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FOCUSING ON LABOR PICKETS' RIGHTS IN SHOPPING CENTERS WITH A SECTION 7 LENS—SCOTT HUDGENS

Picketing employees lost First Amendment freedom of expression on private shopping center property in *Hudgens v. NLRB*¹ in 1976. One year later, however, in *Scott Hudgens and Local 315, Retail, Wholesale, and Department Store Union*,² the National Labor Relations Board (NLRB) ruled that employees have a statutory right to picket on private property under the National Labor Relations Act (NLRA).³ The Board found that the store manager violated Section 8 (a)(1) of the NLRA when he threatened to have the pickets arrested for trespass.⁴ Further, the Board noted that the pickets had a right to engage in activities for their mutual aid and protection under Section 7 of the NLRA.⁵ Based on this, the Board concluded that in balancing the pickets' statutory right against Hudgens' Fifth Amendment property right, the former controlled.⁶

This Note will compare the NLRB's interpretation of the statutory rights of labor picketers in a privately owned mall with traditional criteria for access to private commercial and industrial property. A criticism will be made of the standard used by the Board in reaching

1. 424 U.S. 507 (1976). *Hudgens* reversed *Food Employees Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), which had established that picketing employees had a First Amendment right to be on private shopping center property.

2. 1977-78 N.L.R.B. Dec. (CCH) ¶ 18,290.

3. The National Labor Relations Act (hereinafter cited as the NLRA) has as its purpose the maintenance of a balance of power between labor and management. This balance advances the public interest in a sound economy. See 29 U.S.C. § 151 (1970). To achieve this purpose, the statute created a five-member commission, the National Labor Relations Board (hereinafter referred to as NLRB). The NLRB administers the provisions of the NLRA and resolves labor disputes. It has the power to prevent any person from engaging in any unfair labor practice affecting commerce. 29 U.S.C. § 160(a) (1970).

4. Section 8(a)(1) makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of rights guaranteed in Section 7." 29 U.S.C. § 158(a)(1) (1970).

5. Section 7 provides in relevant part:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . (emphasis added).

29 U.S.C. § 157 (1970).

6. *Scott Hudgens*, 1977-78 N.L.R.B. Dec. (CCH) ¶ 18,290. The Fifth Amendment provides in part that no one "shall be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation." U.S. CONST. amend. V.

its conclusion that pickets were entitled to statutory protection on private mall property. Suggestions will follow for alternative standards for the courts to use in order to reach the same conclusion if the decision is appealed. Finally, the implications of the Board decision, should it stand, will be examined as a new standard for the future resolution of labor law conflicts on private property.⁷

FACTS AND ADMINISTRATIVE HISTORY

During January 1971, warehouse employees of the Butler Shoe Company were engaged in an economic strike protesting the company's refusal to accept the union's contract proposals. The strikers decided to picket all nine of Butler's retail outlets in the Atlanta area, in addition to the warehouse. One of the outlets was located within the North DeKalb Shopping Center, an enclosed mall owned and operated by Scott Hudgens.

Four picketers carrying union placards were told by the general manager of the mall that they would be arrested if they did not cease picketing and leave.⁸ The four left but later returned to picket an area of the mall immediately adjacent to the Butler store. The picketing was peaceful. It continued for thirty minutes before the manager returned and again informed the pickets he would have them arrested for trespassing if they did not leave. The picketers left and Local 315 subsequently filed a charge with the NLRB. The charge alleged that Hudgens committed an unfair labor practice by interfering with the employees' right to engage in concerted activities protected by Section 7 of the NLRA.⁹

Relying on *Food Employees Local 590 v. Logan Valley Plaza Inc.*,¹⁰ the NLRB sustained the charge, finding that the First

7. Scott Hudgens, 1977-78 N.L.R.B. Dec. (CCH) ¶ 18,290. The procedural history of the case is complicated. Therefore, to avoid confusion, the 1977 NLRB decision, which is the subject of this Note, will be referred to as either *Scott Hudgens* or the *Hudgens Board*. All references to the 1976 Supreme Court decision will be to either *Hudgens v. NLRB* or to the *Hudgens Court*.

