, 266 NLRB 1223, 1224-1225 (1983); *Mini-Industries*, 255 NLRB 995, 1002 (1981); *Paceco*, 237 NLRB 399, 401 fn. 11 (1978), vacated and remanded on other grounds and 601 F.2d 180 (5th Cir. 1979).

<sup>8</sup> According to the dissent, our decision is "inconsistent with basic principles of democracy in our political system and in the workplace," and rests on the "long discredited maxim that 'the king can do no wrong.'"

<sup>9</sup> The rule in *Lechmere*, *id.* at 530 fn. 1, read as follows:

access to its property by nonemployees, and the rule's application to union organizers. The Court recognized only two narrow exceptions to the employer's right to exclude nonemployee union representatives from its premises: where communication with employees is severely restricted because of the facility's physical inaccessibility (*id.* at 533–535; 537–541), or where union solicitation is discriminated against (*id.* at 535). According to our colleague, since the Court in *Lechmere* acknowledged an exception for “discriminat[ion] in connection with solicitation or distribution” to the “broad prohibition against nonemployee organizer access to employees at the workplace,” the Board here improperly “sanctions such discrimination in connection with *employees*—a group always presumed to have the right to communicate about unionization in the workplace.”<sup>10</sup> [Emphasis in original.]

*Lechmere*, however, follows *NLRB v. Steelworkers (Nutone, Inc.)*, 357 U.S. 357 (1958), *supra*, so the dissent attempts both to rely upon and to distinguish *Nutone*. The Court in *Nutone* approved the enforcement of otherwise valid no-distribution and no-solicitation rules against prounion employees, even though the employer had engaged in similar conduct covered by the rules. The dissent states that the *Nutone* Court noted that prounion employees had not sought an exception for their activity from the existing rules, even though exceptions had been granted in the past for charitable purposes. The dissent observes that the Court refused to conclude that such a request for an exception would not have been granted, although the Court stated that the Board might have done so as a matter of “industrial experience.” (*Id.* at 363). Finally, the dissent argues that the *Nutone* Court declined to establish a categorical rule, leaving to the Board the responsibility “to appraise carefully the interests of both sides of any labor-management controversy in the diverse circumstances of particular cases and in light of the Board’s special understanding of these industrial situations.” (*Id.* At 362–363). According to the Chairman, the *Nutone* Court thus indicated that the Board could find an employer had engaged in unlawful conduct by applying an otherwise valid no-solicitation, no-distribution rule against employees, while allowing its representatives to engage in conduct covered by the rule. Quoting the Court, *id.* at 364, the Chairman acknowledges that “there must be some basis, in the actualities of industrial relations, for such a finding,” however.

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Non-associates [*i.e.*, nonemployees] are prohibited from soliciting and distributing literature at all times anywhere on Company property, including parking lots. Non-associates have no right of access to the nonworking areas and only to the public and selling areas of the store in connection with its public use.

<sup>10</sup> The dissent states that the workplace is “uniquely appropriate for dissemination of views concerning the bargaining representative and the various options open to the employees” quoting *NLRB v. Magnavox Co.*, 415 U.S. 322, 325 (1974), rehearing denied 416 U.S. 952 (1974).

Purporting to apply these *Nutone* principles, the dissent reviews the previously stated facts showing that the Employer’s supervisors and managers distributed written materials in the work areas of its facility 2 weeks before the election. According to the Chairman, unlike in *Nutone*, the employees here “accurately understood that any request to distribute union materials would have been futile,” citing the statement of Administrator Monte that employees were forbidden from distributing literature in working areas, and the testimony of employees Liato and Domingo recited in section I, above.<sup>11</sup> The dissent concludes that the employer engaged in objectionable conduct by “disparate enforcement” of its no-distribution rule, “especially where the company’s policy, which prohibits ‘talking’ about unions, was impermissibly broad.”<sup>12</sup> In such circumstances, according to our colleague, “no reasonable opportunity exists for open communication among employees,” thus “damag[ing] the laboratory conditions necessary for a free and fair election.” The key factor here, says the dissent, is that, “the Employer permitted only antiunion distributions in its facility, not that it was supervisors rather than unit employees who distributed the literature.”<sup>13</sup>

The dissent also contends that “the statute properly promotes symmetry in avenues of communication for unions, employees and employers.”

Summing up, our colleague states that his personal experience in the labor relations field “teaches that employee free choice is disturbed when supervisory distribution of literature pertaining to a union election is permitted while similar distributions by employees are prohibited.” [Footnote omitted.]<sup>14</sup>

The dissent states that this case is not “about proscribing employer free speech on employer private property,” nor about “tying the hands of an employer concerning its written communication to employees on its premises.”

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<sup>11</sup> As observed in fn. 7, *supra*, employee Domingo testified with regard to *solicitation*, not *distribution* of literature. The evidence of both Domingo and Liato was subjective in character, and thus not probative under Board law (see fn. 7), although Liato’s statement was unquestionably consistent with the Employer’s rule, and Domingo’s apparently so.

<sup>12</sup> This statement again relies upon Domingo’s testimony, dealt with at fn. 7, *supra*.

<sup>13</sup> In the dissent’s view, the legitimate reason for permitting employers to post no-solicitation, no-distribution rules, *i.e.*, maintenance of production and discipline, is vitiated when supervisors are authorized to engage in conduct covered by such rules. According to the Chairman, the Employer’s no-distribution rule is “not relevant or necessary to serve its legitimate interests” because “it may be assumed that the employer no longer has the same concerns about production and discipline when it discriminates in its enforcement of such rules by allowing employees whose views it favors to engage in workplace communications that are proscribed by the employer’s rule.” This principle, according to the dissent, applies equally when antiunion supervisory (as well as employee) distribution is involved.

<sup>14</sup> Rather than summarize certain other comments made by the Chairman, relating to “captive audience” speeches and the “laboratory conditions” doctrine, I will address these points in sec. VIII of this opinion.

Instead, our colleague insists the case is about “*promoting* free speech rights for *all* who are involved in the workplace—employers, employees, and unions.” [Emphasis in original.]

I have set out the Chairman’s views in a lengthy recitation because he resurrects recurring arguments, which, if accepted, would sharply alter longstanding rules and rights. The first step in that response is to review, in sections IV, V, and VI, the development of the law of employer speech and property/managerial rights as they bear upon the issues presented by the dissent. In section VII, I distill relevant legal principles. In sections VIII and IX, respectively, I analyze the substance and policy implications of the Chairman’s position. Later, in section X, I summarize and analyze the position of Members Fox and Liebman, whose concurrence is equally at odds with existing law.

#### IV. THE LAW LEADING TO *NUTONE*

The arguments proffered in the dissent (and, as discussed below, Members Fox and Liebman’s concurrence) would limit both employers’ speech and property and managerial rights. While most cases involve elements of each, for ease of analysis, I shall discuss speech and property/managerial rights case law separately.

##### A. *The Speech Cases*

The Wagner Act Board early concluded that employers must remain “strictly neutral” in a representation campaign and forbade employers from expressing to their employees any opinion about unionization.<sup>15</sup> In 1941, however, the Supreme Court rejected that position and recognized an employer’s right to state noncoercive views on labor issues in *NLRB v. Virginia Electric & Power Co.*, 314 U.S. 469, 477.<sup>16</sup>

Having been refused the power to silence employers, the Board then sought to deny them an audience .by

<sup>15</sup> See Ian M. Adams and Richard L. Wyatt Jr., *Free Speech and Administrative Agency Deference: Sec. 8(c) and the National Labor Relations Board—An Expostulation on Preserving the First Amendment*, 22 J. of Contemp. Law 19, 22–23, esp. cases collected at fn. 19 (1996); James W. Wimberly, Jr. and Martin H. Steckel, *NLRB Campaign Laboratory Conditions Doctrine and Free Speech Revisited*, 32 Mercer L. Rev. 535, 536–537 (1981); Comment, *Labor Law Reform: The Regulation of Free Speech and Equal Access in NLRB Representation Elections*, 127 U. Pa. L. Rev. 755, 756–758 (1979).

<sup>16</sup> See Adams and Wyatt, *supra*, 22 J. of Contemp. Law 19, 24 fn. 15 (“*Virginia Electric* thus implicitly overruled the Board’s doctrine of ‘strict neutrality’ and replaced it with a coercive/noncoercive speech distinction.”); *Thomas v. Collins*, 323 U.S. 516, 537–538 (1945). Subsequently, in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969), the Court reaffirmed an employer’s constitutional right to make noncoercive statements to employees about unionization. (“[A]n employer’s free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the Board. Thus, § 8(c) [of the Act] . . . merely implements the First Amendment by requiring that the expression of ‘any views, argument, or opinion’ shall not be ‘evidence of an unfair labor practice,’ so long as such expression contains ‘no threat of reprisal or force or promise of benefit’ in violation of § 8(a)(1).”)

holding that the employer violated the Act by requiring its employees to attend a mandatory meeting where company representatives delivered noncoercive antiunion (“captive audience”) speeches. *Clark Bros. Co.*<sup>17</sup> The Board conceded that the “speech itself may be privileged under the Constitution,” but stated that the employer may not use its “superior economic power” to compel employees to listen.<sup>18</sup> The Board also found that the employer had discriminatorily applied its no-solicitation/no distribution rule: “[N]otwithstanding the rule, the respondent, by making speeches and by distributing copies of one of these speeches during working hours, utilized the same time and property, which it denied to the CIO, to conduct, in part, its campaign against the CIO.”<sup>19</sup>

In 1947, Congress added Section 8(c) to the text of what became the Taft-Hartley Act in order “to insure both to employers and labor organizations full freedom to express their views to employees on labor matters.”<sup>20</sup> The legislative history of Section 8(c) named *Clark Bros.* as one decision Congress intended to overrule.<sup>21</sup> Section 8(c) reads:

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of any unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

Ignoring the clear declaration of congressional intent, the Board again attempted to limit employer rights, this time through a newfound requirement of parity. *Bonwit Teller, Inc.*<sup>22</sup> Anticipating the Chairman’s reasoning in his dissent today, the Board found that the captive audience speech of the employer’s president constituted an oral solicitation and that the company’s refusal to give the union a right of reply was unlawful: “We have held that by such refusal the Respondent enforced its no-solicitation rule in a discriminatory manner and denied to its employees a reasonable opportunity to hear both sides of the issue of union representation.”<sup>23</sup>

The Board followed *Bonwit Teller* in *F. W. Woolworth Co.*<sup>24</sup> In *Woolworth*, the employer’s manager made noncoercive speeches to employees assembled on its prop-

<sup>17</sup> 70 NLRB 802 (1946), *enfd.* 163 F.2d 373 (2d Cir. 1947).

<sup>18</sup> *Id.* at 805.

<sup>19</sup> *Id.* at 828.

<sup>20</sup> S. Rep. No. 105, 80th Cong., 1st sess. 23 (1947).

<sup>21</sup> *Id.* at 23–24; Comment, *supra* fn. 15 at 761; 13 NLRB Ann. Rep. 49 (1948). See *NLRB v. Golub Corp.*, 388 F.2d 921, 926 (2nd Cir. 1967) (referring to *Clark Bros.* as evidence of the Board’s “rather halting response” to the *Virginia Electric* Court’s overruling of the strict neutrality doctrine).

<sup>22</sup> 96 NLRB 608 (1951), *remanded* 197 F.2d 640 (2nd Cir. 1952), *order on remand*, 104 NLRB 497 (1953).

<sup>23</sup> *Id.* at 615. The Board also emphasized that its result was particularly compelled because a retail employer may bar solicitation in selling areas by employees on nonworking time, a broader privilege than that accorded to other employers. *Id.* at 611–612.

<sup>24</sup> 102 NLRB 581 (1953).

erty, while refusing union requests for a similar opportunity. The Board judged that the employer had acted unlawfully, on the basis that failing to accord equal speech rights as sought by the union constituted a discriminatory application of its valid no-solicitation rule.<sup>25</sup> The employer appealed to the Sixth Circuit, which denied enforcement.<sup>26</sup> The main opinion, by Judge Allen, rejected the Board's position outright:

The precise purpose of the [8(c)] amendment was to establish for the employer this very right which is denied by the instant Board decision. To compel the employer, if he exercises his right of free speech, to accord, not to employees on their free time . . . but to union representatives a similar opportunity in working time, limits the application of the freedom of speech provision written in Section 8(c).<sup>27</sup>

Elsewhere in its opinion, the court went further: "The statute expressly protected the address involved here, but by construing with the section a requirement of an allowance of equal time to be given to union agents the Board nullified the congressional protection."<sup>28</sup>

The court also rejected the Board's argument that the employer's action violated its own no-solicitation rule: "It has never been held by the Supreme Court that the no-solicitation rule prohibits an employer from conferring with his own workmen."<sup>29</sup>

Judge Miller's concurrence in *F. W. Woolworth* was even more emphatic: "Neither the Constitution, the common law, nor the Labor Management Relations Act confers upon employees the right to use for union purposes the property of their employer during working hours, over the objections of the employer."<sup>30</sup> According to Judge Miller: "[I]nterference under the Act contemplates some sort of activity that prevents an employee from exercising the rights which are given to him by the Act," rather than mere noncoercive opposition to unionization.<sup>31</sup>

Meanwhile, the Board independently rejected *Bonwit Teller's* rationale in *Livingston Shirt Corp.*,<sup>32</sup> declaring,

[*Bonwit Teller*] held that, while the [noncoercive] speech was protected by 8 (c), an employer who made a privileged speech was guilty of an unfair labor practice if he denied a request by the union to reply on his time and property. It requires little analysis to perceive that *Bonwit Teller* was the discredited *Clark Bros.* doc-

trine in scant disguise. It is equally contrary to the statute and congressional purpose."<sup>33</sup>

The Board found that *Bonwit's* goal of affording employees the opportunity to hear both points of view in a representation election campaign "is to be achieved not by administratively grafting new limbs on the statute, but by a strict enforcement of those provisions of the statute which afford employers the right of free and uncoercive speech and grant[ ] employees the protected right to join labor unions free from coercion or discrimination."<sup>34</sup>

The Board also said that,

[W]e do not think one party [to a representation election] must be so strangely open-hearted as to underwrite the campaign of the other. We reject the idea that the union has a statutory right to assemble and make campaign speeches to employees on the employer's premises and at the employer's expense. We see no real distinction in principle between this and admitting an employer to the union hall for the purpose of making an antiunion speech . . . . We believe that the equality of opportunity which the parties have a right to enjoy is that which comes from the lawful use of both the union and the employer of the customary fora and media available to each of them. It is not to be realistically achieved by attempting, as was done in *Bonwit Teller*, to make the facilities of the one available to the other.<sup>35</sup>

The Board found "fully adequate" a union's traditional means of organization, such as solicitation of workers while entering and leaving the employer's premises, home visits, and union meetings.<sup>36</sup>

### B. *The Property Cases*

In an early decision, the Board affirmed an employer's right to make and enforce reasonable rules governing employee conduct, including a rule forbidding solicitation on working time, because, "Working time is for work." *Peyton Packing Co.*<sup>37</sup> A rule so limited is accorded presumptive validity.<sup>38</sup> At the same time, however, the Board held that an employer is not at liberty to make and enforce a rule that bans union solicitation on company premises during nonworking time, such as be-

<sup>33</sup> Id. at 407. The Board reiterated elsewhere in its opinion: "[W]e find nothing in the statute which even hints at any congressional intent to restrict an employer in the use of his own premises for the purpose of airing his views." Id. at 406.

<sup>34</sup> Id.

<sup>35</sup> Id. at 406-407.

<sup>36</sup> Id. at 406. In language similar to that used by the Chairman, Member Murdock dissented: "Behind the *Bonwit Teller* principle that employees have the right to hear *both* sides under circumstances of approximate equality, is the explicit recognition that freedom of speech is for all and not for a few." Id. at 417. [Emphasis in original.] Our dissenting colleague states: "This case *is* about *promoting* free speech rights for *all* who are involved in the workplace—employers, employees, and unions." [Emphasis in original.]

<sup>37</sup> 49 NLRB 828, 843 (1943), *enfd.* 142 F.2d 1009 (5th Cir. 1944).

<sup>38</sup> Id.

<sup>25</sup> Id. at 585.

<sup>26</sup> *NLRB v. F. W. Woolworth Co.*, 214 F.2d 78 (1954).

<sup>27</sup> Id. at 81-82.

<sup>28</sup> Id. at 80.

<sup>29</sup> Id. at 82.

<sup>30</sup> Id. at 85.

<sup>31</sup> Id.

