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Dilemma in Labor Law: The Right to Own Versus the Right to Know

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COMMENT

DILEMMA IN LABOR LAW: THE RIGHT TO OWN VERSUS THE RIGHT TO KNOW

INTRODUCTION

From the line of labor decisions beginning with the Cordwainers Case[1] to the most recent ones, one discernible fact is that the effort of labor unions to achieve a power balance with management has been extensive. And, at every step toward this ideal, the unions have been met with opposition by management. While some students of labor law feel that unions have now seen the scales tipped in their favor, others would disagree.

This comment explores one of the most recent conflicts between labor and management. It concerns the National Labor Relation Board's legal justification for requiring management to turn over to the union the names and addresses of all employees eligible to vote prior to Board conducted elections. Specifically, the comment analyzes and evaluates the recent decisions of the Board in the *Excelsior Underwear, Inc.* case[2] and the *General Electric Co.* case[3] in the light of past Supreme Court decisions, Board policies, and other pertinent material in this area.

THE DECISIONS WHICH FORMULATE THE NEW RULE

To more fully appreciate the problems presented a brief consideration of the *Excelsior* and *General Electric* cases is first necessary.

The *Excelsior* "case" actually involved two separate cases in which the unions petitioning for Board certification had requested the employers to furnish lists of names and addresses of all employees prior to the coming election. The purpose specified by the unions was to allow them to answer alleged material misstatements, made by the employers shortly before the election date. The employers did not comply with the requests and the unions lost both elections. Upon objections filed by both unions to the employers' conduct affecting the results of the election, the Board held that the employers did not interfere with the elections

1. See Cordwainers Case, 3 Commons & Associates, *Documentary History of American Industrial Society* 59-248 (1910). The Philadelphia Cordwainers, which was organized in 1794, was probably the first genuine trade union in the United States. It successfully struck against a cut in wages in 1799, but when it struck again in 1806 the court applied the common law, and convicted the leaders of the strike for criminal conspiracy. This action destroyed the union. Other unions sprang up during this same period among printers, carpenters, tailors and hatters, but they were generally short-lived.

2. Excelsior Underwear, Inc., 61 L.R.R.M. 1217 (Feb. 4, 1966).

3. General Electric Co., 61 L.R.R.M. 1222 (Feb. 4, 1966).

by failing to furnish the requested lists. However, continuing its policy of refining its rules regarding election conduct in the direction of higher standards, the Board announced a new and different rule for future cases; i.e., commencing 30 days after February 4, 1966, all employers would be required to file such employee name and address lists with the Regional Director within seven days after the execution of agreements by the parties for conducting an election, or, in elections directed by the Board or its regional directors, seven days after the election has been directed.[4] The lists are then to be turned over to the union. As will be more fully discussed later, unions claim to need such lists so that union election information may be readily transmitted to, or personal contacts arranged with the eligible voters.

On the same day that it made its decision in the *Excelsior* case, the Board also decided the *General Electric* case. There, several days before the Board-directed election, the employer made a non-coercive anti-union speech to its employees at a meeting arranged during working hours on the plant premises. One day before the advertised meeting, the union requested permission of the employer to attend the meeting and to debate the issues then and there. The employer denied the request. When the union lost the election, it filed objections to the employer's election conduct. The Board held, consistent with its *Livingston Shirt*[5] decision, that the employer did not violate Section 8(a)(1) of the Act by refusing to afford to the union the opportunity to speak in rebuttal to the employees during working time and on company property. Of significance to future cases was the fact that the Board indicated that it would, possibly in the future, review the *Livingston* decision and current Board policy in general, but would refrain from doing so until it could first fully appraise the practical results which would flow from the *Excelsior* decision. The Board stated:

> In light of the increased opportunities for employees' access to communication which should flow from *Excelsior*, but with which we have, as yet, no experience, and because we are not

4. The only exception is the expedited elections conducted pursuant to Section 8(b)(7)(c). In this situation, we believe that the time span between the direction of election and the conduct thereof is too brief, taking into account the time required for the employer to compile and file a list of names and addresses, for the union to be able to make any meaningful use of this information. Hence in that limited situation, we do not require disclosure.