8. The placards read "Butler Shoe Store Warehouse on Strike, AFL-CIO, Local 315." Local 315, Retail and Wholesale Store Union, AFL-CIO was the union representing the warehouse employees. *Hudgens v. NLRB*, 501 F.2d 161, 163 (5th Cir. 1974). The employees of Butler's store in the North DeKalb Shopping Center were non-union. *Id.* n.2.

9. While Hudgens was not the employer of the employees involved in the case, it was undisputed that he was an employer engaged in commerce within the meaning of Sections 2(6) and (7) of the NLRA, 29 U.S.C. §§ 152(6) and (7) (1970), thereby conferring jurisdiction on the Board. The NLRB has held that a statutory "employer" may violate Section 8(a)(1) of the NLRA with respect to employees other than his own. See *Austin Co.*, 101 N.L.R.B. 1257, 1258-59 (1952).

10. 391 U.S. 308 (1968). The *Logan Valley* Court held that a state court injunction issued against the picketers violated their First Amendment rights to be on the premises. *Id.* at

Amendment gave the union a right to picket within the mall.¹¹ Hudgens then petitioned the Fifth Circuit Court of Appeals to review the NLRB's decision. While the appeal was pending, however, the Supreme Court decided *Lloyd Corp. v. Tanner*¹² and *Central Hardware Co. v. NLRB*.¹³ Both cases greatly limited First Amendment rights on private property opened to the public.¹⁴

In light of these two cases, the Fifth Circuit remanded the *Scott Hudgens* case to the Board, which sent it to an administrative law judge.¹⁵ Both the Board and the administrative judge again con-

319-20. In so holding, the Court relied heavily on *Marsh v. Alabama*, 326 U.S. 501 (1946). In *Marsh*, the Court held that the shopping district in a company-owned town was the functional equivalent of a public business district for First Amendment purposes. *Id.* at 507-08. The term "functional equivalent" is used to describe privately owned property that serves the same purpose as a publicly owned entity.

A number of state courts reached similar conclusions on the functional equivalent argument before the *Logan Valley* Court rendered its ruling. *See, e.g.*, *Moreland Corp. v. Retail Store Employees Local 444*, 16 Wis. 2d 499, 114 N.W.2d 876 (1962) (if shopping center owner designed property just like public business district, he lost right to ban otherwise lawful picketing as trespass); *Schwartz-Torrance Investment Corp. v. Bakery Workers Local 31*, 61 Cal.2d 766, 394 P.2d 921, 40 Cal. Rptr. 233 (1964), *cert. denied*, 380 U.S. 906 (1965) (picketing cannot be determined in terms of absolute property rights but in terms of a balance between opposing interests of the union and the lessor of the shopping center).

11. 192 N.L.R.B. 671 (1971).

12. 407 U.S. 551 (1972).

13. 407 U.S. 539 (1972).

14. In *Lloyd*, the Court held that an owner of private property could restrict First Amendment rights in two instances: when no direct relationship exists between the activity and the property, and other reasonable alternative means of reaching the intended audience exist. 407 U.S. at 563. For a critical analysis of the *Lloyd* Court's reading of *Logan Valley* see Comment, *Labor Picketing On Private Property and the Vexation of Logan Valley: The Nixon Court Responds in Hudgens v. NLRB*, 6 CAP. U.L. REV. 235, 247-66 (1976); Note, *Lloyd Corp. v. Tanner: The Demise of Logan Valley and the Disguise of Marsh*, 61 GEO. L.J. 1187 (1973).

In *Central Hardware*, the Court held that *Logan Valley* could not be applied to compel First Amendment access to a private parking lot surrounding a single, free-standing retail hardware store. 407 U.S. at 547. Moreover, the dissent in *Central Hardware* even questioned the propriety of applying the First Amendment to cases that could and should be decided under the NLRA. *Id.* at 549. For an extensive analysis of *Central Hardware*, see Note, 24 SYRACUSE L. REV. 861 (1973).

Commentators have written that the reason the Court addressed itself to constitutional issues in these shopping center cases instead of limiting its decision to statutory questions was that the composition of the Court changed from 1968, when *Logan Valley* was first decided, to 1976, when *Hudgens* was decided. It was felt that the new Court, dominated by appointees of former President Nixon, wanted to express its more restrictive view of the First Amendment than was held by the previous Court. *See* Comment, *Labor Picketing On Private Property and the Vexation of Logan Valley: The Nixon Court Responds in Hudgens v. NLRB*, 6 CAP. U.L. REV. 235 (1976).