<sup>32</sup> 107 NLRB 400 (1953).

fore and after work, or during lunch and break periods, absent special circumstances.<sup>39</sup> Such a rule is presumptively invalid.<sup>40</sup>

In *Republic Aviation Corp. v. NLRB*,<sup>41</sup> the Supreme Court ratified the Board's interpretation of the statute. In one of two consolidated cases, the Board had found that an employer's rule prohibiting any solicitation on company premises was unlawful, as were discharges for union solicitation pursuant to the rule, because such a rule denied employees the right of association on their own time.<sup>42</sup> In the second case, the Board had similarly declared illegal a company rule banning distribution of literature on its premises without permission, as well as the suspension of two employees for disseminating union material, also on their own time.<sup>43</sup> In affirming the Board, the Court thus set its seal upon *Peyton Packing's* distinction finding presumptively valid a rule prohibiting solicitation on working time, and any broader rule presumptively invalid.<sup>44</sup>

The Supreme Court reversed the Board's extension of *Republic Aviation* principles to nonemployees in *NLRB v. Babcock & Wilcox Co.*<sup>45</sup> *Babcock* involved three consolidated cases with similar facts. In each case, the Board had found unlawful the application of no-distribution rules to prevent union representatives from passing out organizational literature on company property.<sup>46</sup> The Court found a distinction "of substance" between the rights of employees and nonemployees,<sup>47</sup> and held that, in general, "an employer may validly post his property against nonemployee distribution of union literature".<sup>48</sup>

No restriction may be placed on the employees' right to discuss self-organization among themselves, unless the employer can demonstrate that a restriction is necessary to maintain production or discipline. *Republic Aviation Corp. v. N.L.R.B.* . . . But no such obligation is owed nonemployee organizers. Their access to company property is governed by a different consideration. The right of self-organization depends in some measure on the ability of employees to learn the advantages of self-organization from others. Consequently, if the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them, the employer

must allow the union to approach his employees on his property.<sup>49</sup>

The Court thus established an "inaccessibility" exception to the right of employers to exclude union organizers from company property. Although the plants involved were outside of town, they were close to "small, well-settled communities where a large percentage of the employees live,"<sup>50</sup> and the Court noted the availability of usual means of communication, such as "personal contacts on streets or at home, telephones, letters or advertised meetings."<sup>51</sup> The Court also suggested the discriminatory application of company policy to union solicitation may violate the Act (the "discrimination" exception).<sup>52</sup>

The Court summed up: "The Act requires only that the employer refrain from interference, discrimination, restraint or coercion in the employees' exercise of their own rights. It does not require that the employer permit the use of its facilities for organization when other means are readily available."<sup>53</sup>

The Board thereafter refused to find an employer had committed an unfair labor practice when it simultaneously distributed its own literature and prohibited its employees from distributing theirs under an otherwise valid no-distribution rule.<sup>54</sup> The D.C. Circuit reversed. *Steelworkers (Nutone, Inc.) v. NLRB*.<sup>55</sup> The court acknowledged that an employer has inherent rights that include "the rights to production, to orderly conduct, and to cleanliness and order on his property,"<sup>56</sup> as well as the right to free speech. Contrary to the Board, however, the court found the employer's conduct unlawful on the following basis:<sup>57</sup>

It seems to us unrealistic to say that, if an employer distributes certain amounts of literature at certain places at certain times, he can nevertheless claim that the distribution of the same quantity of literature at the same places and at the same or similar times would be disruptive of order or cleanliness. . . . We think that, if an employer distributes literature in certain amounts under certain conditions, he cannot be heard to say that such distribution is a detriment to his operation; *i.e.*, such a detriment as will support a restriction upon Section 7

<sup>39</sup> Id. at 843-844.

<sup>40</sup> Id.

<sup>41</sup> 324 U.S. 793, 802-803 (1945), rehearing denied 325 U.S. 894 (1945).

<sup>42</sup> Id. at 795-796, 801-802 fns. 6 and 7, and accompanying text, 802-803.

<sup>43</sup> Id. at 796, 801-802, fn. 8, and accompanying text, 802-803.

<sup>44</sup> Id. at 803 fn. 10, and accompanying text.

<sup>45</sup> 351 U.S. 105 (1956).

<sup>46</sup> Id. at 106-111.

<sup>47</sup> Id. at 112-113.

<sup>48</sup> Id. at 112.

<sup>49</sup> Id. at 113.

<sup>50</sup> Id.

<sup>51</sup> Id. at 111; see 107 fn. 1 and accompanying text, id. at 113. The Court contrasted this circumstance with that where employees are "isolated from normal contacts," such as in a lumber camp. Id. at 111.

<sup>52</sup> Id. at 107, 112.

<sup>53</sup> Id. at 113-114. Ultimately, employer property rights, like other property rights, are secured by the Fifth Amendment to the U.S. Constitution, as implicitly recognized by the *Babcock* Court ("Organization rights are granted to workers by the same authority, the National Government, that preserves property rights." Id. at 112).

<sup>54</sup> *Nutone, Inc.*, 112 NLRB 1153 (1955). The company literature was stipulated to be noncoercive.

<sup>55</sup> 243 F.2d 593 (5th Cir. 1956).

<sup>56</sup> Id. at 596.

<sup>57</sup> Id. at 599.

rights of employees. It follows from *National Labor Relations Board v. Babcock & Wilcox Co.* [footnote omitted] and cases there cited that, being without a reason for a rule, he is not entitled to a rule of no-distribution.

#### V. THE SUPREME COURT'S *NUTONE* DECISION

The Supreme Court granted certiorari from the D.C. Circuit's opinion, consolidated it with *NLRB v. Avondale Mills*<sup>58</sup> and reversed the D.C. Circuit.<sup>59</sup> In *Avondale*, the company barred union solicitation, pursuant to an otherwise valid rule, while itself engaging in solicitation the Board had found unlawful.<sup>60</sup> The Fifth Circuit had overturned the Board's finding that the rule was discriminatorily applied.

The Court observed that the only issues were the companies' enforcement practices.<sup>61</sup> The Court framed the question, much like the D.C. Circuit, as whether it is unlawful "when the employer himself engages in anti-union solicitation that if engaged in by employees would constitute a violation of the [no-solicitation or no-distribution] rule."<sup>62</sup> The Court recognized that, under Section 8(c) of the Act, an employer has the right to engage in noncoercive antiunion solicitation.<sup>63</sup>

The Court first noted that in neither case had the employees or the union made a request for an exception to the applicable rule, although in the past exceptions had been granted for charitable purposes.<sup>64</sup> The Court declined to assume that such a request would have been turned down, but said:<sup>65</sup>

Certainly the employer is not obliged voluntarily and without any request to offer the use of his facilities and the time of his employees for prounion solicitation. He may very well be wary of a charge that he is interfering with, or contributing support to, a labor organization in violation of § 8 (a)(2) of the Act. [Citation omitted.]

The Court also declared that there was no "showing that the no-solicitation rules truly diminished the ability of the labor organizations involved to carry their message to the employees," referencing as "highly relevant" *Babcock's* discussion of situations in which employees are physically inaccessible.<sup>66</sup> The Court thus applied the *Babcock* third-party standard when employees seek to solicit on company working time and in plant working areas. The Court continued in language similar to *Babcock's*:

<sup>58</sup> 242 F.2d 669 (1957).

<sup>59</sup> 357 U.S. 357 (1958).

<sup>60</sup> Id. at 360–361. This contrasts with the distribution of *noncoercive* literature in *Nutone*.

<sup>61</sup> Id. at 362.

<sup>62</sup> Id.

<sup>63</sup> Id.

<sup>64</sup> Id. at 363.

<sup>65</sup> Id.

<sup>66</sup> Id.

Of course the rules had the effect of closing off one channel of communication; but the Taft-Hartley Act does not command that labor organizations as a matter of abstract law, under all circumstances, be protected in the use of every possible means of reaching the minds of individual workers, nor that they are entitled to use a medium of communication simply because the employer is using it. . . . If, by virtue of the location of the plant and of the facilities and resources available to the union, the opportunities for effectively reaching the employees with a prounion message, in spite of a no-solicitation rule, are at least as great as the employer's ability to promote the legally authorized expression of his anti-union views, there is no basis for invalidating these 'otherwise valid' rules.<sup>67</sup>

To decide it is unlawful for an employer to enforce an otherwise valid rule against union solicitation (or distribution) while soliciting employees to oppose the union (or distributing antiunion literature), the Court concluded, would require "some basis, in the actualities of industrial relations, for such a finding,"<sup>68</sup> i.e., record evidence of employee inaccessibility under *Babcock*.

Significantly, Chief Justice Warren's dissent disagreed only with the majority's decision regarding *Avondale*, where *coercive* solicitation was involved. Regarding *Nutone*, where *noncoercive* literature distribution was at issue, the Chief Justice reached the same conclusion as his colleagues, declaring without qualification: "Being noncoercive in nature, the employer's expressions were protected by Section 8(c) of the National Labor Relations Act and so cannot be used to show that the contemporaneous enforcement of the no-distribution rule was an unfair labor practice. [Citations omitted.]"<sup>69</sup>

#### VI. DEVELOPMENT OF THE LAW FOLLOWING *NUTONE*

##### A. *Speech Cases*

In 1962, the Board partially revived its pre-*Livingston Shirt* doctrine and prohibited noncoercive antiunion speeches to groups of employees on company time, if an employer denies the union's request for equal opportunity to reply. *May Co.*<sup>70</sup> The Board ruled that *Livingston* had not overturned *Bonwit Teller*, because *Livingston* did not address situations where broader no-solicitation rules allowed retail employers are in force.<sup>71</sup> The Board thus discovered an "imbalance in the opportunities for organizational communication," within *Nutone's* meaning.<sup>72</sup> The employer's captive audience speeches, according to the Board, were designed for "maximum effectiveness,"

<sup>67</sup> Id. at 363–364.

<sup>68</sup> Id. at 364.

<sup>69</sup> Id. at 370.

<sup>70</sup> 136 NLRB 797

<sup>71</sup> Id. at 799–800. See fn. 23 of this opinion, *supra*. The Board found it unnecessary to pass upon the applicability of *Livingston* to nondepartment store situations. Id. at 800, fn. 11.

<sup>72</sup> Id. at 800.

while the union and its supporters were relegated to “relatively catch-as-catch can methods of rebuttal, such as home visits, advertised meetings on the employees’ own time, telephone calls, letters, and the various mass media of communication.”<sup>73</sup> Accordingly, the Board found the employer’s conduct violated Section 8(a)(1) of the Act.

The Sixth Circuit denied enforcement.<sup>74</sup> The court explicitly noted that the employer refused a union request to reply to the captive audience speeches on company-time and property.<sup>75</sup> The court carefully explained its reasoning for rejecting the Board’s position.<sup>76</sup>

The [Board] majority apparently overlooks the point expressly made in *Babcock and Wilcox* that restrictions on employee discussion do not give a right to the Union to approach employees on company premises. What the Board has done in its decision is to use the concededly valid limitations on employee discussion in order to arbitrarily characterize normal contacts away from the job-site “catch-as-catch can,” giving the union a right to approach the employees on company time and company premises in the event an employer speech, protected under Section 8(c) of the Act, is made. That a speech during working time on company premises may be preferable to use of contacts away from the work-site cannot in and of itself render the employer’s conduct unfair under the Act. It was similarly the Board’s view in *Babcock and Wilcox* that “the place of work was so much more effective a place for communication of information that it held the employer guilty of an unfair labor practice for refusing limited access to company property to union organizers.” [footnote omitted] [The court noted that the Supreme Court in *Babcock and Wilcox* had rejected the Board’s position]. . . . There are no findings of nonaccessibility by the Board in this case. There is no showing that the employees, away from the employer’s premises, are removed or isolated from normal, usual communications. Indeed, there appears from the record every indication that they were accessible through alternative channels. The Board majority’s reliance on *Bonwit-Teller, Inc. v. NLRB* [footnote citation omitted] is misplaced as we regard this decision as inconsistent with *Nutone* and *Babcock and Wilcox*. We consider our approach to be in accord with the Supreme Court’s decision in *Nutone*, for neither the use of the magic word “imbalance” nor the characterization of alternative avenues of communication as ‘ineffective’ by the use of a measure inapplicable to nonemployee organizers can give the Union a right of access which the Supreme

Court of the United States has refused to recognize and which it does not possess.

The Fifth Circuit similarly interpreted *Nutone*. In *Boaz Spinning Co. v. NLRB*,<sup>77</sup> the plant manager gave a “captive audience” talk to employees assembled on company-time. At the end, a prounion employee sought the floor to make a reply speech; when he persisted after being twice refused permission, he was discharged.<sup>78</sup> Reviewing the Board’s finding of an 8(a)(1) violation, the court reversed, and held that the company was not obliged to grant “‘equal time’ for reply speeches on company time and property,” citing *Livingston Shirt and Nutone*.<sup>79</sup>

#### B. Property Cases

The Board rendered a definitive interpretation of *Nutone* in *Walton Mfg. Co.*,<sup>80</sup> as follows:

In the *Nutone* case, the Supreme Court also indicated that the following factors are relevant in determining whether “a valid rule has been fairly applied”: (1) The employees must request the employer to make an exception to the rule for pro-union solicitation, even though the employer is engaging in antiunion solicitation and in effect violating the rule himself, because if the employer voluntarily offers the use of his facilities and the time of his employees for prounion solicitation he subjects himself to a possible charge of violation of Section 8(a)(2) of the Act; (2) because such a rule is presumptively valid both as to promulgation and enforcement, the union involved has to show that enforcement of the rule is an “unreasonable impediment” to organization in that it cannot effectively carry its message to the employees in any other way.

In *Stoddard-Quirk Mfg. Co.*, supra,<sup>81</sup> the Board reviewed principles established by the Supreme Court in *Republic*, *Babcock*, and *Nutone*, and summarized the law regarding the presumptive validity of plant rules: (1) an employer rule prohibiting solicitation is presumptively valid where it is limited to working time,<sup>82</sup> and (2) an employer rule against distribution is presumptively valid where it is limited to working time and to working areas of a facility.<sup>83</sup> Presumptive validity may be rebutted by a showing of discriminatory promulgation or enforcement, or employee inaccessibility under *Babcock*.<sup>84</sup>

<sup>77</sup> 395 F.2d 512, 513 (1968).

<sup>78</sup> Id. at 513–514.

<sup>79</sup> Id. at 515.

<sup>80</sup> 126 NLRB 697, 698 fn. 4 (1960), enf. 289 F.2d 177 (5th Cir. 1961).

<sup>81</sup> 138 NLRB 615 (1962).

<sup>82</sup> Id. at 617, 621.

<sup>83</sup> Id. at 618–621. The Board in *Stoddard-Quirk* explained that the organizational purpose behind literature distribution “can, absent special circumstances, be as readily and as effectively achieved at company parking lots, at plant entrances or exists, or in other nonworking areas, as it can be at the machines or work stations where the employer’s interest in cleanliness, order, and discipline is undeniably greater than in nonworking areas.” Id. at 620.

<sup>84</sup> Id. at 621 fn. 8.

<sup>73</sup> Id. at 801–802

<sup>74</sup> *May Co. v. NLRB*, 316 F.2d 797 (1963).

<sup>75</sup> Id. at 799.

<sup>76</sup> Id. at 800–801.

In *Gem International v. NLRB*,<sup>85</sup> the court identified the relevant factors under *Nutone* for determining whether an employer's campaign activities violated the Act where otherwise valid no-solicitation/no-distribution rules are in force: application of the "highly relevant" *Babcock* standards relating to employee inaccessibility, and existence of a request by a union or by prounion employees for permission to engage in conduct similar to the employer's (or a finding that a request would have been futile).

In 1981, in *Steelworkers (Florida Steel Corp.) v. NLRB*,<sup>86</sup> the D.C. Circuit, in an opinion, authored by Judge Harry T. Edwards, involving access to employer property rights as a remedial measure, the court reviewed with care Supreme Court precedents covering employer property and union organizational rights, including *Babcock* and *Nutone*, and concluded: "*Babcock* and its progeny reflect well-established and strict rules governing union access rights to company property during an organizational campaign. *Babcock* and related cases make clear that an employer may deny a union access to company property, unless the union meets a heavy burden of showing that no other reasonable means of communicating its organizational message to the employees exist."

Regarding *Nutone*, Judge Edwards said: "The Supreme Court ruled in *Nutone* that the existence of anti-union solicitation by an employer or other unfair labor practices did not nullify the *Republic Aviation* and *Babcock* standards."<sup>87</sup> Judge Edwards specifically quoted from portions of the *Nutone* opinion referring to the *Babcock* standards as "highly relevant," and to the importance of "the location of the plant" in assessing the legality of "otherwise valid" work rules.<sup>88</sup>

In *St. Francis Hospital*,<sup>89</sup> the Board followed *Nutone* principles, and reversed an administrative law judge's finding that an employer unlawfully refused to grant a union's request for "equal time" to offset its own campaign of noncoercive antiunion individual and group solicitation.<sup>90</sup>

[N]o-solicitation, no-distribution rules are not binding upon employers [citing *Nutone*, 357 U.S. at 362]. As the Supreme Court expressly stated in that case an employer's right to engage in noncoercive, antiunion solicitation is "protected by the . . . 'employer free speech' provision of § 8(c) of the Act," and nothing in law nor logic limits this right of an employer to discussions with employees only in nonwork areas on the employees' breacktimes. [Footnote omitted.]

<sup>85</sup> 321 F.2d 626, 631-632 (8th Cir. 1963); accord: *AMF, Inc. v. NLRB*, 593 F.2d 972, 978 fn. 9 (10th Cir. 1979).

<sup>86</sup> 646 F.2d 616, 629.

<sup>87</sup> *Id.* at 626.

<sup>88</sup> *Id.* at 626-627.

<sup>89</sup> 263 NLRB 834, 835 (1982), *affd.* 729 F.2d 844 (D.C. Cir. 1984).

<sup>90</sup> *Id.*

In *Jean Country*,<sup>91</sup> however, the Board attempted to retreat from *Babcock* principles by creating a balancing test to govern access to employer property, rather than preliminarily determining whether employees are removed physically from normal means of communication.

[I]n all access cases our essential concern will be the degree of impairment of the Section 7 right if access should be denied, as it balances against the degree of impairment of the private property right if access should be granted. We view the consideration of the availability of reasonably effective alternative means as especially significant in this balancing process.

Applying this new test, the Board found the employer's ejection of union informational picketers in front of a retail store in a shopping mall to be illegal.

In *Summitville Tiles*,<sup>92</sup> however, the Board reversed the judge and found no unfair labor practice despite evidence of antiunion supervisory solicitation during worktime and enforcement of an otherwise valid no-solicitation/no-distribution rule against prounion solicitation. The Board said: "[A]bsent evidence that a union does not have sufficient means to communicate with employees, an employer does not violate the Act by enforcing a valid no-solicitation rule while engaging in antiunion solicitations of its own" (citing *Nutone*).<sup>93</sup> The Board found here "no evidence that the Union was *unable to communicate* with employees."<sup>94</sup> (Emphasis added.) The Board also declined to find a violation in the same case based upon the employer's posting of procompany material on its property while forbidding posting by pro and antiunion employees: "If an employer may prohibit employee solicitation during worktime while engaging in soliciting of its own without violating the Act, *Nutone*, supra, then an employer that is uniformly enforcing a no-posting-by-employees rule may post its own materials on company property."<sup>95</sup> [Footnote omitted.]

Two years later, the Supreme Court rejected *Jean Country* as inconsistent with *Babcock*. In *Lechmere, Inc. v. NLRB*, supra,<sup>96</sup> the Board had found an employer committed an unfair labor practice by barring union representatives from organizational handbilling in its parking lot.<sup>97</sup> According to the Court, "*Babcock's* teaching is

<sup>91</sup> 291 NLRB 11, 14 (1988).

<sup>92</sup> 300 NLRB 64, 66 (1990); accord: *Fairfax Hospital*, 310 NLRB 299 fn. 3, *enfd.* 14 F.3d 594 (4th Cir. 1993), *mem. cert. denied* 146 LRRM 2640 (1994). ("[A]n employer may lawfully campaign during employees' breacktime and in working areas even though it prohibits employees from doing so.")