Excelsior Underwear, Inc., 61 L.R.R.M. 1222, 1219 n.14 (Feb. 4, 1966).

5. 33 L.R.R.M. 1156 (Dec. 17, 1953). It may be noted that *Livingston* is not on all fours with the instant case. In *Livingston* the problem was not between the employer and non-employees, as in the instant case, but rather between the employer and *employees*, and dealt with the *employees'* right to the use of company property during working hours. The employee request was denied, but the employees were permitted to speak after working hours on the company property.

> persuaded on the basis of our current experience that other fundamental changes in Board policy are necessary to make possible that free and reasoned choice for or against unionization which the National Labor Relations Act contemplates and which it is our function to insure, we perfer to defer any reconsideration of current Board doctrine in the area of plant access until after the effects of *Excelsior* become known.[6]

WHY THE DECISIONS ARE IMPORTANT

The importance of the two decisions is that *Excelsior* at once makes available better means of communication between the union and the employees, and *General Electric* offers the potential for still greater union flexibility; i.e., direct access to the employees by the unions, on the company's property. An examination of the problems which contributed to the formulation of the new rule of *Excelsior* makes these effects clear.

Before a union may effectively campaign for membership in a plant, it is obviously necessary that it be able to communicate with the employees in order to inform them of the union program and intended manner of operation. For various reasons, the union may find it difficult or impossible to accumulate a list of all the employees' names, and, if it does, it may find it impossible to locate the employees. *NLRB v. United Steelworkers*[7] is a case in which the Board was confronted with just such a problem. There, the union organizers, after diligent efforts, managed to acquire the names and addresses of 1,250 of the 3,100 employees in the plant. To convey its "message" to the other 1,850 employees, the union had to rely on "catching" them somewhere between the employer's property and the employees' homes. Such a procedure has been made generally necessary because of the Supreme Court's ruling that union agents who are not employees have no right to obtain access to the employers' property for campaign purposes during working or nonworking hours unless the union has no reasonable alternative means of reaching the employees.[8] As a result, the union is often, as a practical matter, denied effective contact with the employees, especially where distribution of leaflets at plant gates for various reasons is not fully effectual. Moreover, the meaning of "reasonable alternative means" is obviously not an exact standard, and represents an invitation for litigation in varying fact situations.[9] For example, if a union's treasury is so well

6. General Electric Co., 61 L.R.R.M. 1222, 1223 (Feb. 4, 1966).

7. 357 U.S. 357 (1958).

8. NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1951).

9. See NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 107 (1951), where the court held that if the location of a plant and the living quarters of the employees places the employees

filled that it can readily pay for expensive radio, television and newspaper advertisements, do such facts justify a conclusion that it had a reasonable alternative? If the union's organizer has space to stand on the berm of a highway leading out of the plant parking lot, and has the opportunity of flagging down employee's cars as they exit, does the union then have a reasonable alternative? Also, are handbills given to an employee hurrying by effective? The difficult problem of communicating with *all* of the employees has been commented upon by Professor Bok:[10]

> A major problem confronting the organizer is the lack of accurate, comprehensive information concerning the names and addresses of the employees involved. With the help of friendly employees, he may obtain much of the information he needs, and yet even in small plants, organizers believe that there are often a few voters who are never contacted in the course of the campaign because their names and addresses are unknown. With larger companies, this problem becomes increasingly serious. The organizer must either resort to some petty and underhanded stratagem for obtaining the necessary data from the front office, or risk leaving a substantial number of voters with little more than a handbill to inform them of the union's position in the forthcoming election.

In some cases, no substantial problem of communication may be present if the union is fortunate enough to have a suitable number of employees working in its behalf, since employees ordinarly have the right to solicit membership and to campaign on the union's behalf during non-working time[11] on the employer's property.[12] Employees may also "talk union" among themselves. Such employee rights may be limited by the employer only where their activities interfere with production or discipline,[13] disrupt employee unity or harmony, or involve publication of libelous or slanderous matter.[14] However, this direct mode of communication is often of limited value since many employees refuse to work for the union for fear of some possible employer reprisal.