15. The administrative law judge holds the initial hearing. He then prepares and files a proposed report of his findings of fact and recommendations of what action should be taken. Copies of the report are served upon all parties and filed with the Board. Either party may file exceptions to the law judge's report within 20 days after receipt of the copy. The report and recommendations of the law judge become the order of the Board unless timely exceptions are

cluded that Hudgens had committed an unfair labor practice.¹⁶ The Fifth Circuit affirmed¹⁷ and, in doing so, evaluated the other alternatives available to the picketers, such as using the public streets located five hundred feet from the mall. The court concluded that the distance made it difficult to read the picket signs, caused traffic dangers, posed difficulties in limiting the picketing effect to only Butler's store, and diluted the impact of the message.¹⁸ After the Fifth Circuit ruling, Hudgens petitioned for review in the Supreme Court, which granted certiorari.

In *Hudgens v. NLRB*,¹⁹ the Court reversed *Logan Valley* and held that no First Amendment rights existed in shopping center forums.²⁰ The case was remanded to the court of appeals and the NLRB for a determination of whether the picketers were protected by the NLRA. In remanding the case, the Court instructed the NLRB to look to *Central Hardware*²¹ and *NLRB v. Babcock & Wilcox Co.*²² Both cases involved the question of whether nonemployee union members had a right of access to private property to organize employees. In each case, the Court held that nonemployees did not have a right of access to private property because reasonable alternatives for relaying a pro-union message existed. In referring to these two cases on remand, the *Hudgens* Court noted three factors that distinguished *Central Hardware* and *Babcock & Wilcox* from *Scott Hudgens*.²³ First, *Scott Hudgens* included lawful economic strike activity rather than organizational activity. Economic strike activity embraces employee actions designed to enforce economic demands on the primary employer of the picketers. Organizational activity, on the other hand, usually involves actions by both nonemployees and sometimes off-duty employees. These actions are designed to encourage

filed to the report. See generally K. MCGUINNESS, HOW TO TAKE A CASE BEFORE THE NATIONAL LABOR RELATIONS BOARD (4th ed. rev. 1976).

16. The rationale of the administrative law judge was that no other reasonable alternatives existed for the picketers. *Scott Hudgens*, 205 N.L.R.B. 628, 631-32 (1973). The NLRB, in reaching the same conclusion, held that the picketers could not be excluded from the property for exercising their right to engage in concerted activity since they were within the scope of Hudgens' invitation to the public. *Id.*

17. *Hudgens v. NLRB*, 501 F.2d 161, 169 (5th Cir. 1974).

18. *Id.* For a full discussion of the treatment by the Fifth Circuit, see 44 GEO. WASH. L. REV. 130 (1975).

19. 424 U.S. 507 (1976).

20. *Id.* at 520-21. Justice Marshall, in his *Lloyd* dissent, portended the *Hudgens* decision four years before the Court reached it when he said, "one may suspect from reading the opinion of the Court that it is *Logan Valley* itself that the Court finds bothersome." 407 U.S. at 584.

21. 407 U.S. 539 (1972).

22. 351 U.S. 105 (1956).

23. 424 U.S. at 522.

employees to form a union. Second, the Section 7 activity in *Scott Hudgens* was performed by Butler's employees at the Butler warehouse, not the retail store where the strike activity took place.²⁴ Finally, the property interests allegedly violated in the case were not those of the employer against whom the Section 7 activity was directed but of the mall owner.²⁵ The NLRB held that none of the three distinguishing factors precluded a finding based on *Babcock & Wilcox* that Hudgens had violated Section 8(a)(1) of the NLRA.

EXTENSION OF *BABCOCK & WILCOX* TO ECONOMIC STRIKE ACTIVITY

The *Hudgens* Board relied on *Babcock & Wilcox* in its ruling. In *Babcock & Wilcox*, the Supreme Court denied nonemployee union organizers access to private property because reasonable alternatives for reaching the employees were available to them.²⁶ The Court noted, for example, that personal contact at the employees' living quarters was "reasonable reach" and was possible because the employees were a clearly defined group.²⁷ In so holding, the Court determined that under the NLRA nonemployees should have access to private property only when one of the following two conditions are met: when nonemployees can reach the employees they are seeking to organize in no other reasonable way, or when the employer has discriminated against nonemployees by banning them but allowing other union organizers access to the employees.²⁸

The *Babcock & Wilcox* Court distinguished employees from nonemployees, characterizing the difference between the two groups

24. This factor involves the question of whether the picketers should be considered employees of Butler and thus be given greater access to the property than would be afforded to nonemployees.