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> 502 U.S. 527 (1992).

<sup>97</sup> *Id.* at 529-530. The organizers were excluded under *Lechmere's* existing policy:

Non-associates [i.e. nonemployees] are prohibited from soliciting and distributing literature at all times anywhere on Company property, including parking lots. Non-associates have no right of

straightforward: Section 7 simply does not protect non-employee union organizers *except* in the rare case where ‘the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels.’”<sup>98</sup> [Emphasis in original.] [Citing *Babcock* 351 U.S. at 112.] The Court went on:<sup>99</sup>

[T]he inaccessibility exception] does not apply wherever nontrespassory access to employees may be cumbersome or less-than-ideally effective, but only where “the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them” [citing *Babcock*, 351 U.S. at 113]. [Emphasis in original.] Classic examples include logging camps . . . mining camps . . . and mountain resort hotels . . . . [citations omitted]. *Babcock’s* exception was crafted precisely to protect the § 7 rights of those employees who, by virtue of their employment, are isolated from the ordinary flow of information that characterizes our society. The union’s burden of establishing such isolation is, as we have explained, “a heavy one” [citation omitted], and one not satisfied by mere conjecture or the expression of doubts concerning the effectiveness of nontrespassory means of communication.

The Court stressed that “[i]t is *only* where such access is infeasible that it becomes necessary and proper to take the accommodation inquiry to a second level, balancing the employees’ and employers’ rights . . . .”<sup>100</sup> [Emphasis in original.]

The Court concluded that since *Lechmere’s* employees did not live on the company’s property, they were presumptively not “beyond the reach” of the union’s message.<sup>101</sup> The Court emphasized that residence in a “large metropolitan area” (Greater Hartford) did not make employees inaccessible under *Babcock*, and that the union had used many means of communication: mailings, home visits, telephone calls, newspaper advertising, and picket signs displayed from public property outside the main entrance of the shopping center in which the Lechmere store was located.<sup>102</sup>

In *Guardian Industries Corp. v. NLRB*,<sup>103</sup> employee supporters of the union sought access to a company bul-

letin board to post notices of union meetings. Contrary to the Board, the court refused to find that the employees were entitled to bulletin board access for such purpose, even though the employer permitted employees to post “swap and shop” notices. In so ruling, the court emphasized language in *Nutone* that the Act “‘does not command that labor organizations’ . . . are entitled to use a medium [of communications in the workplace] simply because the employer is using it.”<sup>104</sup> The court continued:<sup>105</sup>

Section 7 of the Act protects organizational rights—including the right to oppose the union’s campaign—rather than particular means by which employees may seek to communicate. Just as the right of free speech and association in the political marketplace does not imply that the government must subsidize political parties by distributing their literature without charge or giving them billboards on public buildings, so the right of labor organization does not imply that the employer must promote unions by giving them special access to bulletin boards.

Furthermore, the court pointed out:<sup>106</sup>

It would be much easier to say that if the employer uses the bulletin board to call a meeting at which managers will denounce the union, then it is discriminatory not to let union adherents have equal space and equal time; yet an employer may announce assemblies to be held on company time, while requiring union supporters to meet on their own time. *May Department Stores Co. v. NLRB*, 316 F.2d 797 (6th Cir. 1963).

#### VII. SUMMARY OF LEGAL PRINCIPLES

The following principles flow from reviewing the law’s development:

1. An employer has the right to express its views about labor issues and unionization in noncoercive terms; put another way, Congress may not restrict an employer’s noncoercive speech. *NLRB v. Virginia Electric & Power Co.*, 314 U.S. 469, 477 (1941); *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969); Section 8(c) of the Act; First Amendment, U.S. Constitution.

2. This free speech right embraces the right to address employees in mandatory meetings held on company time without affording equal time to the union or to prounion employees. *Livingston Shirt Corp.*, 107 NLRB 400 (1953); *NLRB v. F. W. Woolworth Co.*, 214 F.2d 78 (6th Cir. 1954); *May Co. v. NLRB*, 316 F.2d 797 (6th Cir. 1963); *Boaz Spinning Co. v. NLRB*, 395 F.2d 512 (5th Cir. 1968); *Guardian Industries Corp. v. NLRB*, 49 F.3d 317, 319 (7th Cir. 1995); see also Section 8(c) of the Act and its legislative history, S.Rep. No. 105, 80th Cong., 1st sess. 23–24 (1947); 13 NLRB Ann. Rep. 49 (1948).

access to the nonworking areas and only to the public and selling areas of the store in connection with its public use. Id. at 530 fn 1.

<sup>98</sup> Id. at 537. The Court reviewed not only its reasoning in *Babcock*, but also in subsequent cases bearing on the issue: *Food Employees v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968); *Central Hardware Co. v. NLRB*, 407 U.S. 539 (1972); *Hudgens v. NLRB*, 424 U.S. 507 (1976); and *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180 (1978). Id. at 534–535.

<sup>99</sup> Id. at 539–540.

<sup>100</sup> Id. at 538.

<sup>101</sup> Id. at 540.

<sup>102</sup> Id. The Court noted that employees entered and exited the main entrance daily, and that the union had picketed there for months. Id.

<sup>103</sup> 49 F.3d 317, 318, 319 (7th Cir. 1995).

<sup>104</sup> Id. at 318 [citation omitted].

<sup>105</sup> Id.

<sup>106</sup> Id. at 319.

3. An employer has the right to make and enforce rules that prohibit distribution of literature or solicitation by nonemployee organizers on its property, unless access to employees is so deficient (usually characterized by remote location) that communication by normal channels is ineffective, *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956); *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), or unless the rule is applied discriminatorily to union activity, *Babcock* at 107, 112; *Lechmere* at 535; see also Fifth Amendment, U.S. Constitution.

4. An employer has the right to make and enforce reasonable rules to govern its work force, including rules presumptively forbidding employee solicitation on working time, and rules presumptively prohibiting employee distribution of literature on working time and in working areas; conversely employees possess the presumptive right to solicit on nonworking time and to distribute material in nonworking areas on nonworking time. See *Peyton Packing Co.*, 49 NLRB 828, 843 (1943), enf. 142 F.2d 1009 (5th Cir. 1944) (“Working time is for work.”); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 798, 803, fn. 10 (1945), rehearing denied 325 U.S. 894 (1945); *Babcock*, supra, 351 U.S. 105, 113; *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615, 616–621 (1962); *Steelworkers (Nutone, Inc.)*, 357 U.S. 357, 361 (1958); *Our Way, Inc.*, 268 NLRB 394, 394–395 (1983); *Lechmere*, supra, 502 U.S. at 533. An employer may not, however, promulgate an otherwise valid rule for a discriminatory purpose, or discriminatorily enforce such a rule. *Stoddard-Quirk Manufacturing Co.*, supra, at 621 fn. 8. Under *Nutone*, employees may be entitled to greater rights, notwithstanding otherwise valid no-solicitation/no-distribution rules, where two conditions are satisfied: a request has been made for an exception to the employer’s rules and a showing under *Babcock* that the employees cannot be reached through traditional channels of communications, which, on balance, requires that employer property rights yield to employee § 7 rights. *Nutone*, supra at 363–364; *Lechmere*, 502 U.S. at 538; *Walton Mfg. Co.*, 126 NLRB 697, 698 fn. 4 (1960), enf. 289 F.2d (5th Cir. 1961); *Gem International, Inc. v. NLRB*, 321 F.2d 626, 631–632 (8th Cir. 1963); *Summitville Tiles, Inc.*, 300 NLRB 64, 66 (1990).

5. An employer has the right to engage in noncoercive solicitation and distribution activities and maintain at the same time a valid no-solicitation/no-distribution rule. *Nutone*, supra, 357 U.S. 357 (1958); *Nutone*, dissenting opinion of Chief Justice Warren, at 370; *Steelworkers (Florida Steel Corp.)*, supra, 646 F.2d 616, 626–627 (D.C. Cir. 1981). This privilege applies in situations in which the solicitation takes the form of an employer “captive audience address,” *Livingston Shirt Corp.*, supra, 107 NLRB 400 (1953); *NLRB v. F. W. Woolworth Co.*, supra, 214 F.2d 78 (6th Cir. 1954); *May Co. v. NLRB*, supra, 316 F.2d 797 (1963); *St. Francis Hospital*, 263 NLRB 834, 835, 843–845 (1982), affd. 729 F.2d 844

(D.C. Cir. 1984), as well as where solicitation occurs on an individual basis. *Summitville Tiles, Inc.*, 300 NLRB 64, 66 (1990); *St. Francis Hospital*, supra, 263 NLRB at 835, 843–845. And it applies in situations involving employer distribution of literature. *Nutone*, supra; *Fairfax Hospital*, 310 NLRB 299 fn. 3 (1993), enf. 14 F.3d 594 (4th Cir. 1993) mem. cert. denied 146 LRRM 2640 (1994). Finally, an employer may post materials on its property while prohibiting employees from doing so. *Summitville Tiles, Inc.*, supra, 300 NLRB at 66.

#### VIII. ANALYSIS OF THE DISSENT

##### A. Preliminary Matters

I must first address the dissent’s argument, not previously recounted, that “Section 8(c) rights are not involved because that free speech proviso is directed to unfair labor practice cases rather than representation matters.” This, of course, ignores the constitutional dimensions of employer free speech,<sup>107</sup> but even on its own terms the dissent overlooks the fact that most objectionable conduct also constitutes unfair labor practice conduct.<sup>108</sup> The dissent’s contention is that the employer discriminatorily applied a no-distribution rule that is valid under existing Board law by engaging in conduct that is the subject of the rule. Traditionally, discriminatory application of an otherwise valid rule against solicitation or distribution necessarily violates Section 8(a)(1).<sup>109</sup> Indeed, in *Nutone*, the issue was whether the employers committed unfair labor practices by maintaining such rules while their representatives distributed literature or solicited employees.<sup>110</sup> I disagree, of course, that such “discrimination” amounts either to objectionable or unfair labor practice conduct. But our dissenting colleague cannot reasonably take the position that, if alleged, he would fail to find the conduct he now labels objectionable violative of Section 8(a)(1). Accordingly, an employer’s conduct in such circumstances must be judged according to the same standards, whether in the representation or unfair labor practice context.<sup>111</sup>

<sup>107</sup> The First Amendment must be considered in both representation and unfair labor practice cases. *Dal-Tex Optical Co.*, 137 NLRB 1782, 1787 fn. 11 (1962).

<sup>108</sup> Since the Board refused any longer to set aside representation elections based on allegations of material misrepresentation of facts, *Midland National Life Insurance Co.*, 263 NLRB 127 (1982), few circumstances remain in which the Board deems conduct objectionable that does not also constitute (whether or not alleged) an unfair labor practice. See, e.g., *Peerless Plywood Co.*, 107 NLRB 427 (1953) (prohibiting captive audience speeches within 24 hours of an election); *Sewell Mfg. Co.*, 138 NLRB 66 (1962) (prohibiting propaganda designed to inflame racial prejudice).

<sup>109</sup> See, e.g., *Stoddard-Quirk Mfg. Co.*, supra, 138 NLRB at 621 fn. 8; *NLRB v. S. E. Nichols Co.*, supra 862 F.2d 952, 958–959 (2d Cir. 1988), cert. denied 490 U.S. 1108 (1989).

<sup>110</sup> 357 U.S. at 362.

<sup>111</sup> In *Dal-Tex Optical Co.*, supra, 137 NLRB 1782, 1786 (1962), cited by the dissent, the Board said: “Conduct violative of Section 8(a)(1) is, *a fortiori*, conduct which interferes with the exercise of a free and untrammelled choice in an election.”

### B. Substantive Matters

The dissent's underlying premise, which seems to be that "the statute properly promotes symmetry in avenues of communication for unions, employees and employers," is wholly without basis in law.<sup>112</sup> To the contrary, "[T]he Taft-Hartley Act does not command that labor organizations as a matter of abstract law, under all circumstances, be protected in the use of every possible means of reaching the minds of individual workers, nor that they are entitled to use a medium of communication simply because the employer is using it."<sup>113</sup> *Babcock*<sup>114</sup> and *Lechmere*<sup>115</sup> similarly affirm that unions are not entitled to enter an employer's premises to conduct campaign activities in the same manner as the employer. Conversely, nothing in the statute requires that a labor organization give an employer the opportunity to address employees at its union hall.<sup>116</sup> It is also objectionable conduct for employer representatives to campaign in Board elections by visiting employees in their homes, but not so for union representatives.<sup>117</sup> If parity is required by text or logic, the dissent must be prepared to give employers access to union halls and to employee homes to conduct their representation election campaign, which the Board majority in *Livingston Shirt* recognized as the natural extension of the type of reasoning used by the Chairman.<sup>118</sup>

As a result of this faulty premise, our dissenting colleague is forced to contend that two lawful and unobjectionable acts, engaging in noncoercive speech (oral or written) about union issues in the workplace, and maintaining a rule prohibiting employees from solicitation and distribution on their working time and from distribution in working areas at any time, become unlawful and objectionable where the employer does both rather than one or the other. Thus understood, it is plain that an employer's free speech rights are infringed, contrary to Constitutional mandates and Congressional intent, when as a condition of exercising those rights, an employer must surrender its equally well-established right to main-

tain production, order and discipline in the workplace by making and applying otherwise valid rules governing solicitation and distribution.<sup>119</sup> Thus, notwithstanding protestations in the dissent, this case *is* about burdening an employer's free speech rights on its own property, not about promoting free speech generally.<sup>120</sup>

This issue ought to have been laid to rest when the Taft-Hartley Act was passed in 1947. As previously set forth, the legislative history is explicit that,<sup>121</sup> with the insertion of Section 8(c) in the law, Congress overruled the Board's *Clark Bros. Co.* decision,<sup>122</sup> in which the Board had banned employers from making noncoercive

<sup>119</sup> Chairman Gould seriously distorts my position in asserting that I believe (1) that an employer is justified under *Republic Aviation*, supra, 324 U.S. 793, "in prohibiting all union solicitation at its facility, at all times, in all places, and under any circumstances," (2) that *Republic Aviation* "burden[s] employer free speech rights, because the Court required employers . . . 'surrender production' by affording Section 7 rights to all employees rather than limiting them just to those who oppose the union," and (3) that *Republic Aviation* itself is inconsistent with the Constitution.

The Chairman fails to comprehend that the central distinction drawn in *Republic Aviation* is between solicitation carried out on working time, which an employer may prohibit, and solicitation that occurs on nonworking time, which it may not forbid. As a general rule, activity engaged in by employees on nonworking time does not interfere with production, because employees do not engage in work activity for the employer at such time. Indeed, the Court in *Republic Aviation* quoted with approval from the Board's decision in *Peyton Packing Co.*, supra, 49 NLRB 828, 843: "The Act, of course, does not prevent an employer from making and enforcing reasonable rules covering the conduct of employees on company time. Working time is for work. It is therefore within the province of an employer to promulgate and enforce a rule prohibiting union solicitation during working hours." 324 U.S. at 803 fn. 10. *Republic Aviation* thus lends no support to the Chairman's position that an employer must give up its employees' working time for organizational activity to maintain valid work rules while making its own views on unionization known.

Chairman Gould's statement that "[w]hether the activity takes place during working or nonworking time, the test for balancing competing interests is always the same," is erroneous. As noted before in this opinion, rules prohibiting solicitation on working time are *presumptively valid*, as are rules prohibiting distribution on working time and in working areas of a facility. *Peyton Packing Co.*, supra; *Stoddard-Quirk Mfg. Co.*, supra, 138 NLRB 615, 617-621. A broader rule, prohibiting solicitation in selling areas of retail stores on both working and nonworking time, is presumptively valid in that industry, because of particular concern that business may be disrupted. See *May Co.*, 59 NLRB 976, 981 (1944). Otherwise, special justification must be shown to establish rules that forbid solicitation and distribution beyond the parameters set forth in *Stoddard-Quirk*, as where, for instance, patient care interests are at issue in the health care industry. See *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 507 (1978). Thus, as a general correlative principle employees have the presumptive right to solicit on nonworking time and to distribute literature on nonworking time in nonworking areas.

<sup>120</sup> Of course, there is no general "right" to free speech. Rather, the First Amendment limits the power of Congress to regulate or prohibit speech ("Congress shall make no law") and, implicitly, through the Fourteenth Amendment, the states. It does not apply to private actors, and, most assuredly does not grant one party the right to invade the property or operations of another to speak. See *NLRB v. F. W. Woolworth Co.*, supra, 214 F.2d 78, 85 (1954) (Judge Miller's concurrence).

<sup>121</sup> S. Rep. No. 105, 80th Cong., 1st sess. 23-24 (1947).

<sup>122</sup> 70 NLRB 802 (1946), enf. 163 F.2d 373 (2d Cir. 1947).

<sup>112</sup> This presupposition is apparent since the dissent requires accommodation of employee organizational activity only when the employer itself engages in noncoercive campaign activity.

<sup>113</sup> *Nutone*, supra, 357 U.S. at 364; accord: *Livingston Shirt Co.*, supra, 107 NLRB 400, 407 (1953) ("We believe that the equality of opportunity which the parties have a right to enjoy is that which comes from the lawful use of both the union and the employer of the customary fora and media available to each of them. It is not to be realistically achieved by attempting . . . to make the facilities of the one available to the other."); *NLRB v. F.W. Woolworth Co.*, supra, 214 F.2d 78, 84 (Judge Miller's concurrence) (1954); *Guardian Industries Corp. v. NLRB*, supra, 49 F.3d 317, 318 (7th Cir. 1995).

<sup>114</sup> 351 U.S. at 112-114.

<sup>115</sup> 502 U.S. at 539-541.

<sup>116</sup> See *Livingston Shirt*, supra, 107 NLRB at 407.

<sup>117</sup> *Plant City Welding & Tank Co.*, 119 NLRB 131, 133-134 (1957), motion to file a more definite certified list granted 275 F.2d 859 (5th Cir. 1960); remanded 281 F.2d 688 (5th Cir. 1960), revd. on other grounds 133 NLRB 1092 (1961).