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beyond the reach of reasonable union efforts to communicate with them, then the employer's refusal to allow the union to approach his employees on his property is a violation of 8(a)(1) of the Act.

10. Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 HARV. L. REV. 38, 99 (1964).

11. Even if the employees are paid during rest and lunch periods, that time is considered theirs and subject to solicitation by the pro-union employees. Olin Industries, Inc. v. NLRB, 191 F.2d 613 (5th Cir. 1951), *cert. denied*, 343 U.S. 919 (1952); NLRB v. J. H. Rutter Rex Mfg. Co., 229 F.2d 816 (5th Cir. 1956).

12. Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945).

13. NLRB v. May Dept. Stores Co., 154 F.2d 533 (8th Cir. 1946).

14. NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1951).

THE BOARD'S RATIONALE AND JUSTIFICATION FOR ITS REQUIREMENT THAT EMPLOYEES NAMES AND ADDRESSES BE FURNISHED TO THE UNION

In order to legally justify its position in *Excelsior*, the Board had to cope with two perplexing questions. These problems were: (I) would employee rights be infringed upon by the new rule; and (II) would the new rule conflict with the Supreme Court's decision in *Babcock and Wilcox*[15] and/or *NLRB v. United Steelworkers of America (Nutone)*.[16]

The employer had argued that his supplying of the list would interfere with his employees' right to refrain from joining a labor organization guaranteed by Section 7 of the Act, and protected by Section 8(a)(1) and 8(b)(1)(A) of the Act. The employer added that once the union acquired the list, it could subject ". . . employees to the danger of harassment and coercion in their homes."[17]

The Board's response to these contentions was threefold. First, it noted in general that what the new rule requires is no more than what is available for public inspection in our civilian elections; that lists of names and addresses of all qualified voters be available; and that all parties interested in the election have the right to use these lists for whatever purpose they desire. Second, the Board considered that the Section 7 guarantee of a right to refrain from union activity would not be violated by having the employer submit a list of employee names and addresses because all the employer is doing is aiding the employee to acquire a better informed basis for the choice he must make—to join or refrain from joining a labor organization. Third, the Board brushed aside the "harassment and coercion" argument advanced by the employer:

> We cannot assume that a union seeking to obtain employees' votes in a secret ballot election, will engage in conduct of this nature; if it does we shall provide an appropriate remedy.[18]

The Board's answers reveal its obvious desire to reach a practical and workable solution to comport with its conclusion that there does exist a need for a more effective means of informing all employees of "both" sides of the story in a Board conducted election. It considered that the resulting "better informed choice" would strengthen the democratic fiber which is necessary for an ordered democracy.

The Board's answers appear to have a logical basis. As to its analogy to civil elections, it is quite true that in such elections all interested

15. *Ibid.*
16. NLRB v. United Steelworkers of America (Nutone), 357 U.S. 357 (1958).
17. Excelsior Underwear, Inc., 61 L.R.R.M. 1217, 1220 (Feb. 4, 1966).
18. *Ibid.*

parties may have access to voting lists, and this opportunity permits each party to contact all potential voters and inform them of his position. Thus, the electorate may be better informed, and a social structure that more nearly approaches democratic ideals will develop. Conversely, it seems obvious that those who are to make a choice about whether to join or refrain from joining a union should know as much as possible about the union. Allowing unions to have a means of communicating with employees as effecive as that available to management is the best way to inform employees of the arguments of both sides, and to better educate them in their choice on election day. The implementation of this democratic philosophy in the area of insuring that the union would respond to the desires of the majority of the membership was an important part of the motive behind the Labor Management Reporting and Disclosure Act of 1959 (Landrum-Griffin).[19]

The Board's second answer tends to partially repeat the same reasoning.

Section 7 of the Act provides:

> Employees shall have the right of self-organization, to form, join, or assist labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . . .[20]

This portion of the Act guarantees freedom of choice. But how can a person effectively choose between two alternatives, the Board reasoned, when he is only given one side of the story? Thus, the employer, by furnishing the list, is effectuating the policy of the Act by aiding the employees in making an educated choice. When the employer furnishes the list the union then has an opportunity to present its position and as a direct result the employee has the opportunity to hear both sides of the question, and, after analyzing both sides, he has a basis for making an intelligent decision.