25. This is not to say that Hudgens was not a statutory employer under the NLRA. See note 9 and accompanying text *supra*.

26. 351 U.S. 105, 113 (1956). Under *Babcock & Wilcox*, a conclusive presumption developed that the nonemployee organizers had "reasonable" alternatives as long as any means existed, however limited, for contact with employees. See, e.g., *Dexter Thread Mills Inc.*, 199 N.L.R.B. 543 (1972) (nonemployee union organizers denied access to employer parking lot because reasonable alternative, although more expensive and less convenient, of copying employee license numbers from nearby public highway existed); *Monogram Models, Inc.*, 192 N.L.R.B. 705 (1971) (nonemployee union organizers denied access, despite danger created by distributing literature to employees in cars on public highways and despite greater inconvenience and expense of reaching employees through newspapers and other media in a big city); *Falk Corp.*, 192 N.L.R.B. 716 (1971) (nonemployee organizers denied access because license numbers and solicitation of company owned buses at bus stops on publicly owned property were available as alternatives). See generally *Broomfield, Preemptive Federal Jurisdiction over Concerted Trespassory Union Activity*, 83 HARV. L. REV. 552, 552-54 (1970); *Zimny, Access of Union Organizers to "Private" Property*, 25 LAB. L.J. 618, 620-21 (1974).

27. 351 U.S. 105, 113 (1956).

28. *Id.* at 112.

as "one of substance" in determining whether reasonable alternatives exist for communication with unorganized employees.²⁹ This distinction is valid because employees do not violate the employer's constitutionally protected property rights, while nonemployees do. Employees are entitled to be on the premises because of their work relationship. Nonemployees, on the other hand, are considered strangers whose presence violates the employer's right to be free of nonemployee interference.³⁰ Because of this distinction, courts have held that employers may not interfere with their employees' Section 7 rights of self-organization unless there is a valid reason, such as security,³¹ customer interference,³² or production and discipline.³³ Alternately, nonemployees can gain access in only a narrow range of cases.³⁴

29. *Id.* at 113.

30. *See* 54 B.U. L. REV. 199 (1974).

31. *See, e.g.,* McDonnell Douglas Corp. v. NLRB, 472 F.2d 539 (8th Cir. 1973), where the court upheld a rule prohibiting employees' distribution of union literature on company property for security reasons.

32. *See, e.g.,* Marshall Field & Co., 98 N.L.R.B. 88 (1952), *modified* 200 F.2d 375 (7th Cir. 1953), where it was determined that a store could prohibit solicitation in public areas of the store.

33. *See, e.g.,* Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945), where the Court held that an employer violated the NLRA by imposing a no-solicitation rule during working time since the rule was not legitimately based on production and discipline. Working time was those hours spent actually performing assigned tasks. Working hours, on the other hand, were those spent from the beginning to the end of the work shift. A rule prohibiting solicitation during working hours was presumptively invalid because it potentially restricted employees' activity during breaks, lunch hours, and other nonworking time when employees were on company property. *Id.* at 803-04, n.10, *citing with approval from* Matter of Peyton Packing Co., 49 N.L.R.B. 828, 843-44. *See generally* Note, *No-Solicitation and No-Distribution Rules: Presumptive Validity and Discrimination*, 112 U. PA. L. REV. 1049 (1964).