<sup>118</sup> 107 NLRB 400, 407.

captive audience speeches. Nonetheless, in *Bonwit Teller, Inc.*,<sup>123</sup> where the employer refused to grant “equal time” for reply to a captive audience speech, the Board used our dissenting colleague’s reasoning to find the company’s conduct unlawful, only to abandon it soon thereafter in *Livingston Shirt*.<sup>124</sup> When the Board briefly revived the *Bonwit Teller* doctrine in the department store setting in *May Co.*,<sup>125</sup> the Sixth Circuit rejected the Board’s position as inconsistent with Section 8(c).<sup>126</sup> All of these cases arose where there was an allegation that an employer violated its own otherwise valid no-solicitation rule by addressing employees on companytime without affording the union an equal right to do so.

The dissent argues that an employer which does not abide by its own rule has impermissibly discriminated and may not enforce it. Although phrased in the context of literature distribution, it is clear the dissent’s logic applies equally to solicitation: an employer may not solicit employees regarding unionization where there exists a presumptively valid plant rule governing solicitation without giving equal opportunity for pronoun solicitation. A captive audience speech obviously is a solicitation, as indicated in the cases recited. Accordingly, under the dissent’s view, absent an offer of equal time, an employer would also discriminate by engaging in group (captive audience) solicitations or, indeed, individual employee solicitation concerning union issues. Recoiling from the logic of his position, the Chairman argues, however, that the “captive audience” cases are not “implicated” because “they involve nonemployees and, thus, necessarily implicate some of the considerations contained in *Lechmere*, supra.” I will address later in this opinion the Chairman’s analysis of *Lechmere* and whether his position has “implications” regarding non-employee access to employer property. For now, however, our colleague, despite his denial, cannot logically maintain that, at the least, under his position, an employer would have to grant *pronoun employees* the same solicitation rights it exercises, including the right to make speeches favoring unionization on company time.

Contrary to the dissent’s view, *Nutone* clearly held, as a general rule, that the employer’s enforcement of otherwise valid rules against employee solicitation and distribution, while simultaneously campaigning against a un-

ion, is not illegal discrimination constituting an unfair labor practice.<sup>127</sup>

Our colleague suggests, however, that the Supreme Court implied in *Nutone* that it would have reached a different result if the employees had merely requested permission to solicit or distribute. As set out above, the Court acknowledged that an employer is not obliged to open its facilities voluntarily to union solicitation, and risk violating Section 8(a)(2) of the Act by “interfering with, or contributing support to, a labor organization.”<sup>128</sup> The Court did thereby not indicate that an employee request was *sufficient* reason to grant an exception to an otherwise valid rule on solicitation and distribution, but merely a *necessary* one, lest the employer lay himself open to an 8(a)(2) charge by *voluntarily* making available his facility and production time for union proselytizing.

Within 2 years of *Nutone*, the Board took precisely this view, in *Walton Mfg.*,<sup>129</sup> declaring that a request for an exception to a rule *and* a showing that the union “cannot effectively carry its message to the employees in any other way” must *both* exist before an employer’s campaign conduct in the presence of a presumptively valid rule offends the statute.<sup>130</sup> Moreover, when the Sixth Circuit applied *Nutone* in *May Co. v. NLRB*, supra,<sup>131</sup> it noted that a request for an exception had been made there, but attached no significance to the fact standing alone. Nor did the Board in the underlying case.<sup>132</sup>

That brings us to *Nutone*’s second condition precedent. In *Nutone*, the Court invoked *Babcock* standards (describing them as “highly relevant”) for assessing whether employees are inaccessible from the union’s message.<sup>133</sup> In *Babcock*, as noted, the Court distinguished between the usual situation, in which employees may be reached by “personal contacts on streets or at home, telephones, letters or advertised meetings,”<sup>134</sup> and situations where “the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them.”<sup>135</sup> The *Babcock* Court envisioned lumber camps and mining

<sup>123</sup> 96 NLRB 608, 615 (1951), remanded 197 F.2d 640 (2d Cir. 1952), order on remand 104 NLRB 497 (1953).

<sup>124</sup> 107 NLRB 400, 407 (1953).

<sup>125</sup> 136 NLRB 797 (1962).

<sup>126</sup> *The May Co. v. NLRB*, supra, 316 F.2d 797 (1963). Ironically, Chairman Gould calls our attention to a recent Sixth Circuit decision in *Meijer, Inc. v. NLRB*, 130 F.3d 1209 (1997), rehearing *en banc* denied 150 LRRM 1216 (1998), which merely reiterated basic principles from *Republic Aviation, Babcock & Wilcox*, and *Lechmere*. Yet the Chairman has nothing to say about controlling precedent from that Circuit on the issue in dispute, namely *May Co. v. NLRB*, supra, and *NLRB v. F. W. Woolworth Co.*, supra, 214 F.2d 78 (1954).

<sup>127</sup> Indeed, as observed, Chief Justice Warren’s dissent in *Nutone*, which disagreed only with the majority’s application of this principle to circumstances involving *coercive* solicitation, was otherwise categorical: “Being noncoercive in nature, the employer’s expressions were protected by Section 8(c) of the National Labor Relations Act and so cannot be used to show that the contemporaneous enforcement of the no-distribution rule was an unfair labor practice.” (Footnote omitted.) 357 U.S. at 370.

<sup>128</sup> 357 U.S. at 363.

<sup>129</sup> 126 NLRB 697, 698 fn. 4 (1960), *enfd.* 289 F.2d 177 (5th Cir. 1961).

<sup>130</sup> *Id.*

<sup>131</sup> 316 F.2d 797, 799 (1963).

<sup>132</sup> 136 NLRB 797 (1962).

<sup>133</sup> 357 U.S. at 363.

<sup>134</sup> 351 U.S. at 111.

<sup>135</sup> *Id.* at 113.

camps<sup>136</sup> as examples of the latter. Under *Babcock*, therefore, an employer's property right must yield to admit nonemployee organizers only where a request for an exception to a valid rule has been made, and where it is established that the employees, whose Section 7 rights are at stake, are physically isolated from normal means of communication. The *Nutone* Court thus applied the same stringent standard to situations where employees seek to use the employer's time and property to propagandize for a union as in cases involving nonemployee access to the employer's property.<sup>137</sup>

In *May Co.*, supra,<sup>138</sup> as we have seen, the Board interpreted *Nutone* otherwise, and decided that enforcement of a presumptively valid no-solicitation rule, combined with employer captive audience speeches, in and of itself, created an "imbalance in the opportunities for organizational communication" such that access should be provided to the union. The Board dismissed normal channels of communication (home visits, advertised meetings, telephone calls, letters, etc.) as "catch-as-catch can."<sup>139</sup> As noted, the Sixth Circuit rejected the Board's position and held that *Nutone* required "findings of non-accessibility by the Board,"<sup>140</sup> which were absent. The Eighth<sup>141</sup> and D.C.<sup>142</sup> Circuits have read *Nutone* in harmony with the Sixth.

More recently, as described, the Supreme Court in *Lechmere*, supra,<sup>143</sup> rebuffed the Board's attempt to relax *Babcock* standards in *Jean Country*.<sup>144</sup> The Court strongly reaffirmed the limited circumstances under which union access to employer property may be required, declaring that a union must meet a "heavy burden" to show that the employees' physical location (as in a logging or mining camp or mountain resort hotel) "isolated [them] from the ordinary flow of information that characterizes our society."<sup>145</sup> Employees in Greater Hartford were accessible through such usual means of communication as mailings, home visits, telephone calls, newspaper advertising, picket signs, etc.<sup>146</sup> Only in a

case where employee inaccessibility is found as a threshold matter, according to the Court, should the Board "balance" constitutionally protected employer rights against employee rights secured under the Act.<sup>147</sup> The Court continued *Babcock's* discrimination exception.<sup>148</sup>

Ostensibly applying *Nutone* principles, our dissenting colleague seizes on the Court's acknowledgment that a contrary result might be reached where an employer's campaign activity involves conduct subject to an otherwise valid rule if there is "some basis, in the actualities of industrial relations, for such a finding."<sup>149</sup> As recognized by the Board in *Walton Mfg.*, supra,<sup>150</sup> *St. Francis Hospital*, supra,<sup>151</sup> and *Summitville Tiles, Inc.*, supra,<sup>152</sup> and by the Sixth Circuit in *May Co. v. NLRB*, supra,<sup>153</sup> what the Court plainly meant is that a proper factual record must satisfy both conditions laid down in the text of its opinion for finding an unfair labor practice: a request and refusal for an exception, and a showing employees were physically isolated from normal channels of communication. Indisputably, in this case, there was no such request and refusal, nor was there any showing that the nursing home's employees, who reside in the metropolitan Honolulu, Hawaii, area, were inaccessible from union efforts to communicate with them.<sup>154</sup>

The Court in *Nutone* wrote in conditional "if . . . then" terms, echoing *Babcock's* emphasis on plant location, when it said:

If, by virtue of the location of the plant and of the facilities and resources available to the union, the opportunities for effectively reaching the employees with a pro-union message, in spite of a no-solicitation rule, are at least as great as the employer's ability to promote the legally authorized expression of his antiunion views,

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quent Supreme Court cases involving access to employer property (id. at 534-535), it simply reaffirmed principles dating from the *Babcock* decision in 1956. Id. at 538.

<sup>147</sup> Id. at 538.

<sup>148</sup> Id. at 535.

<sup>149</sup> 357 U.S. at 364.

<sup>150</sup> 126 NLRB 697, 698 fn. 4 (1960), enfd. 289 F.2d 177 (5th Cir. 1961).

<sup>151</sup> 263 NLRB 834, 835 (1982), enfd. 729 F.2d 844 (D.C. Cir. 1984).

<sup>152</sup> 300 NLRB 64, 66 (1990).

<sup>153</sup> 316 F.2d 797 (1963); see *NLRB v. Gem International, Inc. v. NLRB*, supra, 321 F.2d 626, 631-632 (8th Cir. 1963).

<sup>154</sup> Indeed the factual context is peculiarly inhospitable to any such theory. This is a *decertification* proceeding. The union had represented the employees for 20 years (see fn. 1, supra), and the collective-bargaining agreement required the employer to provide an annual list of employee names, addresses, and other information, as well as a monthly update of all changes in names, addresses, or classifications (see fn. 4, supra). In addition, the hearing officer found that the union's campaign consisted of not less than fifteen mailings to employees, including one announcing a meeting to be held days before the election (see fn. 4, supra). Further, in the record, the union's district director conceded that union representatives could have handbilled from public property employees going to and from the employer's facility, but failed to do so.

<sup>136</sup> Id. at 111.

<sup>137</sup> The Board cited *Nutone* for this very point in *Summitville Tiles, Inc.*, supra, 300 NLRB 64, 66 (1990), stating that an employer may enforce a valid no-solicitation rule and engage simultaneously in non-coercive antiunion solicitations itself, unless there is "evidence that a union does not have sufficient means to communicate with employees," following *Walton Manufacturing Co.*, supra, 126 NLRB 697, 698 fn. 4 (1960), enfd. 289 F.2d 177 (5th Cir. 1961).

<sup>138</sup> 136 NLRB 797, 800 (1962).

<sup>139</sup> Id. at 801-802.

<sup>140</sup> 316 F.2d 797, 801 (1963).

<sup>141</sup> *Gem International, Inc. v. NLRB*, supra, 321 F.2d 626, 631-632 (1963).

<sup>142</sup> *Steelworkers (Florida Steel Corp.)*, supra, 646 F.2d 616, 626-627 (1981).

<sup>143</sup> 502 U.S. 527 (1992).

<sup>144</sup> 291 NLRB 11 (1988).

<sup>145</sup> 502 U.S. at 540.

<sup>146</sup> Id. Contrary to the dissent, *Lechmere* does not represent the "high water mark for employer property rights" under the Act. Rather, as the *Lechmere* Court emphasized by reviewing *Babcock* and subse-

[then] there is no basis for invalidating these “otherwise valid” rules.<sup>155</sup>

The language could hardly be plainer, as the Sixth Circuit stressed in *NLRB v. May Co.*,<sup>156</sup> where the court set aside the Board’s Order because it had failed to make findings of physical inaccessibility required by *Nutone* and *Babcock* before union representatives could be granted “equal time” to answer company speeches to employees, and set aside its order. But the dissent reads the requirement for finding evidence in the “actualities of industrial relations” in *Nutone* as a license to make subjective judgments, based on personal experience, about what constitutes a proper balance in communication opportunities among employer, union, and employees in the workplace. A recitation of the Chairman’s experience, however, cannot hide the dissent’s lack of record support for, or its attempt to smuggle in, the discredited arguments of the Board in *Clark Bros.*,<sup>157</sup> *Bonwit Teller*,<sup>158</sup> and *May Co.*<sup>159</sup> in place of, any “actualities.” Thus, the Chairman (like the Board in *Bonwit* and *May*) finds improper conduct simply because an employer, who has an otherwise valid rule covering the activity, engages in distribution (or solicitation) without according equal time to employees or unions.<sup>160</sup> He would use this reasoning to nullify *Nutone*’s requirement that record evidence of “actualities” within the meaning of *Babcock* be aduced.<sup>161</sup>

<sup>155</sup> Id. at 364.

<sup>156</sup> 316 F.2d 797, 801.

<sup>157</sup> 70 NLRB 802 (1946), enf. 163 F.2d 373 (2nd Cir. 1947).

<sup>158</sup> 96 NLRB 608 (1951), remanded, 197 F.2d 640 (2nd Cir. 1952), order on remand, 104 NLRB 497 (1953).

<sup>159</sup> 136 NLRB 797 (1962), enf. denied, 316 F.2d 797 (6th Cir. 1963).

<sup>160</sup> Chairman Gould reiterates this circular reasoning when he states: “[W]hile alternative channels of communication could be of considerable importance in determining the impact of such a rule in the absence of discriminatory conduct, it is not necessarily determinative when there is evidence of discriminatory enforcement of the rule.” Of course, *Nutone* itself concerned conduct by employers of the type deemed “discriminatory” by the Chairman. And the Court found the conduct lawful absent application of the “highly relevant” *Babcock* criteria relating to employee inaccessibility. 357 U.S. at 363.

<sup>161</sup> Chairman Gould can find no comfort in the “authoritative” decision of the Tenth Circuit in *AMF, Inc. v. NLRB*, supra, 593 F.2d 972, 978 fn. 9 (1979), which he quotes, as follows:

The *Steelworkers* case does not hold that an employer is in all circumstances free to engage in distribution which is prohibited to its employees so long as it enforces against its employees equally the “no distribution rule” rule. Rather, it simply states that such distribution by the employer does not automatically mean that such strict enforcement of the prohibition against employees constitutes an unfair labor practice.

This quotation is followed by a citation to *Gem International, Inc. v. NLRB*, 321 F.2d 626 (8th Cir. 1963), supra, and spot citation to page 631, which the Chairman states “accepts this view of *Nutone*.” There are two problems with the Chairman’s reasoning: the quotation from *AMF* is *dicta*, and it supports my position, not his.

Regarding the first, the court found that the employer had applied its no-distribution rule unevenly as between *employees*, not between supervisors and employees, and thus explicitly enforced the Board’s Order even assuming the validity of the Company’s interpretation of *Nutone* (supra at 978).

The Chairman, as earlier noted, also quotes from *NLRB v. Magnavox Co.*,<sup>162</sup> to make the following supporting point: “The place of work is a place uniquely appropriate for dissemination of views concerning the bargaining representative and the various options open to the employees.” There the Court refused to find, under the terms of a collective-bargaining agreement, that a union had waived the employees’ right to distribute literature in nonwork areas of the company’s property. Immediately following the sentence relied on by Chairman Gould, the Court qualified that language: “[s]o long as the distribution is by employees to employees and so long as the in-plant solicitation is on nonworking time, banning of that solicitation might seriously dilute § 7 rights.”<sup>163</sup> [Emphasis added.] The Court’s observations relating to the workplace as a forum for the exchange of views did not call into question the employer’s otherwise valid rules prohibiting literature distribution on working time or in nonworking areas of a plant, consistent, of course, with *Republic Aviation* and *Babcock*.

More directly on point, since it involves the precise issue raised here, is the Sixth Circuit’s opinion in *May Co. v. NLRB*,<sup>164</sup> where the court observed that the Supreme Court had rejected the selfsame argument in *Babcock and Wilcox* concerning the place of work as a convenient communications forum when the Board attempted thereby to justify burdening the employer’s property right.

The dissent seeks to bolster its position by utilizing yet another argument, namely, that “it may be assumed that the employer no longer has the same concerns about production and discipline when it discriminates in its enforcement of such rules by allowing employees whose views it favors to engage in workplace communications that are proscribed by the employer’s rule.”<sup>165</sup> Regardless of whether supervisors or employees distribute pro-employer literature, in Chairman Gould’s words, “the Employer has demonstrated that the rule prohibition is not relevant or necessary to serve its legitimate interests.”

First, as a general proposition, such logic proves too much, since every captive audience speech would vitiate

As to the second, the court’s construction of *Nutone* is illuminated by the reference to *Gem International*. The court in *Gem* asked, “What factors, then, [under *Nutone*], determine whether a disparate application of a no-solicitation rule is illegal?” 321 F.2d at 631. The answer, given on the same page to which the *AMF* court cited, is that “[*Nutone*] emphasizes two factors in support of its conclusion”: “truly diminished” ability of unions to reach employees under the “highly relevant” standards developed in *Babcock*, and whether there has been a request for an exception to a valid rule (or, at p. 632, a finding that such a request would have been futile).

<sup>162</sup> 415 U.S. 322, 325 (1974), rehearing denied 416 U.S. 952 (1974).

<sup>163</sup> Id.

<sup>164</sup> 316 F.2d 797, 800–801 (1963).

<sup>165</sup> The dissent, of course, equates discrimination involving distribution of antiunion literature by employees with that done by supervisors.

the *Peyton Packing Co.*, supra,<sup>166</sup> principle that “[w]orking time is for work.” An employer thus could not maintain an otherwise valid no-solicitation rule since, according to the Chairman, making such a speech, in and of itself would show that the rule did not serve a legitimate interest in production.

Second, however, the Chairman’s reasoning mirrors that of the D.C. Circuit in *Nutone*, which the Supreme Court thus implicitly rejected in reversing that court.<sup>167</sup>

Third, the dissent also fails to recognize that an employer may limit the amount of time management personnel engage in campaign activity, taking into account operational requirements, but would have difficulty doing so with employees claiming equal time for response under color of law.