The Board's refusal to accord any weight to the employer's contention that the union will use the lists for the purpose of harassment and coercion also appears well founded. It is not logical or reasonable to assume that the union would harass someone whose support it wanted at election time. This assumption is especially valid when the choice will be made by secret ballot. Common sense indicates that if we want someone to favor us in a secret ballot election, we should persuade rather than harass them.

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19. Labor Management Reporting and Disclosure Act of 1959 (Landrum-Griffin Act), 73 Stat. 519 (1959), 29 U.S.C. § 401 (1959).

20. National Labor Relations Act, 49 Stat. 452 (1935) as amended by 61 Stat. 140 (1947), 29 U.S.C. § 157 (1947).

The second question the Board considered was whether its decision to require furnishing of the lists would conflict with the *Babcock & Wilcox* case and/or *United Steelworkers (Nutone)*. The employer had argued in *Excelsior* that such a requirement would violate the principles of these cases because reasonable alternatives did exist, by which the union could reach the employees. The employer also had argued that the giving of the lists would interfere with a significant employer interest—the right to keep his own business information away from others. The Board concluded that both of these employer contentions were invalid.

The Board noted that even though other methods of general communication were available to the union, the name and address lists would add an element of certainty to the communication of the message. It said that furnishing of the lists would insure the opportunity of all employees to be reached by all parties in the period immediately preceding a representation election.[21]

The employer's argument that its business information was being interfered with was effectively answered by the Board, which pointed out that the "alternative channels of communication" argument is a valid one only where the ". . . employer's interest in *controlling the use of property owned by him*"[22] is at issue. "Here . . . the employer *has no significant interest in the secrecy* of employee names and addresses."[23] Thus the Board need not consider ". . . the existence of alternative channels of communication before requiring disclosure of that information."[24] The Board further noted that assuming *arguendo* there was a substantial employer interest in non-disclosure, the employer waives any contention against the existence of a valid question of representation when he consents to the representation election. Similarly, where the Board directs an election, it does so because under all the evidence it has found that a *bona fide* question of representation exists. Thus, the employer's interest is waived for the sake of determining the representation question.

Finally, the Board stated that while it would not rule on whether a refusal to produce the lists would constitute the "interference, restraint, or coercion" type of unfair labor practice which violates Section 8(a)(1) of the Act, it did indicate that a possible violation might be involved. It stated:

> . . . we are persuaded . . . that disclosure is one of the safeguards necessary to insure the fair and free choice of bargaining repre-

21. Excelsior Underwear, Inc., 61 L.R.R.M. 1217, 1220 (Feb. 4, 1966).
22. *Id.* at 1221.
23. *Ibid.*
24. *Ibid.*

> sentative by employees[25] and that an employer's refusal to disclose, regardless of the existence of alternative channels of communication, tends to interfere with a fair and free election.[26]

Although the rules and analysis which the Board propounded are workable, further inquiry might be made to determine whether the Board was justified in concluding that its *Excelsior* rule was not precluded by the *Babcock & Wilcox*, and *Nutone* cases. Further distinctions could have been made. First, the *Nutone* case could not possibly be in conflict because the issue there was essentially whether *employees* could solicit on company time and property in violation of a valid no solicitation rule. The *Excelsior* case does not deal in any way with *employee* rights, the use of company time, or company property. Real property rights have been crucial to the question because in all prior cases of labor and management conflicts dealing with the solicitation of membership the Board and the Court balanced the employees' right to bargain through representatives of their own choosing with the employer's right to control his real property. Thus, ordering the use of the employer's "*personal* property" freely distinguishes it from other union solicitation cases involving the use of company real property. Also, the instant case does not deal with an employee-employer conflict but rather a union-employer controversy. This important distinction has been noted in past court decisions.[27]

The *Babcock & Wilcox* case also presents other distinguishing factors in addition to the Board's persuasive argument that the reasonable alternative test has no applicability in *Excelsior*. The distinction between the employer's real property and his personal property, as first noted, is fundamental, and on this basis alone an additional distinction can be made. As for interference with the employer's property interest, a pragmatic view recognizes that the only "interference" will be with the employer's previously dominant position in keeping from the union the names and addresses of all qualified voters.