34. The narrow range of cases where nonemployees gain access include isolated lumber camps and company towns. *See, e.g.,* NLRB v. Stowe Spinning Co., 336 U.S. 226 (1949) (nonemployee union organizers allowed access to privately owned meeting hall in a company town); NLRB v. Lake Superior Lumber Corp., 167 F.2d 147 (6th Cir. 1948) (nonemployee union organizers allowed access to solicit within isolated lumber camp); Sabine Towing and Transp. Co., 205 N.L.R.B. 423, 426 (1973) (nonemployee union organizers allowed access to employees housed on deep sea tankers); Alaska Barite Co., 197 N.L.R.B. 1023, 1029 (1972), *enforced* 83 L.R.R.M. 2992 (9th Cir. 1973) (nonemployee union organizers granted access to a plant on small island in Alaska because of physical isolation of employees from personal contact with union); Interlake S.S. Co., 174 N.L.R.B. 308 (1969) (nonemployee union organizers allowed access to ships docked in port when employees spent almost all time at sea aboard the ship); Joseph Bancroft & Sons Co., 140 N.L.R.B. 1288 (1963) (nonemployee union organizers granted access when employees lived and worked on company property and other union solicitation attempts had failed).

Nonemployees also have gained access in cases involving isolated resorts. *See, e.g.,* NLRB v. S&H Grossinger's Inc., 372 F.2d 26 (2d Cir. 1967) (court enforced NLRB order granting nonemployee union organizers entrance to employer's hotel where most of the employees lived and worked to solicit). *But see* NLRB v. Kutsher's Hotel and Country Club Inc., 427 F.2d 200 (2d Cir. 1970) *denying enforcement of* 175 N.L.R.B. 1114 (1969) (nonemployee union organizers

The *Babcock & Wilcox* test has become the traditional standard for cases arising in an organizational context. The policy behind the rule is one of protecting the Section 7 rights of employees by granting nonemployee union organizers limited access to company property. The test balances these Section 7 rights against the employer's property rights "with as little destruction of one as is consistent with the maintenance of the other."³⁵

Before the *Scott Hudgens* case arose, the Board unsuccessfully attempted to extend the *Babcock & Wilcox* test to economic strike activity on private property.³⁶ Despite the result of that attempt, the *Scott Hudgens* Board again applied the *Babcock & Wilcox* test to economic strike activity.³⁷ The Board modified the discrimination test by saying that Hudgens, the mall owner, discriminated by opening up the property to the general public while refusing to let the employees picket.³⁸

denied access because union could solicit on public road crossed by most employees on their way to work). See also *NLRB v. Taamiment Inc.*, 451 F.2d 794 (3d Cir. 1971), *cert. denied*, 409 U.S. 1012 (1972), *denying enforcement of* 180 N.L.R.B. 1074 (1970) (nonemployee union organizers denied access because union could reach employees living on the premises of a self-contained adult summer camp by mail, posting notices at staff facilities, or by holding a union meeting).

35. 351 U.S. at 112.

36. The Board ruled in *Frank and Vincent Visceglia*, 203 N.L.R.B. 265 (1973), that the owner of an industrial park committed an unfair labor practice by threatening the pickets with arrest for trespass. The pickets were employees of a tenant of the park. The employees were picketing their own work place in the park. When they decided also to picket another building leased by their employer in a remote area of the park, they were threatened with arrest. The Board's ruling against the employer was overturned in the Third Circuit Court of Appeals for lack of substantial evidence to support the findings, *NLRB v. Visceglia*, 498 F.2d 43 (3d Cir. 1974). In addition to rejecting the Board's ruling on evidentiary grounds, the Third Circuit refused to take a stand on whether *Babcock & Wilcox* could properly be extended beyond organizational cases to economic picketing in industrial parks. *Id.* at 49.

37. The Board was under no obligation to use the *Babcock & Wilcox* test. The Supreme Court indicated when it remanded the case that the Board should determine whether *Babcock & Wilcox* was relevant to the *Scott Hudgens* facts. 424 U.S. at 522. Chairman Fanning, in his concurring opinion, underlined his approval of the *Hudgens* Board's use of the *Babcock & Wilcox* test. Fanning said the fact that *Babcock & Wilcox* involved organizational activity and *Scott Hudgens* involved economic activity was "irrelevant." 1977-78 N.L.R.B. Dec. (CCH) ¶ 18,290 (Fanning concurring). He asserted that since the rights of the passive employees in *Babcock & Wilcox* were considered "paramount," then "even greater deference" should be afforded employees actively asserting their statutory rights in *Scott Hudgens*. Finally, he said that the fact that the property rights interfered with in *Scott Hudgens* were not those of the employer against whom the Section 7 activity was directed, as in *Babcock & Wilcox*, had little significance. *Id.*

38. 1977-78 N.L.R.B. Dec. (CCH) ¶ 18,290 (Fanning concurring). The Board pointed out that members of the public were welcome at the mall, whether or not they came with the intent to buy. The Board then said that the pickets, as members of the public, "were apparently within the scope of the invitation and welcome as long as they did not picket." *Id.*

Such use of the test is unrealistic and impractical. Under this reasoning, Hudgens could have prevented a discrimination charge only by closing the center prior to banning the picketing. This result is highly unlikely to occur. The emphasis in *Babcock & Wilcox* on the element of discrimination detracts from the real issue in economic strike activity, which is the conflict that exists between property rights and labor rights.