Another dissent contention is raised in the form of an analogy. The dissent argues that, because *Lechmere* acknowledged a “discrimination” exception where nonemployee access for solicitation or distribution is involved, the same principle must apply to employees, who have always possessed “the right to communicate about unionization in the workplace.”<sup>168</sup> The argument misses the nature of the discrimination exception found in *Babcock* and *Lechmere*. This exception refers to different employer treatment of union and other third party solicitation or distribution.<sup>169</sup> It cannot refer to differences in the way management treats actions by its managers, supervisors, and agents, as opposed to its own employees or nonemployee third parties. If it were not so, the *Nutone* Court would have been compelled to find the employer’s conduct illegal, because it would have clearly

violated the dissent’s interpretation of *Babcock*’s discrimination exception.

More graphically, to apply the Chairman’s expanded definition of “discrimination” to *Lechmere* would have required a different result by that Court, because allowing managers, supervisors, and agents access to the employer’s property to conduct normal business (or noncoercive antiunion campaign activity), would “discriminate” against excluded union organizers. If that were the logic, there is no principled rationale for not allowing *nonemployee union organizers* to engage in the same solicitation and distribution activity as company officials. Thus, our dissenting colleague’s logic leads ineluctably to the conclusion that union representatives, not only employees, would acquire rights to reply to captive audience speeches, to engage in individual solicitation of employees on worktime, or to distribute literature to employees on worktime and in work areas to the same extent as the employer. This position, of course, contradicts the dissent’s argument that “captive audience” speeches are somehow not “implicated” in his opinion.<sup>170</sup>

Fundamentally, objectionable or illegal discrimination and election interference is not made out simply because an employer declines to make available to a union or to prounion employees the use of the facilities and resources to which it may lawfully resort to wage a noncoercive representation campaign. Discrimination and interference that is to be condemned is that which hinders the exercise by employees of rights guaranteed under Section 7 of the Act, including the rights “to form, join, or assist labor organizations,” and to engage in protected, concerted activities for “mutual aid or protection.”

As Judge Miller observed in *NLRB v. F. W. Woolworth Co.*:<sup>171</sup> “[I]nterference under the Act contemplates some sort of activity that prevents an employee from exercising the rights which are given to him by the Act . . . .” The *Babcock* Court adopted the same view: “The Act requires only that the employer refrain from interference, discrimination, restraint or coercion in the employees’

<sup>166</sup> 49 NLRB 828, 843 (1943), enfd. 142 F.2d 1009 (5th Cir. 1944).

<sup>167</sup> The core of the circuit court’s reasoning was that, “[I]f an employer distributes literature in certain amounts under certain conditions, he cannot be heard to say that such distribution is a detriment to his operation: i.e., such a detriment as will support a restriction upon Section 7 rights of employees. . . . [B]eing without a reason for a rule, [the employer] is not entitled to a rule of no-distribution.” 243 F.2d 593, 599 (1956).

<sup>168</sup> I must take issue with the dissent’s contention that *Lechmere* “burdens the ability of employees to communicate at the workplace.” *Lechmere* does not affect employee communication rights at all, which are defined by *Republic Aviation*. Rather, *Lechmere* simply affirmed *Babcock*’s holding that employer property rights permit the exclusion of *nonemployee* union organizers from company premises except in rare circumstances involving remote location. To the extent Chairman Gould’s comment suggests a belief that the law should be changed elsewhere to compensate for the effect of a Supreme Court decision with which he disagrees, it has no place here.

<sup>169</sup> I find it unnecessary here to judge the breadth of the discrimination exception (first recognized in *Republic Aviation Corp.*, 324 U.S. 793, 797 (1945), rehearing denied 325 U.S. 894 (1945)). See *Be-Lo Stores v. NLRB*, 126 F.3d 268, 284 (4th Cir. 1997) (“[W]e . . . doubt that an employer’s approval of limited charitable or civic distribution while excluding union distribution constitutes discrimination.”); cf. *Guardian Industries Corp. v. NLRB*, supra, 49 F.3d 317 (7th Cir. 1995) (employer’s refusal to permit notices of union meetings to be posted on company bulletin board not discriminatory, although it allowed “swap and shop” notices).

<sup>170</sup> Chairman Gould collides with his own logic in attempting to evade its application to captive audience situations. First, he contends such speeches involve only “non-employees,” and thus “*Lechmere*” considerations are invoked. The dissent refuses to recognize that prounion employees may, under his view, seek equal time and make captive audience talks in reply to similar employer presentations. See *Boaz Spinning Co. v. NLRB*, supra, 395 U.S. 512 (5th Cir. 1968). Second, the Chairman states that “the captive audience speech is a peculiar *sui generis* kind of employer ‘solicitation,’ and the issue of the right to respond poses more invasive property problems—in the sense that production would be halted altogether during speeches on working time.” Yet the Chairman simultaneously argues that an employer who engages in conduct prohibited by its otherwise valid no-solicitation/no-distribution rule no longer serves a legitimate objective with such a rule and that “it may be assumed that the employer no longer has the same concerns about production and discipline.” If the employer’s conduct in such circumstances is the measure of the legitimacy of such a rule, it cannot matter whether its campaign techniques involve all or a few employees, or whether much or little production time is consumed.

<sup>171</sup> 214 F.2d 78, 85 (1954).

exercise of their own rights. It does not require that the employer permit the use of its facilities for organization when other means are readily available.<sup>172</sup> This reading of the law is fully consistent with *Nutone's* declaration that the Act does not protect labor organizations' use of every possible method of communication, nor does it entitle unions to use every such method an employer uses.<sup>173</sup>

#### IX. POLICY IMPLICATIONS OF THE DISSENT

Before turning to the opinion of Members Fox and Liebman, I must identify the policy implications raised by our dissenting colleague's position.

Under the Chairman's view, an organizational campaign poses a Hobson's choice to an employer: either conduct no campaign and continue production by maintaining otherwise valid work rules regarding solicitation and distribution, or conduct a campaign but jeopardize production and subsidize the union's effort by according its representatives or prounion employees equal access and opportunity.

In the former case, the employer altogether surrenders his free speech rights secured by First Amendment to the United States Constitution, Section 8(c) of the Act, and the Supreme Court. And the employer is not the only loser: "Granting an employer the opportunity to communicate with its employees does more than affirm its right to freedom of speech; it also aids the workers by allowing them to make informed decisions. . . ." <sup>174</sup> In the latter case, the same rights are denied where an employer cannot express his views unless he is willing to subsidize (to the same extent) the expression of contrary opinions with production time, and thereby place at risk order and discipline in the facility.<sup>175</sup> "To compel a man," in Thomas Jefferson's ringing words, "to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical."<sup>176</sup>

<sup>172</sup> 351 U.S. at 113–114. This echoes the Board's reasoning in *Livingston Shirt*, which stated that equal opportunity for election campaigning "is to be achieved . . . by a strict enforcement of those provisions of the statute which afford employers the right of free and uncoercive speech and grant[ ] employees the protected right to join labor unions free from coercion or discrimination." 107 NLRB at 406.

<sup>173</sup> 357 U.S. at 364.

<sup>174</sup> *Kinney Drugs, Inc. v. NLRB*, 74 F.3d 1419, 1428 (2nd Cir. 1996).

<sup>175</sup> See *NLRB v. Virginia Electric & Power Co.*, 314 U.S. 469, 477 (1941); *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969). As the court recognized in *NLRB v. F.W. Woolworth Co.*, 214 F.2d 78, 80 (1954): "The statute expressly protected the address involved here, but by construing with the section a requirement of an allowance of equal time to be given to union agents the Board nullified the congressional protection."

<sup>176</sup> Quoted by the Supreme Court in *Chicago Teachers Union, Local 1 v. Hudson*, 475 U.S. 292, 305 fn. 15 (1986). Chairman Gould maintains that my use of this quotation confirms his opinion that I regard "any prounion activity by employees on company property, even during nonworking time, as employer subsidization of that activity which is both 'sinful and tyrannical.'" (Emphasis in original.) Since the quotation refers to furnishing "contributions of money," and since an em-

The Chairman contends his position "promotes" speech rights "for *all* who are involved in the workplace—employers, employees, and unions" (emphasis in original), and suggests that current law "is inconsistent with basic principles of democracy in our political system and in our workplace." The reverse is true: "Just as the right of free speech and association in the political marketplace does not imply that the government must subsidize political parties by distributing their literature without charge or giving them billboards on public buildings, so the right of labor organization does not imply that the employer must promote unions by giving them special access to bulletin boards."<sup>177</sup> An even more direct analogy is that one political party is not obliged to pay for equal broadcast time or print space to finance propaganda by the opposing party as a condition of publicizing its own position. The dissent's view, of course, is directly contrary to the Board's opinion in *Livingston Shirt*: "[W]e do not think one party [to a representation election] must be so strangely open-hearted as to underwrite the campaign of the other."<sup>178</sup> Speech is not "free" when it must be paid for in wages for lost production time.

Under the dissent's conception of the law, employers would be compelled to grant equal campaign time to prounion employees or to union representatives as a price for maintaining presumptively valid work rules. This leads to even more troubling questions about how such a principle would be applied:

- Since the conduct found by the Chairman to be objectionable also would constitute an unfair labor practice, would not any employer solicitation or distribution regarding wages, hours, and terms and conditions of employment, be unlawful, absent availability of an opportunity for employees to express contrary views, whether or not a union is actively attempting to organize?
- Is an employee or union representative required to request "equal time" or is a request presumed where it might be futile? Since there was no request in this case, the assumption is that only employer action, not a request, triggers the requirement. If that is so, does not the employer face liability unless he checks with every member of his workforce to determine if any prounion employee desires an opportunity to reply?

ployer is not paying wages to employees who are not on working time, Jefferson's words have no relevance to legitimate employee campaign activity conducted "off the clock" on the employer's premises.

<sup>177</sup> *Guardian Industries Corp. v. NLRB*, supra, 49 F.3d 317, 318 (7th Cir. 1995). Union access to company bulletin boards was at issue in this case; the same principle, of course, would hold true for other forms of communication.

<sup>178</sup> 107 NLRB 400, 406 (1953); accord: *NLRB v. F. W. Woolworth Co.*, 214 F.2d 78, 84 (1954) (Judge Miller's concurrence).

- Where there is no incumbent union and no union seeking to organize its employees, how does the employer go about determining which worker or workers should be offered the equal time privilege when the employer addresses workplace conditions?
- Do all forms of employer communication, captive audience speech, individual conversation, bulletin board access, facsimile machine, telephone, electronic mail, or individual supervisory interaction with employees, etc., become subject to the equal time rule where the subject is labor conditions or unionization?
- Where a union organization drive is under way, must the employer contact the union (even though it does not yet represent the employees) to offer equal opportunity, as well, or in lieu of, ascertaining whether employees want to exercise the right? May both a union representative and prounion employees claim the reply right? What if there are two unions? Does each get time equal to the employer's or only a *pro rata* share? Anti-union employees have § 7 rights, so may they seek to duplicate the employer subsidized individual campaign activity of prounion workers?
- If a worker observes supervisors simply asking employees at their work stations to vote against the union (individual solicitation) or describing their own personal experience, does the worker have the right to cease production and solicit for the union to the same extent? Does it matter whether an employee or the supervisor initiated the exchange? Who is the judge of what is comparable or equal solicitation or distribution—the employer, the employee or union, or the Board?
- If an employer's supervisors distribute literature in work areas and on working time, may an employee or union representative prepare opposing literature and hand it out during production time the following day?
- If an employer posts in its facility an antiunion notice, or indeed any kind of nonlegally required notice on terms and conditions of employment, may any employee or union representative demand that an opposing notice be posted?
- If an employer has a noncoercive statement opposing unionization in its handbook, does a union or an employee have the right to demand equal space for a prounion statement?
- What standards would the Board be required to adopt to adjudicate whether offers of equal time were made to the right individual and whether the opportunity afforded was truly "equal" with the employer's?

These are serious questions that the dissent must address before using abstract notions of "discrimination"

to "promot[e]" "free speech rights for *all* who are involved in the workplace."

#### X. SUMMARY AND ANALYSIS OF THE FOX-LIEBMAN CONCURRENCE

Neither analyzing nor discussing Board or court precedent subsequent to *Nutone*, our concurring colleagues read the Supreme Court's 40-year old *Nutone* opinion in a vacuum. Supposedly avoiding Chairman Gould's "per se approach," Members Fox and Liebman suggest that the Board undertake a "case-by-case approach" to determining the validity of employer no-solicitation, no-distribution rules during election campaigns. This position, they contend, will take account of the "actualities of industrial relations," within the meaning of *Nutone*,<sup>179</sup> as "they affect the opportunities for employees to communicate in the workplace about unionization."

More specifically, according to our colleagues,

The Court [in *Nutone*] noted that no attempt had been made in either of the cases at issue to make a showing that the no-solicitation rules 'truly diminished the ability of the labor organizations involved to carry their message to the employees'—a consideration that would be "highly relevant" in determining whether an otherwise valid rule has been fairly applied. *Id.* at 363. Where the Union's opportunities for effectively reaching the employees with a pro-union message are "at least as great" as the employer's ability to promote its antiunion views, the Court said, there is no basis for finding a violation. Thus, the presence or absence of "alternative channels" available to unions to communicate with employees would also be relevant to such a determination. *Id.*

Like the dissent, the concurrence notes the Court's observation that no request was made of the employers to permit an exception to existing rules, although charitable exceptions had previously been granted.

Members Fox and Liebman deny that the "inaccessibility standard" established in *Babcock & Wilcox*, *supra*, 351 U.S. 105, is relevant where employee organizational rights are involved, as distinct from those where access to employer property by outside union representatives is concerned.

Applying this reading of *Nutone* to the facts before us, Members Fox and Liebman find no objectionable conduct in the instant case, stating no attempt was made to show the no-distribution rule "significantly diminished" the union's ability to transmit its message to the employees, or that its enforcement "to any considerable degree created an imbalance in the relative abilities of the union and the employer to communicate with the employees." They state the record shows the employees were permitted to distribute literature on the premises other than in

<sup>179</sup> 357 U.S. at 364

working areas, and there was no evidence that employees asked for an exception to the no-distribution rule or that such a request would have been honored.

The concurrence's interpretation of *Nutone* squares neither with the text of that decision nor with the Board's and courts' construction of it in the intervening four decades.

As regards *Nutone*, Members Fox and Liebman first fail to supply the proper context for the Court's statements regarding "imbalance in the opportunities for organizational communication" (supra at 362), and whether a no-solicitation rule "truly diminished the ability of the labor organizations involved to carry their message to the employees" (supra at 363). The *Nutone* Court directly referred to page 112 of the *Babcock & Wilcox* opinion as "highly relevant in determining whether a valid rule has been fairly applied (supra at 363), and, at page 112, *Babcock* sets forth the "inaccessibility standard":

[W]hen the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels, the right to exclude from property has been required to yield to the extent needed to permit communication of information on the right to organize.

The *Lechmere* Court cited to the same page of *Babcock* to support the same proposition. 502 U.S. at 523–524.

Contrary to Members Fox and Liebman, the *Nutone* Court adopted the *Babcock* inaccessibility test precisely to identify the limited circumstances in which prounion employee campaign activity may encroach on an employer's property rights, including the right to enforce otherwise valid rules governing production, order and discipline.<sup>180</sup> Lest the point be missed, the *Nutone* Court

<sup>180</sup> Members Fox and Liebman contend that the *Babcock* "inaccessibility standard" applies only to nonemployees. They quote language from that decision stating that the Board, in seeking to extend the Court's holding in *Republic Aviation*, involving employee rights, to third parties, "failed to make a distinction between rules of law applicable to employees and those applicable to nonemployees." (Footnote omitted.) (at p. 113), and cite *Lechmere* to similar effect. Members Fox and Liebman suggest I repeat the Board's error.

This contention fails to recognize that the *Nutone* Court's application of *Babcock* standards to employee rights occurred in a completely different context. *Babcock*, merely reaffirmed in *Lechmere*, acknowledged an employer's general right to bar nonemployee organizers from its property, subject to rare exceptions created by employee inaccessibility caused by remote location. Neither *Babcock* nor *Nutone* limited traditional rights of employees to solicit on nonworking time and to distribute literature on nonworking time and in nonworking areas under *Republic Aviation* and cases like *Stoddard-Quirk Mfg. Co.*, supra. By referencing the *Babcock* inaccessibility standard, the *Nutone* Court applied the more stringent nonemployee standard to situations in which employees seek to use for organizational purposes the employer's working time, and plant working areas, to which they would normally have no legal right.

In this regard, Members Fox and Liebman cannot reconcile their interpretation of *Nutone* with the Fifth Circuit's decision in *Boaz Spinning Co. v. NLRB*, supra, 395 F.2d 512 (1968), which applied *Nutone* to reject an employee's right to respond to an employer's captive audience speech, nor with the Seventh's Circuit's decision in *Guardian Indus-*

stressed (supra at 364) that "otherwise valid" no-solicitation rules were not to be upset where "by virtue of the location of the plant and of the facilities and resources available to the union," adequate means of communication existed. [Emphasis added.] Thus, the *Nutone* Court, like the *Babcock* Court, identified geographic inaccessibility of employees as central to judging whether there exists in particular circumstances an "imbalance" in communication opportunities.

As pointed out in section VI, B of this opinion, the Board itself so interpreted *Nutone* within 2 years of the Supreme Court's decision, stating that whether, in the words of the *Nutone* Court, "a valid [no-solicitation or no-distribution] rule has been fairly applied" is determined by (1) whether there has been a request for an exception to a rule, and (2) a union showing that "enforcement of the rule is an 'unreasonable impediment' to organization in that [the union] cannot effectively carry its message to the employees in any other way." *Walton Mfg. Co.*, 126 NLRB 697, 698 fn. 4 (1960), enf. 289 F.2d 177 (5th Cir. 1961); accord: *Gem International, Inc. v. NLRB*, supra, 321 F.2d 626, 631–632 (8th Cir. 1963). *Summitville Tiles, Inc.*, supra, 300 NLRB 64, 66 (1990).