THE MATTER HELD IN ABEYANCE IN THE GENERAL ELECTRIC CASE

In view of the Board's conclusion in *Excelsior*, the *General Electric* case emerges as important in this evaluation only for the limited purpose of examining the Board's reasoning in refusing to permit the opening of another avenue for union-employee communication; i.e., the union's oral

25. Excelsior Underwear, Inc., 61 L.R.R.M. 1217, 1221 (Feb. 4, 1966), citing NLRB v. A. J. Tower Co., 329 U.S. 324, 330; see also NLRB v. Waterman Steamship Corp., 309 U.S. 206.

26. Excelsior Underwear, Inc., 61 L.R.R.M. 1217, 1221 (Feb. 4, 1966).

27. NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 112 (1951), where the court notes that there is a distinction when dealing with employer rights in relation to employees and non-employees, i.e., in union solicitation controversies.

presentation to employees on company property during work time,[28] until future examination of the results which may flow from the *Excelsior* decision. This approach in *General Electric* obviously stems from the Board's hope that the *Excelsior* rule may effectively overcome the union's problem of communication with all of the employees.

It is submitted that while the *Excelsior* ruling is a step in the right direction, it will not effectively solve the overall problem of communication, and that a decision which would afford the union the right to reply to employer anti-union speeches on the employer's time and property, or at least to reply on the employer's property if not on its time, regardless of reasonable alternatives, is what is really needed. The basis for this contention is that, while the lists will assist the union in making its approach to the voters a week or two before the election either through the mails or through personal visits, this method of communication becomes ineffective when employers with large work forces make anti-union speeches before captive audiences a few days before the election. The short period of time available makes it impracticable for the union to reach the employees, even with the aid of employees' names and addresses. Professor Bok appears to be of the same opinion, for he notes that in the last few days of the campaign "[l]eaflets [sent through the mails or handed out at the home] may not be read, radio and newspaper advertisements are less reliable . . . and house calls cannot be made in sufficient numbers to serve the needed purpose."[29] Professor Bok therefore suggested a solution which is worthy of consideration:

> . . . [O]ne possible solution would be to provide that in elections involving 75 or more employees, the employer could not deliver a speech to his employees during working hours within the last seven days of the campaign unless he permitted the union to do likewise, nor could he allow his supervisors to solicit during this period without relaxing his ban on solicitation by the employees.[30]

By rejecting the union's request in *General Electric* and relying, at least temporarily, on the *Excelsior* rule to remedy the communication problem, the Board has probably encouraged further litigation, and possibly even legislative action.[31]

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28. The *General Electric* case was concerned with the problem of whether or not the employer's conduct in refusing the union equal time to reply on the company property to employer speeches was sufficient to set aside the results of the election.

29. Bok, *supra*, note 10, at 101.

30. *Id.* at 102.

31. Reference should here be made to the fact that in a federal election all means of communication afforded through the public media of broadcasting, if given to one candidate, must be given to the other. Communications Act of 1934, 48 Stat. 1088 (1934), as amended, 73 Stat. 557 (1959), 47 U.S.C. 315 (1959). An analogy can be drawn with the Board con-

SOME CONCLUSIONS

As suggested, it is doubtful that *Excelsior* will remedy the campaign communication problem. One thing is certain: *Excelsior* is a positive advance toward a democratic process. The courts in past decisions, and students of labor-management relations, have long felt that something had to be done in order to afford unions a more equal opportunity to communicate with their employees.[32] Professor Bok advocated and anticipated the *Excelsior* rule several years ago, noting that "[t]hese difficulties could be alleviated to a significant degree by requiring the employers to divulge the names and addresses of the employees."[33] Organizers generally have felt that *Excelsior* was overdue if for no other reason than to stop the "underhanded" union practices in acquiring the employee lists. Yet, even with such practices, organizers seldom ever acquire all the employee names.[34]

While *Excelsior* was a necessity, it does not solve all problems. The supplying of employee lists may not suffice when several days before the election the employer forecasts the possibility of loss of jobs, the moving of the plant, the trouble brought on by strikes, union corruption, and other anti-union comments. This practice leaves the union with insufficient time and means for effective rebuttal.