Further, the employee/nonemployee distinction in *Babcock & Wilcox*, which is inherently appropriate for organizational activity because both groups are involved in unionizing efforts, is correspondingly irrelevant in economic strike activity for reasons other than its impracticality.³⁹ Economic picketing usually is carried on by striking employees in the local union rather than outside union members who are nonemployees. Striking employees are not strangers to the employer as are nonemployee union organizers. The distinction between employees and nonemployees is even more irrelevant when the employer is not the owner of the property, as was the case in *Scott Hudgens*. In that case, the owner of the Butler Shoe Company was not the owner of the mall. To Hudgens, the owner, all Butler's employees were "strangers." This was true whether the employees worked at the mall or the Butler warehouse. The *Hudgens* Board would have been more prudent if it had rejected the *Babcock & Wilcox* test and either fashioned a new standard or relied on one that is more applicable to economic strike activity.⁴⁰

The second part of the test espoused in *Babcock & Wilcox* dealt with whether nonemployees could reach the unorganized employees in any reasonable way other than on the employer's private property. It is appropriate to speak in terms of alternatives to communication in organization cases because organizers can easily identify the employee group they want to solicit. The employer's property is the most convenient place to reach the unorganized employees but it rarely is the only location.⁴¹

39. See Comment, *Labor Picketing on Private Property and the Vexation of Logan Valley: The Nixon Court Responds in Hudgens v. NLRB*, 6 CAP. U.L. REV. 235, 271 (1976).

40. For a criticism of the use of *Babcock & Wilcox* as the standard to be used by the Board, see Comment, *The First Amendment and Section 7 of the National Labor Relations Act: A Union's Right To Picket in the Privately Owned "Public" Forum*, 8 U. TOL. L. REV. 437, 466-70 (1977).

41. The NLRB and the courts have found a number of alternatives reasonable in situations involving nonemployee union organizers. See, e.g., *Babcock & Wilcox*, 351 U.S. 105 (1956) (visit to employees' homes); *Falk Corp.*, 192 N.L.R.B. 716 (1971) (mail, and employer granting permission for access to property); *Monogram Models, Inc.*, 192 N.L.R.B. 705 (1971) (telephone); *New Pines Inc.*, 191 N.L.R.B. 944 (1971), *enforcement denied on other grounds*, 468 F.2d 427 (2d Cir. 1971) (contacts at bars, taverns, and other places of recreation).

In economic strike activity, however, picketing is a tool used to communicate a different message to a different audience. The pickets' message is designed to apply economic pressure on the struck employers. In order to do so, employees attempt to generate sympathetic support from viewers.⁴² As a consequence, the effectiveness of the picketers to a large extent depends upon their proximity to the store. A shorter distance in time and space between when the shoppers learn of the pickets' message and when they approach the store results in more effective picketing activity. Any discussion of alternatives in economic strikes ignores the pickets' need for proximity to the location.⁴³ The Fifth Circuit Court of Appeals pointed this out in *Scott Hudgens* when it noted that the strategic nature of the primary strike makes the application of the *Babcock & Wilcox* alternative means test "patently inappropriate."⁴⁴

As the *Scott Hudgens* Board pointed out, the right to strike enjoys even greater protection than that afforded organizational activity.⁴⁵ For example, the 30-day limitation for organizational picketing set forth in the NLRA is not applicable to economic picketing by a recognized union.⁴⁶ In addition, the legitimate use of picketing as part

42. Picketing plays on the sympathies of the buying public and has the ability to create "psychic tension" in the potential patron, causing him to deny his patronage to the picketed store. Comment, *First Amendment Analysis of Peaceful Picketing*, 28 MAINE L. REV. 203, 208 (1976). See generally Haggard, *Picket Line Observance As a Protected Concerted Activity*, 53 N.C. L. REV. 43 (1974).