The Sixth Circuit made the point definitive in *May Co. v. NLRB*, supra, 316 F.2d 797, 800 (1963): "The Supreme Court [in *Nutone*] in reversing the Court of Appeals cited *Babcock & Wilcox* for the proposition that there must be a showing of true diminution in the ability of labor organizations to carry their messages to employees in order to invalidate a no-solicitation rule or to charge the employer with unfair application of a valid rule." The court of appeals went on to state that the Board had made no findings of inaccessibility within the meaning of *Babcock* in the case before it (involving, as recited previously, a demand for equal time to reply to a captive audience speech), noting, "There is no showing that the employees away from the employer's premises, are removed or isolated from normal, usual communications." *Id.* at 801.<sup>181</sup>

In *St. Francis Hospital*, supra, 263 NLRB 834, aff. 729 F.2d 844 (D.C. Cir. 1984), as set forth previously, the Board stated the general rule that it has followed (except for the brief deviation in *May Co.*, supra, 136 NLRB 797 (1962), enf. denied 316 F.2d 797 (1963)) since *Nutone*:

*tries Corp. v. NLRB*, supra, 49 F.3d 317 (1995), which applied *Nutone* to deny employees access to a company bulletin board. And Members Fox and Liebman certainly cannot square this interpretation with the Board's statement in *St. Francis Hospital*, supra, 263 NLRB 834, 835 (1982), aff. 729 F.2d 844 (D.C. Cir. 1984), that "[A]n employer may lawfully campaign against a union during employees' nonbreaktime and in working areas even though neither employees nor nonemployee organizers may do so." (Emphasis added.)

<sup>181</sup> See to the same effect: *Gem International, Inc. v. NLRB*, supra, 321 F.2d 626, 631–632 (8th Cir. 1963); *Steelworkers (Florida Steel Corp.) v. NLRB*, supra, 646 F.2d 616, 626–627 (D.C. Cir. 1981).

[N]o-solicitation, no-distribution rules are not binding upon employers [citing *Nutone*, 357 U.S. at 362]. As the Supreme Court expressly stated in that case an employer's right to engage in noncoercive, antiunion solicitation is "protected by the 'employer free speech' provision of § 8 (c) of the Act," and nothing in law nor logic limits this right of an employer to discussions with employees only in nonwork areas on the employees' breaktimes. [Footnote omitted.]

Courts of appeals have upheld the same principle. In addition to *May Co. v. NLRB*, supra, see *Boaz Spinning Co. v. NLRB*, supra, 395 F.2d 512, 513 (1968); *Guardian Industries Corp. v. NLRB*, supra, 49 F.3d 317, 318 (7th Cir. 1995).

Most recently, the Supreme Court, in *Lechmere, Inc. v. NLRB*, supra, 502 U.S. 527 (1992), not only reaffirmed *Babcock* and its inaccessibility exception, but placed in proper analytical perspective the "balancing" principle on which Members Fox and Liebman rely: "It is *only* where such access is infeasible that it becomes necessary and proper to take the accommodation inquiry to a second level, balancing the employees' and employers' rights . . . ." (Emphasis in original.) Thus, the Supreme Court has established a finding of employee inaccessibility from normal means of communication as a condition precedent to balancing the employer's property and speech rights against Section 7 rights.

By ignoring *Nutone's* plain text and its application in Board and court decisions, Members Fox and Liebman offer no guidance and, instead, invite every employee and labor organization in every campaign to request full access to the employer's property and an opportunity to respond. Following a union loss in a representation election, my concurring colleagues would countenance filing objections and unfair labor practice charges arguing that the employer's hitherto lawful exercise of its Section 8(c) rights and operational rules resulted in an "imbalance in the opportunities for organizational communication" and "truly diminished" ability of the union to spread its message. As a result, cautious employers faced with a demand for access, uncertain law, and rising legal costs, will restrict or eliminate their campaigns, in effect abandoning their Section 8(c) rights and depriving the employees of an informed choice.

Unlike Chairman Gould, who, however illogically, purports to permit an exception for captive audience speeches, Members Fox and Liebman do not, leaving the vitality of *Livingston Shirt*, supra, in doubt. Far from reaffirming controlling Board precedent, such as *Walton Mfg. Co., St. Francis Hospital, Summitville Tiles, Inc., and Fairfax Hospital*, all supra, on which employers have long relied, Members Fox and Liebman refuse to discuss such cases; indeed, they do not even acknowledge their existence. Arguably, they have sub silentio joined

Chairman Gould in their reversal.<sup>182</sup> Nor do they comment upon 40 years of court of appeals precedent applying *Nutone's* traditional teaching: *Steelworkers (Florida Steel Corp.) v. NLRB*, 646 F.2d 616 (D.C. Cir. 1981); *Boaz Spinning Co. v. NLRB*, 395 U.S. 512 (5th Cir. 1968); *May Co. v. NLRB*, 316 F.2d 797 (6th Cir. 1963); *Guardian Industries Corp. v. NLRB*, 49 F.3d 317 (7th Cir. 1995), and *Gem International, Inc. v. NLRB*, 321 F.2d 626 (8th Cir. 1963).

The only thing certain is that the traditional safe harbor, sanctioned by the Board and ratified by the courts, on which employers have relied since 1958 to wage legitimate election campaigns and maintain equally legitimate work rules has been replaced with trackless swampland in the form of a "case-by-case approach."

#### XI. CONCLUSION

Under existing law, employees have full opportunity to engage in organizational activity at their place of work, subject only to the limitation—if imposed by employers—that solicitation and distribution be conducted on their own time and that distribution not take place in work areas. Since 1958, when *Nutone* became law, the Board has expanded off-site union access to employees by requiring employers to make available the names and addresses of eligible voters before an election.<sup>183</sup> More-

<sup>182</sup> If, like Chairman Gould, Members Fox and Liebman have jettisoned such decisions, I pose to them the same questions I did to Chairman Gould in the preceding section of this opinion regarding different factual scenarios and how they would treat them.

Following a "See, e.g.," introduction, Members Fox and Liebman cite only *AMF, Inc.*, 228 NLRB 1406 (1977), enfd. 593 F.2d 972 (10th Cir. 1979) to support their statement that they do not contradict 40 years of Board precedent. There the judge, adopted by the Board, found unlawful an employer's discharge of an employee for violating a no-distribution rule by passing out antiemployer literature on working time and in working areas of the facility. Although there was evidence that both supervisors and employees distributed antiunion literature on working time and in working areas of the employer's facility, the judge based his theory of disparate enforcement on the fact that the discharge was "another in a series of instances found unlawful in 222 NLRB 161, in which Respondent applied its no-solicitation, no-distribution rule unevenly." 228 NLRB at 1416. In the previous case, the Board found disparate enforcement of a no-distribution rule based upon discrimination between different groups of employees, rather than between supervisors and employees. 222 NLRB at 171. Also, the union's request for an exception to the rule in *AMF* to allow pronoun solicitation was predicated upon the employer's permitting employee, not supervisory, antiunion solicitation contrary to the rule. 228 NLRB at 1411. Finally, the court of appeals explicitly enforced the Board's Order on the sole basis that discrimination in the application of the rule had occurred between rank-and-file employees, not between supervisors and employees. 593 F.2d at 978. Thus, *AMF* is completely consistent with four decades of Board law and particularly with our key decisions in *Walton, St. Francis, Summitville, and Fairfax Hospital*. To the extent Members Fox and Liebman, like Chairman Gould, rely on the court's decision in *AMF*, see fn. 161 of this opinion, supra.

Members Fox and Liebman also refer to "the discussion of *Nutone* in *G.H. Bass & Co.*, 258 NLRB 140, 144 fn. 12 (1981)." This "discussion" consists of a one-sentence observation that the *Nutone* court had noted the absence of a request for an exception to the employers' rules. This aspect of the *Nutone* decision is treated in sec. V of this opinion.

<sup>183</sup> *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966).

over, since *Nutone*, new methods of electronic communication, including facsimile transmission, electronic mail, targeted mailing lists, and web sites, have become available and may be put to organizational use.<sup>184</sup> And, of course, the multitude of traditional communication methods remain: advertised meetings at union halls or other off premises facilities, handbilling or picketing from public areas adjacent to an employer's property, telephone contact, home visits, print and broadcast advertising, and "free media" in the form of radio, television, or print news stories.

Labor organizations do not generally lack a wide range of avenues with which to carry their message to employees. If unions today are having more difficulty organizing than in the past, something other than the methods of communication may be to blame. The answer, however, is not to disrupt four decades of relative stability and certainty, and to require that employers subsidize union campaigns at the cost of presenting their side of the story to their own workers on company time and premises.

CHAIRMAN GOULD, dissenting.

My colleagues find that the Employer's disparate enforcement of its no-distribution rule does not constitute objectionable conduct. I dissent. For the reasons set forth below, I find that the enforcement of the rule is objectionable in view of the supervisors' distribution of antiunion literature.<sup>1</sup>

Before discussing the facts and the law at issue in this case, it is important to know what this case is *not* about. It is not about proscribing employer free speech on employer private property, as my colleagues assert. Nor is it about tying the hands of an employer concerning its written communication to employees on its premises, as my colleagues assert. This case *is* about *promoting* free speech rights for *all* who are involved in the workplace—employers, employees, and unions.

The essential facts are not in dispute. The Employer had long posted the following rule at the entrances to its facility and on its main bulletin board:

Employees are not permitted to distribute advertising material, handbills, printed or written literature of any

<sup>184</sup> A recent BNA article reported on a seminar given by two management labor attorneys at the annual conference of the Society of Human Resource Management. "Staying Union-Free Needs Preparation, SHRM Hears," 158 LRR 246 (1998). According to the article, the speakers said that the "Internet has been vital to spreading the union message. *Id.* at 247. The article went to state: "Potential members can download authorization cards and give unions information about pay and working conditions that can form the basis of an organizing campaign." *Id.*

<sup>1</sup> I find no merit to Member Brame's suggestion that this issue is not properly before the Board on exceptions. The hearing officer sustained Objection 2, which alleges, *inter alia*, that the Employer "engaged in favoritism in the application of the [No-Distribution] Rule." The Employer has excepted to this finding, thus placing the issue directly before the Board for consideration.

kind at all times in immediate patient care areas or any other work areas of the facility.

On November 18, 1996, little more than 2 weeks prior to the election, the Employer's supervisors distributed antiunion literature to employees in the dietary, house-keeping, and laundry departments, and also near the Employer's timeclocks. The Employer's administrator, Norma Monte, testified that employees were not permitted to engage in the distribution of materials similar to that engaged in by the supervisors on November 18.

In addition, the record shows that employees understood that the Employer's no-distribution rule prohibited them from similarly distributing union materials of their own. Shop Steward Matauage Leiato testified that "[t]hey (management) are passing out fliers when we are punching out from work. We are not allowed to do that for the Union." Employee Venica Domingo testified that "[w]e knew we were not supposed to [talk about the union] because we were on the facility. That is the way its always been."

The majority conclusion that objectionable conduct is not present here<sup>2</sup> is inconsistent with basic principles of democracy in our political system and in the workplace. It constitutes an uncritical acceptance of the long discredited maxim that "the king can do no wrong," an idea completely repudiated by the Supreme Court of the United States in constitutional litigation involving even the highest and most exalted office in this country itself, *i.e.*, the Presidency.<sup>3</sup> So too is this vestigial remnant of a bygone era properly rejected by the National Labor Relations Act which establishes the parameters for our decision making. Yet the majority's refusal to set this election aside states for all within earshot that in the workplace there *is* a king who *can* do no wrong.

Even *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), which represents the high water mark for employer property rights under the National Labor Relations Act,<sup>4</sup> acknowledged that under the National Labor Relations Act an employer which discriminates in connection with so-

<sup>2</sup> It is both curious and ironic that dissenting Members of the Board have voted to circumvent *Lechmere* in, for instance, *Loehmann's Plaza*, 316 NLRB 109, 114 (1995) (W. Gould, concurring); and *Leslie Homes Inc.*, 316 NLRB 123, 131 (1995) (W. Gould, concurring), when the Court's opinion in that case allows only the most narrow exception to its prohibition of union activity and thus, mistakenly in my view, is supportive of broad property interests which diminish almost completely union organizer activity on employer facilities. And, yet here, where the Court in *NLRB v. United Steelworkers of America (Nutone, Inc.)*, 357 U.S. 357 (1958), has invited the Board to consider this question anew, and there can be little doubt of the Board's ability to refashion the law, I am the lone dissenter.

<sup>3</sup> *U.S. v. Nixon*, 418 U.S. 683 (1974) (No unqualified Presidential privilege from judicial process; President thus obligated to comply with subpoena duces tecum of Special Prosecutor); and *Clinton v. Jones*, 117 S.Ct. 1636 (1997) (Constitution does not provide President with temporary immunity from civil litigation arising out of events occurring prior to taking office). Of course, many events in 1998 make it clear that *Jones* was not well reasoned.

<sup>4</sup> The Act, of course, does not reference such rights.

licitation or distribution violates the Act. This is one of the exceptions to the broad prohibition against nonemployee organizer access to employees at the workplace set forth in the majority opinion in that case.<sup>5</sup> Yet today's decision sanctions such discrimination in connection with *employees*—a group always presumed to have the right to communicate about unionization in the workplace from the beginnings of the statute itself.

Under our system free speech in the workplace is for both employees *and* employers!<sup>6</sup> For as the Supreme Court said: “The place of work is a place uniquely appropriate for dissemination of views concerning the bargaining representative and the various options open to the employees.”<sup>7</sup> Today's decision allows employers to apply a standard for themselves which is contrary to that existing for all others and thus places employers above the law. Under American labor law, no one—employers, unions, or individual employees—is above the law. In the United States we have rejected the idea of a royalty that may devise rules for others, like their workers, and then disobey those very same rules with impunity themselves.

The majority apparently finds sustenance for its ill-founded position in *NLRB v. Steelworkers (Nutone, Inc.)*, 357 U.S. 357 (1958), but the result in that case is not dispositive of the issue presented here. In *Nutone*, the Supreme Court considered, inter alia, whether the enforcement of a no-distribution rule was unlawful because the employer had distributed antiunion literature to employees. Noting that the enforcement of the no-distribution rule, and not the validity of the rule itself, was at issue before it, the Court declined to find that the employer's distribution of antiunion material made the enforcement of the rule unlawful. In support, the Court

<sup>5</sup> 502 U.S. at 535. I further note that the *Lechmere* decision pertains to nonemployee organizers exclusively. Thus, Member Brame's contention, i.e., that a finding of disparate enforcement in the instant case—which solely involves the rights of *employees*—would be inconsistent with *Lechmere*, is erroneous.

<sup>6</sup> See, e.g., *Eldorado Tool*, 325 NLRB 222 (1997) (W. Gould, concurring and dissenting in part) and *Caterpillar*, 321 NLRB 1178, 1185–1185 (1996) (W. Gould, concurring).

<sup>7</sup> *NLRB v. Magnavox Co.* 415 U.S. 322, 325 (1974). Member Brame's opinion dismisses *Magnavox* on the ground that it arose in the context of bulletin boards and an allegation that the union had waived its rights under the collective-bargaining agreement. But Justice Douglas' language is not predicated upon this distinction. Further, Member Brame's point concerning the Court's observations about invalid rules is irrelevant because there is no dispute in the instant case as to the facial validity of the instant no-distribution rule. Moreover, *Republic Aviation* itself, while not containing the explicit language in *Magnavox*, possesses a rationale which rests upon the premise that the workplace is the central forum for discussion about unionization. And, of course, by the reasoning of both opinions, the idea that “parity” would “give employers access to union halls and to employee homes to conduct their representation election campaign” is rejected. This remains true of the workplace in 1998, except possibly in those instances of telecommuting or other forms of independent employee relationships which take employees away from the workplace. See *Technology Service Solutions*, 324 NLRB 298 (1997) (W. Gould, concurring).

noted that the employer had granted employee requests for exceptions to the no-distribution rule in connection with charitable solicitations by employees, and that no request for a similar exception was made for organizational purposes. Thus, the Court concluded that, in such circumstances, there was no basis for it to find that the employer's conduct was unlawful. 357 U.S. at 363–364.

Of particular importance, however, is the Court's statement that it is for the Board, rather than for the Court, to determine whether an employer's violation of its own rule is unlawful. Specifically, the Court stated:

For us to lay down such a rule of law would show indifference to the responsibilities imposed by the Act primarily on the Board to appraise carefully the interests of both sides of any labor-management controversy in the diverse circumstances of these industrial situations. [357 U.S. at 362–363.]

Accordingly, the Court found that the Board had not set forth a standard upon which the enforcement of the rule could be found unlawful, and thus the Court declined to find a violation of the Act. Speaking for the Court, Justice Frankfurter stated:

Notwithstanding the clear anti-union bias of [the employer], it is not for us to conclude as a matter of law—although it might well have been open to the Board to conclude as a matter of industrial experience—that a request for a similar qualification upon the rule for organizational solicitation would have been rejected [357 U.S. at 363].<sup>8</sup>

Thus, the Court in no uncertain terms indicated that in the proper circumstances, an employer could be found to have engaged in unlawful conduct<sup>9</sup> by enforcing an otherwise valid no-distribution rule while at the same time engaging in antiunion distribution of its own. Any doubts on this score have been resolved by an authoritative opinion of the Court of Appeals for the Tenth Circuit which addresses this point precisely,<sup>10</sup> as well as the Court of Appeals for the Eighth Circuit which accepts this view of *Nutone*, albeit in a different factual circumstance.<sup>11</sup> However, “there must be some basis, in the

<sup>8</sup> The Court used the terms “distribution” and “solicitation” interchangeably in its decision.

<sup>9</sup> There, the enforcement of the no-distribution rule was alleged to be an unfair labor practice rather than objectionable conduct.

<sup>10</sup> *AMF, Inc. v. NLRB*, 593 F.2d 972, 978 fn. 9 (10th Cir. 1979):

<sup>11</sup> See *Gem International, Inc. v. NLRB*, 321 F.2d 626, 631–632 (8th Cir. 1963). Member Brame asserts that the Eighth Circuit's decision in this case supports the position he so strongly advocates, i.e., that the Board is effectively precluded from finding that supervisory distribution in violation of a no-distribution rule is objectionable. However, he fails to give proper consideration to the court's point that under *Nutone*, the Board may find such supervisory distribution unlawful, and that such a finding could be based, in part, on the Board's conclusion as a matter of industrial experience that any request to distribute would have been rejected. *Id.* at 632. Indeed, insofar as this authoritative point undermines his view that the Board should never find such con-

actualities of industrial relations, for such a finding.” *Nutone*, supra at 364.