Thus, although the remedy considered in the *General Electric* case is considered justifiable for the above reasons, it is doubtful that it can be justified on any "psychological" basis, as suggested by Professor Bok.

> It is worth noting that union organizers are interested in the right to equal time for reasons other than to rebut employer statements late in the campaign. In particular, many organizers place great importance on the psychological advantage of being given the status of addressing the employees within the plant itself. This interest, however, has never been considered suffi-

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ducted elections. In federal elections, the most effective media of communication are radio and television broadcasting. In Board elections the most effective media of communication are speeches on the employers' property with all the employees present. Thus it follows that if it has been seen fit to give equal time in federal elections to the most effective media of communication that same policy should prevail at Board conducted elections. While the problem of the employers' property rights vs. the right to a free and informed choice still exists, the fact remains that under the Communications Act the property rights of the broadcasting industry are limited in that they must submit their property to the use of a political party with which they possibly are not sympathetic, if they have permitted the other political party to use their facilities.

32. Latourneau Co. of Ga., 43 NLRB 1253 (1944). "Moreover the employees' homes are scattered over a wide area. In the absence of a list of names and addresses, it appears that direct contact with the majority of respondents' employees away from the plant would be extremely difficult." See also, Bok, *op. cit. supra*, note 10.

33. Bok, *supra*, note 10 at 101.

34. A striking example is NLRB v. United Steelworkers, 357 U.S. 357 (1958).

> cient to justify incursions on the normal rights of the employer to control the use of his premises.[35]

The Board's new rulings may present other unexpected ramifications for the employer. It is worthy of note that an employer who becomes over-cooperative and furnishes the employee lists to a union before agreeing to an election may be faced with a possible Section 8(a)(2) violation. Thus, if an employer realizes a union is seeking to organize his shop and in order to expedite the procedures leading to an election, he releases to the organizing union the employee list, his conduct may be the cultivation of a Section 8(a)(2) violation.[36]

It is considered apparent that other means than what *Excelsior* provides are necessary in order to establish a proper balance of employee communication between labor and management. It is submitted that the public interest in our democratic society should do away with the employee non-employee distinction and give to the non-employee union organizer at least the same privileges as those given to the employee when soliciting for union representation.[37] This distinction, based upon effectuating a proper balance in each case between the free choice of representatives guaranteed in Section 7 of the Act, on the one hand, and property rights of the employer, on the other hand, is not so basic that it cannot be changed. In our society we strive for democratic systems. Fundamental to these systems is the right to freedom of choice. In order to give the benefit of this democratic principle to all those employees who must make a choice at Board conducted elections, the best possible method of communication must be made available to both sides. Our law and society need not enforce property concepts where they give an employer the right to keep off his property non-employee union organizers who contribute to a democratic choice by showing the employee another view or idea.[38] However, we should not remain oblivious to the difficult dilemma facing our law; i.e., should property rights so engrained in our society be over-ridden by the right to a free and informed choice?

Finally, of what value is the right given to the employee to solicit if he is untrained in the art of union solicitation? In this connection, it must be remembered that before any election may be conducted where the

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35. Bok, *supra*, note 10 at 101 n.174.

36. This argument assumes that there has been no demand for recognition made by the union, or if there was the employer showed that he had a good faith doubt that the union represented the majority of his employees and thus the representation question would be submitted to the procedures of a Board conducted election.

37. For *employees'* rights see Republic Aviation Corp. v. NLRB, 357 U.S. 357 (1958). For union rights in this situation, see NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1951).

38. It is perhaps not essential that the employer permit the non-employee organizer to solicit during company time, but he should at least be permitted on company property when the employees are present.

employees initiate Board processes, thirty percent of them must file a petition. Fairness and justice require that if this number of employees want to determine the union representation issue, the employer should be required to give all affected employees the opportunity to hear both sides by permitting the trained non-employee organizer to enter the property and state his position.

While other approaches may exist, it seems that the suggested solutions have the most validity in the face of the perplexing problem presented. Other methods would only offer temporary relief, and defer the problem for which a final solution has been long overdue.

Joseph Pass Jr.