Applying the principles set forth by the Court in *Nutone*, I find that the “actualities” present in the instant case provide a basis, not found in *Nutone*, to find that the Employer’s enforcement of its no-distribution rule is objectionable. Here, the Employer distributed antiunion flyers in the dietary, housekeeping, and laundry departments, as well as in the timeclock areas. Unlike the record in *Nutone*, which showed that the employer had granted exceptions to its no-distribution rule, the instant record shows that the employees accurately understood that any request to distribute union materials would have been futile. Indeed, as noted above, employees Leiato and Domingo testified that the Respondent would not permit employees to distribute materials in the areas in which the supervisors distributed antiunion flyers, and Administrator Monte corroborated this when she testified that employees were not permitted to engage in the distribution of materials as the Respondent’s supervisors did on November 18. And, the uncontradicted and credited testimony of Domingo is that employees could not even “talk” about the union on company facilities.

Member Brame attacks this dissent for failing to stress the employer’s constitutional right of free speech recognized in Supreme Court precedent.<sup>12</sup> But employees and even union representatives have the right of free speech as well<sup>13</sup>—a right which, if at issue in an unfair labor practice proceeding comparable to the employer free speech cases which are the object of Member Brame’s exclusive focus, enjoys constitutional protection.<sup>14</sup> And the Supreme Court, in considering employee free speech as protected activity under Section 7, has relied upon its own landmark constitutional decisions which have protected First Amendment activity.<sup>15</sup> As with so much of

duct objectionable, it is no surprise that Member Brame fails to give any serious consideration to it.

<sup>12</sup> *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969) and *NLRB v. Virginia Electric & Power Co.*, 314 U.S. 469 (1941).

<sup>13</sup> *Thomas v. Collins*, 323 U.S. 516, 537 (1945) and *Staub v. City of Baxley*, 355 U.S. 313 (1958).

<sup>14</sup> *NLRB v. Fruit & Vegetable Packers Local 760 (Tree Fruits)*, 377 U.S. 58 (1964); *NLRB v. Teamsters Local 639*, 362 U.S. 274 (1960), and *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Trades Council*, 485 U.S. 568 (1988). Cf. Goldman, “The First Amendment and Nonpicketing Labor Publicity under Section 8(b)(4)(ii)(B) of the National Labor Relations Act,” 36 V and L. Rev. 1469 (1983).

<sup>15</sup> *Linn v. Plant Guard Workers Local 114*, 383 U.S. 53 (1966), which used *New York Times v. Sullivan*, 376 U.S. 254 (1964), as a basis for determining what employee speech is protected under Sec. 7 and removed from state defamation and libel law. Accord generally *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978); *Southwestern Bell Telephone Co.*, 200 NLRB 667 (1972); *Inland Steel Co.*, 257 NLRB 125 (1981); *Borman’s Inc. v. NLRB*, 676 F.2d 1188 (6th Cir. 1982); *Southern California Edison Co.*, 274 NLRB 1121 (1985); *Tyler Business Services*, 256 NLRB 567 (1981); and *Gatliff Coal Co. v. NLRB*, 953 F.2d 247 (6th Cir. 1992). See also *Rankin v. McPherson*, 483 U.S. 378 (1987). Drawing inspiration from *Linn* and its reliance upon *Sullivan*, I have relied upon the First Amendment authority of *Brandenburg v. Ohio*,

Member Brame’s opinion, only employer free speech and interests are considered.<sup>16</sup> Indeed, Member Brame opines that employees will lose as a result of any loss of employer free speech, for he states that promoting the instant supervisory distribution of antiunion literature, even in the face of a rule prohibiting employees from similarly distributing pronoun literature, “aids the workers by allowing them to make informed decisions.” To the extent an employer would defend the instant conduct with such an assertion, the defense would fail. As Justice Souter stated in *Auciello Iron Works, Inc. v. NLRB*,<sup>17</sup> “[t]he Board is . . . entitled to suspicion when faced with an employer’s benevolence as its workers’ champion. . . .” *Id.* at 790.

I disagree with Member Brame’s interpretation of *Nutone* as requiring the application of a rigid, two-pronged, test that must be satisfied before an employer’s violation of its no-distribution rule can be found unlawful. According to Member Brame, such conduct can be found unlawful under *Nutone* only if two conditions are satisfied. First, a request *must* be made for an exception to the rule (presumably no matter how futile such a request would be). Second, there must be a showing that the employees cannot be reached by traditional channels of communication. Applying this analysis, he finds the Employer’s conduct lawful because no request was made to distribute pronoun materials, and the Union was able to reach employees via 15 “mail-outs” during the election campaign.

With respect to the first consideration, the Court specifically stated, as noted above, that it would be “open to the Board” to find that any such request would have been rejected.<sup>18</sup> Indeed, Member Brame fails to give any serious consideration to this critical point anywhere in his opinion. Moreover, his entire attack on this dissent is premised on the erroneous assumption that “*Nutone* itself concerned conduct by employers of the type deemed ‘discriminatory’ by [my dissent].” Thus, Member Brame conveniently ignores the distinction that in *Nutone* there was no showing that employees would not have been permitted to engage in similar distribution, as evidenced by the employee requests that had been granted in the past, whereas in the instant case the testimony establishes

395 U.S. 444 (1969), in *Caterpillar, Inc.*, 321 NLRB 1178, 1184–1188 (1996) (W. Gould, concurring).

<sup>16</sup> To the extent Member Brame suggests that my view today portends “troubling” limitations on employer free speech rights, I respectfully disagree with any such contention. To the contrary, I, along with former Member Higgins, have specifically endorsed the view that employers are free to engage in certain “employment practices, developed in the absence of union activity or the perceived resurrection of same, which are designed to instill a high morale among employees and thus deter employees from seeking unionization.” *Dayton Hudson*, 324 NLRB 33, 36 at fn. 17 (1997). That view is in no way compromised by my position today.

<sup>17</sup> 517 U.S. 781 (1996).

<sup>18</sup> 357 U.S. at 363.

that any request to engage in distribution would have been futile.<sup>19</sup>

As to the second consideration, I believe that its application ignores the Court's directive that "no such mechanical answers will avail for the solution of this [issue]."<sup>20</sup> In finding that it is for the Board and not for the court to determine whether such conduct is unlawful, the Court stated that "[t]he Board, in determining whether or not the enforcement of such a rule in the circumstances of an individual case is [unlawful], may find relevant alternative channels available for communications on the right to organize (emphasis added)."<sup>21</sup> Thus, while alternative channels of communication could be of considerable importance in determining the impact of such a rule in the absence of discriminatory conduct, it is not necessarily determinative when there is evidence of discriminatory enforcement of the rule.<sup>22</sup> Indeed, had the instant case involved allowing distributions by antiunion employees, not even Member Brame could argue that such conduct is lawful by virtue of the Union's alternative means of communication. In my view, the same principles apply here, where the evidence indicates that employees were not allowed even to talk about the Union at the facility, much less distribute prounion literature.<sup>23</sup> Moreover, the broad prohibition against "talking" about union activity on company facilities burdens employee

<sup>19</sup> Members Fox and Liebman contend that the notion that any such request would have been futile is of little significance here because there may have been other "opportunities for organizational communication" available to the Union. Their contention thus reveals both a misreading of *Nutone* and a failure on their part to appreciate the importance of the workplace as a central forum for employee communication about the merits of unionization.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> Members Fox and Liebman have effectively joined the mechanical approach set forth by Member Brame insofar as they rely on their assertion that the Employer's conduct here is not objectionable because it did not create an imbalance "in the relative abilities of the Union and the Employer to communicate with the employees." Thus, although they pay lip service to the notion that an employer's violation of its own no-distribution rule could be objectionable in certain circumstances, it is readily apparent from their analysis that—like Member Brame—they would be hard pressed to find such conduct objectionable absent overwhelming evidence that the union was significantly burdened in its ability to carry its message to employees. In my view, this approach is not faithful to *Nutone* or to the policies of the Act.

<sup>23</sup> I find unpersuasive my colleagues' contention that Domingo's testimony, that employees were not permitted to talk about the Union in the facility, is not probative evidence. According to them, the testimony is subjective in character, is contrary to the rule prohibiting solicitation on working time, and thus does not constitute probative evidence. As noted above, however, the testimony is uncontradicted and was explicitly credited by the hearing officer. Further, the Employer's solicitation rule is phrased in terms of prohibited conduct. It does not specifically state that talking about the Union is permitted. Therefore, although the language of the rule is not unlawful on its face—and thus Member Brame's reliance on the validity of the rule is completely misplaced—it does not contradict Domingo's credited testimony. Accordingly, their contention that the statement has no significance is without support.

communication rights in a manner contemplated by *Babcock & Wilcox*, supra.<sup>24</sup>

Member Brame further justifies the Employer's conduct here by invoking the Court's statement in *Nutone* that an employer risks violating Section 8(a)(2) of the Act when he opens his property for union solicitation.<sup>25</sup> The Court's statement is taken out of context. Indeed, it ignores the fact that the Act does not assume that every organizing campaign is or should be an adversarial one. To the contrary, the Act contemplates the voluntary recognition of unions without reliance on statutory procedures. See *Snow & Sons*, 134 NLRB 709 (1961). Additionally, the contemporary emergence of more mature and cooperative labor-management relationships, something that was unknown in the 1950's, are now part of the "industrial realities" that are appropriate for Board consideration under the guidelines set forth under *Nutone*.

While Member Brame may quarrel with the expertise that the Board brings to bear in given cases and may suggest that *Nutone* did not contemplate what he characterizes as my reliance upon "subjective" judgments, the fact of the matter is that we are obliged to make decisions based upon something more than the rarefied environment of the Washington offices which we currently inhabit. We are obliged to use our professional expertise<sup>26</sup> in defining industrial realities pursuant to the Court's invitation in *Nutone*.

In the instant case, it is clear that the instant supervisory distribution of antiunion flyers was precisely the kind of activity prohibited by the Employer's no-distribution rule. In my view, the Employer has engaged in disparate enforcement of its rule by allowing supervisory distribution in such circumstances, especially where the company's policy, which prohibits "talking" about unions, was impermissibly broad.<sup>27</sup> Indeed, when employees are prohibited from discussing the issue of union representation in the workplace, no reasonable opportunity exists for open communication among employees, and thus the disparate enforcement of the no-distribution rule in these circumstances can significantly damage the

<sup>24</sup> My colleagues have erroneously characterized my view as a "per se" approach. This assertion ignores the discussion throughout this dissent of the relevance of (a) whether any request to distribute would have been futile; (b) the availability of alternative avenues for communication; and (c) the industrial realities that the Court has instructed the Board to take into account. My view that these factors should be considered is hardly synonymous with a "per se" approach.

<sup>25</sup> *Nutone*, supra at 363.

<sup>26</sup> See *San Diego Building Trades v. Garmon*, 359 U.S. 237 (1959). As Justice Frankfurter stated, the Board is "equipped with its specialized knowledge and cumulative experience." *Id.* at 242.

<sup>27</sup> See, e.g., *MDI Commercial Services*, 325 NLRB 53 (1997); *W.C. McQuaide, Inc.*, 319 NLRB 756, 761–762 (1995); *Impressive Textiles, Inc.*, 317 NLRB 8, 13 (1995), and *Rice Growers Associates of Calif.*, 224 NLRB 663, 667 (1976).

laboratory conditions necessary for a free and fair election.<sup>28</sup>

That it was supervisors distributing the antiunion literature, and not unit employees does not lessen the consequence to the recipients of the distributed literature, i.e., the unit employees who voted in the election. If anything, reliance upon the supervisory hierarchy in the distribution of literature enhances the prospects for intimidation and correspondingly diminishes employee free choice. The critical factor in determining whether the laboratory conditions have been disturbed is that the Employer permitted only antiunion distributions in its facility, not that it was supervisors rather than unit employees who distributed the literature.

In establishing the principle that employers have the right to devise rules that may—in certain circumstances—restrict Section 7 activity during worktime, the Court and Board have long recognized that such rules serve the fundamental and legitimate business purpose of maintaining production and discipline.<sup>29</sup> However, it may be assumed that the employer no longer has the same concerns about production and discipline when it discriminates in its enforcement of such rules by allowing employees whose views it favors to engage in workplace communications that are proscribed by the employer's rule. That is the teaching of more than half a century of Board and Court law. Thus, in the instant case, it should not matter that it was supervisors rather than employees who were permitted to distribute the antiunion literature in violation of the no-distribution rule. In either instance, the Employer has demonstrated that the rule prohibition is not relevant or necessary to serve its legitimate interests.<sup>30</sup>

<sup>28</sup> Member Hurtgen's reference to a rule requiring employees to clock in when reporting for work has no relevance to the purposes of the Act or any issue relevant to our statute.

<sup>29</sup> *Republic Aviation v. NLRB*, 324 U.S. 793 (1945), *Peyton Packing Co.*, 49 NLRB 828, 843–844 (1943), enf. granted 142 F.2d 1009 (5th Cir. 1944), cert. denied 323 US 730 (1944).

<sup>30</sup> Members Fox and Liebman misconstrue this part of my opinion today as one that was essentially taken by the D.C. Circuit and thereafter rejected by the Supreme Court in *Nutone*. The Supreme Court in *Nutone* reversed the D.C. Circuit's decision that employer violations of its no-distribution rule are unlawful *apart* from any consideration of the "actualities of industrial relations." In applying the teachings of Justice Frankfurter's opinion, I have given due consideration to the actualities of industrial relations—including the fact that any request by employees to distribute here would have been rejected—in determining that the Employer's conduct is objectionable. By contrast, in stating that they would find force with my position only if they were writing on a "clean slate," Members Fox and Liebman have demonstrated their misreading of the decisions of both the D.C. Circuit and the Supreme Court in *Nutone*.

I further note that Member Hurtgen misses the point by stating that my view would require an employer to essentially double the amount of time allowed for distribution in work areas, and "to monitor closely the situation, lest it unintentionally give one group more leeway than the other." These "concerns" are a red herring, as both the increase in time and the "monitoring" problem would arise in *any* instance of disparate enforcement whether conduct by supervisors or employees was the

According to Member Brame, a finding that an employer may not prohibit prounion distribution while engaging in its own antiunion distribution would "jeopardize" production and require employers to "subsidize" union activity. Curiously, however, no mention of the jeopardy to production or the subsidization of Section 7 activity is invoked when discussing the right of employers or their surrogates to freely distribute antiunion materials in work areas during worktime. These inconsistent characterizations smack of a double standard that the Supreme Court long ago found unlawful in *Republic Aviation*, 324 U.S. 965 (1945) and its progeny for more than a half century. Indeed, if Member Brame seeks to invoke a standard upon which the lawfulness of Section 7 activity is determined by whether it can be characterized as "employer subsidized activity," then *Republic Aviation* would have no meaning because an employer would be justified in prohibiting all union solicitation in its facility, at all times, in all places, and under any circumstances. Under this standard, employers should be free to discriminate against employees for engaging in prounion conduct in the interest of preventing a jeopardy to production.<sup>31</sup> Until such time as Congress amends the Act to reflect such a standard, it has no place in Board decisions.<sup>32</sup>

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trigger which created the discrimination. But such concerns would never constitute a legitimate defense to such disparate enforcement of an otherwise valid rule.

<sup>31</sup> Member Brame's reliance on the language in *Livingston Shirt*, 107 NLRB 400, 406 (1953), in this regard, is misplaced. As discussed infra, the captive audience rationale has implications far greater than what is at issue here. Further, *Livingston Shirt* speaks of an increasingly discredited era of an adversarial approach to labor relations. See *Keeler Brass Co.*, 317 NLRB 1110, 1116–1119 (1995) (W. Gould, concurring). Today labor and management are frequently more open than they were in the time of *Nutone* and even, to use the language of *Livingston Shirt*, from time-to-time "strangely open hearted." To the extent that we can do so consistent with the Act which we are charged to interpret, we should promote and not discourage such practice. See W. Gould IV, Speech before the American Forest and Paper Association Southern Conference Fall Meeting, "Promotion of Cooperative Relationships between Labor and Management: Policies of the National Labor Relations Board," October 25, 1996, in Atlanta, Georgia; W. Gould IV, Speech before the Nebraska Bar Association Labor and Employment Law Section, "Employee Participation and Labor Policy: Why the TEAM Act Should be Defeated and the National Labor Relations Act Amended," June 7, 1996, in Omaha, Nebraska, and W. Gould IV Speech before the Seventeenth Annual Seminar on Labor-Management Relations, "Beyond 'Them and Us' Litigation: The Clinton Board's Administrative Reforms and Decisions Promoting Labor-Management Cooperation," February 29, 1996, in Indianapolis, Indiana, reported in BNA Daily Labor Report 196 DLR 208 at D3, E. See generally Robyn Meredith, "Many at the Saturn Auto Factory Are Finding Less to Smile About," *The New York Times*, March 6, 1998, at A1 and Frank Swoboda, "Saturn Workers Vote to Keep Existing Pact: Japanese-Style Contract Supported 2 to 1," *The Washington Post*, March 12, 1998, at D2.

<sup>32</sup> Thus, I find that the questions proposed in Member Brame's opinion, although an interesting academic exercise, to be of no relevance to the instant case. I note, however, that to the extent his first question suggests that my view today would logically lead to finding unlawful "any employer solicitation or distribution regarding wages, hours, and

Member Brame also defends the instant prohibition against prounion distribution on the ground that it is necessary to protect employer free speech rights. In Member Brame's view, if an employer must permit employees to distribute prounion material in the same (and in this case limited) manner that its supervisors have distributed antiunion literature, the employer's free speech rights are infringed by requiring its surrender of "production, order and discipline in the workplace." As noted above, such blanket assertions about production and discipline ignore the teachings of *Republic Aviation*, which set forth a careful balance of the legitimate interests of both employers and employees. Taking this logic one step further, however, Member Brame apparently must also view *Republic Aviation* as burdening employer free speech rights, because the Court required employers to (in Member Brame's terms) "surrender production" by affording Section 7 rights to all employees rather than limiting them just to those who oppose the union.<sup>33</sup> Indeed, one must wonder whether Member Brame's views are driven by a belief that *Republic Aviation* itself is inconsistent with the Constitution.

I also find inapplicable Member Brame's analogy to obligating one political party to pay for equal broadcast time of the opposing political party. In the political arena, no political party has, as here, exclusive control over access to the primary avenues of communication. If this was the case, our political system would be more totalitarian or, at a minimum, more autocratic than democratic. This, I fear, is the approach which Member Brame espouses for the workplace. It is an approach which is fundamentally at odds with the National Labor Relations Act itself.

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terms and conditions of employment," he is wrong. See *Dayton Hudson*, supra at fn. 17

<sup>33</sup> Contrary to Member Brame's assertion, employee activity during nonworking time may be prohibited if it interferes with business interests. *Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978); *NLRB v. Baptist Hospital, Inc.*, 442 U.S. 773 (1979); *Marshall Field & Co. v. NLRB*, 200 F.2d 375 (7th Cir. 1953); *McDonald's Palolo*, 205 NLRB 404 (1973); *Goldblatt Bros.*, 77 NLRB 1262 (1948); *May Department Stores*, 59 NLRB 976 (1944). Thus, Member Brame's contention that the working/nonworking time demarcation is dispositive of employer interests is in error. *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615 (1962). In fact, my view has been that the case is wrongly decided. See Gould, *The Question of Union Activity on Company Property*, 18 Vanderbilt Law Review 73, 77-81 (1964). But *Stoddard-Quirk* is the law, and, indeed, it helps illuminate the deficiencies in Member Brame's analysis. Whether the activity takes place during working or nonworking time, the test for balancing competing interests is always the same. Indeed, "Section 7 does not reach activities which inherently carry with them a tendency toward . . . disturbing efficient operation of the employer's business." *Caterpillar Tractor Co. v. NLRB*, 230 F.2d 357, 358 (7th Cir. 1956) (employer lawfully prohibited wearing of employee buttons with slogan "Don't be a scab" even though the activity is engaged in during nonworking time). Accord: *Midstate Telephone Operator v. NLRB*, 306 F.2d 401, 403 (2d Cir. 1983). The failure to apprehend this key point has contributed substantially to the confusion in Member Brame's opinion. Indeed, his opinion always ignores the underlying reason for the test formulated in each area of the litigation.

To the extent that prior Board cases have held that it is not unlawful for an employer to distribute literature to employees in the face of a no-distribution rule,<sup>34</sup> I respectfully disagree with that precedent and would overrule it.<sup>35</sup> Those cases generally rely on *Nutone* as the basis for holding that such conduct is not unlawful.<sup>36</sup> However, as noted above, the Court made clear in *Nutone* that it is well within the discretion of the Board to find—"as a matter of industrial experience"—that the policies of the Act are not effectuated by allowing an employer to prohibit employees from distributing union literature while at the same time engaging in its own distribution of antiunion materials to the employees. My experience in this field, as one who has been both a practitioner and academic in this area for more than three-and-one-half decades and most recently as the Chairman of this Agency, teaches that employee free choice is disturbed when supervisory distribution of literature pertaining to a union election is permitted while similar distributions by employees are prohibited.<sup>37</sup> Moreover, as I

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<sup>34</sup> See, e.g., *Fairfax Hospital*, 310 NLRB 299 fn. 3 (1993); *Summitville Tiles*, 300 NLRB 64, 66 (1990); *St. Francis Hospital*, 263 NLRB 834, 835 (1982), enf. 729 F.2d 844 (D.C. 1984). While the captive audience cases of which *May Co.*, 136 NLRB 797 (1962), enf. denied 316 NLRB 797 (6th Cir. 1963) and *Montgomery Ward*, 145 NLRB 846 (1964), enf. as modified 399 F.2d 889 (5th Cir. 1965), and *Bonwit Teller Inc.*, 96 NLRB 608 (1951), are illustrative also provide free speech rights for unions, workers and employers in the workplace, they are not directly implicated by the *Nutone* issue because they involve nonemployees and, thus, necessarily implicate some of the considerations contained in *Lechmere*, supra. Sometimes, when there are representation proceedings, as in the instant case, Sec. 8(c) rights are not involved because that free speech proviso is directed to unfair labor practice cases rather than representation matters. See *General Shoe Corp.*, 77 NLRB 124, 127 (1948); *Dal-Tex Optical Co.*, 137 NLRB 1782, 1787 fn. 11 (1962). Accord: *Borden Mfg. Co.*, 193 NLRB 1028, 1034 (1971); *Fiber Industries*, 267 NLRB 840, 841 fn. 4 (1983). In any event, the right of nonemployee union organizers to reply to captive audience speeches under appropriate circumstances is not extinguished by *Lechmere* and, most important, is not involved here.

<sup>35</sup> Of course, the Tenth Circuit has already done so. See *Head Division of AMF, Inc. v. NLRB*, supra.

<sup>36</sup> I note that in *Reno Hilton*, 319 NLRB 1154 fn. 4 (1995), I, along with former Members Browning and Truesdale, found it unnecessary to rely on evidence of employer violations of its own no-solicitation rule as evidence of disparate enforcement of the rule. Thus, the lawfulness of such conduct was not squarely before the Board, as it is in the instant case.

<sup>37</sup> See Gould, *The Question of Union Activity on Company Property*, 18 Vanderbilt Law Review 73 (1964); Gould, *Union Organizational Rights and the Concepts of "Quasi-Public" Property*, 49 Minnesota Law Review 505 (1965). Indeed, the assumption contained in these writings were subsequently affirmed in *Excelsior Underwear*, 156 NLRB 1236 (1966), which presumed that union communication was necessary in light of the natural advantages available to employers at company facilities. The Supreme Court has affirmed *Excelsior Underwear* in *NLRB v. Wyman-Gordon Co.*, 394 US 759 (1969). As noted above, in some of my opinions during my term of office I have emphasized enforcement of *Excelsior Underwear* in *Mod Interiors, Inc.*, 324 NLRB 164 (1997); *Fountainview Care Center*, 323 NLRB 990 (1997) (W. Gould, concurring); *Technology Service Solutions*, 324 NLRB 298 (1997) (W. Gould, concurring). At the same time, I have promoted employer as well as union free speech. See *Eldorado Tool*, supra. Except as contradicted by *Lechmere*, supra, the statute properly pro-

have noted elsewhere,<sup>38</sup> the *Lechmere* holding—not yet the law at the time of *Nutone*—burdens the ability of employees to communicate at the workplace—a “place uniquely appropriate for dissemination of views” on this subject.<sup>39</sup>

Member Brame contends that a finding that the instant no-distribution rule has been unlawfully enforced would necessarily lead to a rule whereby an employer would engage in unlawful conduct if it gave a captive audience speech without affording prounion employees the same right to make speeches on companytime. I disagree. First, although the captive audience cases are illustrative of free speech rights for unions, workers, and employers in the workplace, they are not directly implicated by the *Nutone* issue because they involve nonemployees, and thus necessarily implicate some of the considerations contained in *Lechmere*.<sup>40</sup> Second, the captive audience speech is a peculiar *sui generis* kind of employer “solicitation,” and the issue of the right to respond poses more invasive property problems—in the sense that production would be halted altogether during speeches on working time—than those at issue here.<sup>41</sup> Thus, contrary to Member Brame’s assertion, I do not believe that a find-

notes symmetry in avenues of communication for unions, employees and employers.

<sup>38</sup> See *Mod Interiors, Inc.* supra; and my concurring opinions in *Fountainview Care Center*, supra, and *Technology Service Solutions*, supra.

<sup>39</sup> See fn. 7. Contrary to Member Brame’s assertion, *Lechmere* burdens employee rights because the Court’s decision makes it more difficult for employees to hear the union’s message about union organization when nonemployee organizers are denied access to private property.

<sup>40</sup> *May Co.*, 136 NLRB 797 (1962), enf. denied 316 F.2d 797 (6th Cir. 1963), *Montgomery Ward*, 145 NLRB 846 (1964), enf. as modified 399 F.2d 889 (5th Cir. 1965), and *Bonwit Teller Inc.*, 96 NLRB 608 (1951).

<sup>41</sup> In this regard, Member Brame’s reliance on *Boaz Spinning Co. v. NLRB*, 395 F.2d 512 (5th Cir. 1968), in support of his captive audience analogy is misplaced. In that case, the issue before the court was whether an employee was lawfully discharged for shouting at a captive audience meeting that the plant manager was “no different than Castro.” That the employee was denied equal time to reply to a captive audience speech was incidental to the litigated issue of whether he was lawfully discharged. See *F. W. Woolworth*, 251 NLRB 111 (1980); *Masonelan International*, 223 NLRB 965 (1976); *J. P. Stevens*, 219 NLRB 850 (1975); *Prescott Industrial Products Co.*, 205 NLRB 51 (1973), enf. denied 500 F.2d 6, 11 (8th Cir. 1974). Notwithstanding the above, however, it is noteworthy that Member Brame fails to address the *one* Board case that is on point which holds that employees have the right to respond to captive audiences and, as part of its rationale, states that employees have a greater right to respond in this regard than do nonemployees. See *Biltmore Mfg. Co.*, 97 NLRB 905 (1951). As the Board said: “[t]he factual setting of this case essentially the same in its operative facts as the situation existing in *Bonwit Teller*. Indeed, in several respects the instant case is an even stronger one for applying the rule of *Bonwit Teller*. . . . [I]n this case the union representative . . . was actually an employee rather than an outside union representative . . . .” Id. at 906.

ing of objectionable conduct here runs afoul of the well-settled law pertaining to captive audience speeches.<sup>42</sup>

Nonetheless, I confess that Member Brame’s lengthy opinion makes one point which possesses merit. In discussing *Lechmere*, he states that my definition of discrimination would extend to managerial and supervisory access for “normal business” and then, appearing to recognize that *Lechmere* itself, as well as the employee cases, have long ago rejected his own straw man, he states that if my analysis is predicated upon employer conduct “there is no principled rationale for not allowing *nonemployee union organizers* to engage in the same solicitation and distribution activity as company officials.” Member Brame is correct.<sup>43</sup> But his opinion fails to take account of the fact that the Supreme Court itself has established a rigid and, to use Member Brame’s language “illogical” demarcation line between nonemployee and employee activity in *Babcock* and *Lechmere*.<sup>44</sup> The Board is subordinate to the Supreme Court.<sup>45</sup> Yet, Mem-

<sup>42</sup> To that end, Member Brame’s discussion of the legislative history of Sec. 8(c) and the overruling of *Clark Bros.*, 70 NLRB 802 (1946), enf. 163 F.2d 373 (2d Cir.1947), and its progeny have nothing whatsoever to do with the instant issue, as that law simply stands for the proposition that captive audience speeches are to be permitted.

<sup>43</sup> As relevant to the discussion in the text, the Court rejected my views in its *Lechmere* opinion. W. Gould, “The Question of Union Activity on Company Property,” 18 *Vanderbilt Law Review* 73 (1964). However, it must also be noted that the “noncoercive anti-union activity” which Member Brame so champions was not part of the Court’s analysis in *Lechmere*, and thus his comment that my “expanded” definition of discrimination would have required a different result in *Lechmere* is in error and, in any event, is not in any way relevant to the instant issue.

<sup>44</sup> The Court of Appeals for the Sixth Circuit has reminded us again of the importance of the demarcation line between nonemployees and employees in *Meijer Inc. v. NLRB*, 156 LRRM 3057 (6th Cir. 1998). In his opinion, Member Brame states that *Meijer* has nothing to say of controlling precedent relied upon in that circuit. This is true. But it has everything to say about the way in which his opinion cobbles together principles relating to nonemployees and applies them to employees.

<sup>45</sup> To this end, Member Brame’s suggestion that I am attempting to “compensate” for the effects of *Lechmere* is off the mark. My view is no more compensation for *Lechmere* than is the Supreme Court’s unanimous holding that paid union organizers, excluded from company property under *Lechmere*, may come inside the employer’s gates by applying for work and, in so doing, are “employees” within the meaning of the Act. *NLRB v. Town & Country Electric*, 516 U.S. 85 (1995).

In any event, the point is not to “compensate” for *Lechmere*. Rather, it is to recognize that *Lechmere* is part of the new “industrial realities” that we are to consider as directed by the Court in *Nutone*. Thus, where new issues are implicated by the emergence of such realities, it is the Board’s duty to address them. There are numerous examples of this:

(1) Lockouts: See *American Ship Building v. NLRB*, 300 U.S. 380 (1965), where the Court recognized the right of an employer to lockout employees in support of its bargaining position to be the correlative to the union’s right to strike, because the right to strike served to create such problems for an employer. Indeed, Justice Stewart pointed out that such a right does not harm the collective bargaining process because “the right to bargain collectively does not entail any ‘right’ to insist on one’s position free from economic disadvantage.” Id. at 309. Accord: *NLRB v. Teamsters Local 449 (Buffalo Linen Supply Co.)*, 353 U.S. 87 (1957). In essence, it was the previously recognized right to strike which served as a rationale for the right to lock out. See also *International Paper Co. v. NLRB*,

ber Brame's entire opinion is a sweeping attack upon not only the National Labor Relations Act, which we are charged to interpret, but also the distinctions articulated by the Supreme Court itself.<sup>46</sup>

As the conclusion of his opinion reveals, the opinion's thrust is to require labor organizations to communicate and organize without protection under the Act—and his implicit yet readily apparent suggestion, that the content of the unions' message is less appealing to workers today, reveals the concurrence's personal views, views which are irrelevant to our statutory mandate.

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115 F.3d 1045 (D.C. Cir 1997) (rule allowing an employer the right to permanently subcontract during a lockout was recognized, in part, because of recognition that a contrary rule would provide incentive to an employer to provoke a strike and accomplish—via permanent replacements—what it could not by locking out employees).

(2) No-Strike Injunctions: See *Boys Markets v. Retail Clerks Local 770*, 398 U.S. 235 (1970) where the Court recognized the right to enjoin—in certain circumstances—strikes concerning matters which are subject to a mandatory grievance arbitration procedure because the no-strike clause is a *quid pro quo* for a broad arbitration provision in the collective bargaining agreement. Accord Justice Stevens' dissenting opinion in *Buffalo Forge v. United Steelworkers*, 428 U.S. 397, 413 (1976). See also W. Gould, *On Labor Injunctions Pending Arbitration: Recasting Buffalo Forge*, 30 Stanford L. Rev. 533 (1978).

(3) Concerted Activity: The *Alleluia Cushion Co. Inc.*, 221 NLRB 999 (1975), presumption of concerted activity is an appropriate response to the complexity of analysis required to determine whether an individual employee's action is concerted under the rationale of *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683 (3rd Cir. 1964), and the reasoning of the former decision is related to this development. Under *Mushroom Transportation*, an individual employee's action can be found concerted only if it can be shown that the action was engaged in with the object of initiating or inducing or preparing for group action, or that it was in some way related to group action. An unsophisticated, unrepresented employee's protection can rest on the happenstance of how and where he phrased his collective concern. The *Alleluia* doctrine avoids such contorted analysis and potentially unfair results by making a rebuttable presumption that other employees consented to an individual employee's assertion of a work-related statutory right. See William B. Gould, "Recent Developments under the National Labor Relations Act: The Board and the Circuit Courts," 14 U.C. Davis Law Review 497, 513–519, 1981.

These are but a few examples of instances where rules were devised because of the judge made realities that have emerged in the courts. In all of these areas and in many others as well—the law has been fashioned with specific reference to the context of related rules of law. Indeed, in *Boys Markets* the Court abandoned *stare decisis* to achieve this objective. Here, where the Court has "invited" the Board to formulate doctrine based upon a record, it is appropriate for the Board to take into account the intervening developments contained in *Lechmere*.

<sup>46</sup> Member Brame's reliance on Thomas Jefferson's "ringing words" that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical," again dramatizes the fact that he views *any* prounion activity by employees on company property, even during nonworking time, as employer subsidization of that activity which is both "sinful and tyrannical." Indeed, contrary to Member Brame's assertion, employees frequently *are* paid for nonworking time such as lunch periods and rest periods—and in any event they are using company property—which, under Member Brame's rationale, means they are receiving "contributions" that are "sinful." This, of course, is contrary to *Republic Aviation*.

Finally, I disagree with Member Hurtgen's contention that a departure from Board precedent is somehow unwarranted absent "thorough briefing by the parties and interested amici." As he is well aware, the Board has, on numerous occasions in the past, overruled past precedent without having the issue briefed by the parties or amici.<sup>47</sup> Indeed, my colleague's finding, that reversing precedent is unwarranted absent such briefing, represents in itself a departure from precedent.

Thus, I find, contrary to my colleagues, that in view of the supervisory distribution of antiunion material in work areas of the facility, the Employer engaged in disparate enforcement of its no-distribution rule, and that such enforcement constitutes objectionable conduct warranting setting aside the election.<sup>48</sup>

Today's decision mocks the idea that the National Labor Relations Act is a Magna Charta or bill of rights for workers. Again, it says what the Supreme Court has rejected regarding the highest office in the land, i.e., that the "king can do no wrong."

The poet laureate Archibald MacLeish said it best when he observed: "This land acknowledges no princes!"<sup>49</sup> But that is what the majority does today. I, therefore, dissent.

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<sup>47</sup> See, e.g., *Carpenters Local 1031*, 321 NLRB 30, 32 (1996); *Sunrise Rehabilitation Hospital*, 320 NLRB 212 (1995); *J. E. Brown Electric*, 315 NLRB 620 (1994).

<sup>48</sup> Because I have found that the Employer has disparately enforced its no-distribution rule, I find it unnecessary to address whether the rule is unlawful on its face, and whether the Board's current standard for determining the validity of no-distribution rules is appropriate.

<sup>49</sup> See Archibald MacLeish, *Collected Poems, 1917–1982*, "Acknowledgment," p. 406, Houghton Mifflin Company (1985).

The full text read as follows:

" . . . I shall not again publicly acknowledge you." Francis Cardinal Spellman to Eleanor Roosevelt. July 21, 1949.

Prince of the church whose lofty mind  
Looks down upon the whole creation—  
You who *acknowledge* human kind—  
Consider, Prince, your place and nation.

Prince who can acknowledge man  
—The word hurts and the spirit winces—  
Prince, consider if you can  
This land acknowledges no princes!