43. The ineffectiveness of alternatives to picketing was succinctly noted in *Hughes v. Superior Court*, 339 U.S. 460, 465 (1950):

Publication in a newspaper, or by distribution of circulars, may convey the same information or make the same charge as do those patrolling a picket line. But the very purpose of a picket line is to exert influences, and it produces consequences, different from other modes of communication. The loyalties and responses evoked and exacted by picket lines are unlike those flowing from appeals by printed word.

44. 501 F.2d 161, 168 (5th Cir. 1974).

45. 1977-78 N.L.R.B. Dec. (CCH) ¶ 18,290. The right to strike enjoys double protection under the NLRA. It is grounded in Section 7, which guarantees the right to self-organization, and is reinforced by Section 13, which provides in pertinent part:

Nothing in this subchapter, except as specifically provided for herein shall be construed so as to either interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

29 U.S.C. § 163 (1970).

The courts have consistently upheld federal labor policy by equating picketing with striking for purposes of Section 13 of the Act. See *NLRB v. Drivers Local 639*, 362 U.S. 274, 281 n. 9 (1960).

46. Although Section 8(b)(7)(c), 29 U.S.C. § 158 (b)(7)(c) (1970) places a 30-day limit on continuous organizational picketing, the NLRA places no time restriction on economic picketing. The *Scott Hudgens* Board acknowledged this distinction in a footnote. 1977-78 N.L.R.B. Dec. (CCH) ¶ 18,290 n. 21.

of the arsenal of strike weapons has repeatedly received protection from Congress, the Court, and the Board.⁴⁷ Moreover, strike action goes to the heart of the federal labor scheme.⁴⁸ It is used to implement and support the principles of the collective bargaining agreement.

In light of the preferential treatment for strike activity, it is clear that the right to strike, in direct contrast to the right to organize, requires a greater right of access to private property and, therefore, warrants a different test than that applied to organizational activity. To deny access to striking workers would drastically weaken the national scheme of labor relations. Requiring striking pickets to resort to television, radio, and newspaper advertisements would limit the ability of employees to put pressure on their employers and would seriously disadvantage the smaller and poorer labor unions. As a consequence, striking employees would be denied the protection Congress traditionally and consistently has afforded them.

The *Hudgens* Board gave proper weight to both Board and Court precedent as well as to cost to the union when it ruled in favor of granting the picketers access to the private property.⁴⁹ In so ruling, however, the Board should not have relied on a standard formulated for organizational cases. A more appropriate standard should focus on the particular factors involved in economic strike cases and should be consistent with Court and Congressional protection of the right to strike.

47. Congress has redirected national labor policy through various changes in the Taft-Hartley Act, but its concern for the strong continuation of the strike weapon has remained constant. For example, as the Court pointed out in *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 234-35 (1963):

[W]hen Congress chose to qualify the use of the strike, it did so by prescribing the limits and conditions of the abridgement in exacting detail. . . and by preserving the positive command of Section 13 that the right to strike is to be given a generous interpretation within the scope of the labor Act.

Court support of the strike weapon has been consistent. The Court recognized Congress' intent to preserve not only the right to strike but also the right to picket as a "major weapon to implement the goals of a strike" in *United Steel Workers of America v. NLRB*, 376 U.S. 492, 499 (1964). See also *NLRB v. International Rice Milling Co.*, 341 U.S. 665, 670 (1951) (agents of union who picketed unorganized mill and encouraged truckers of a neutral employer to refrain from going to the mill did not violate the NLRA's prohibition against secondary boycotts); *International Union of United Automobile Workers of America v. O'Brien*, 339 U.S. 454 (1950) (strike vote provisions of Michigan labor mediation law conflicted with NLRA).

The Board said in *Frank & Vincent Visceglia*, 203 N.L.R.B. 265, 267 (1973), that the NLRA gave employees the right to picket their own employer at a primary location.

48. See *Bus Employees v. Missouri*, 374 U.S. 74, 82 (1963). See also Straus, *Alternatives to the Strike*, 23 LAB. L.J. 387 (1972).

49. 1977-78 N.L.R.B. Dec. (CCH) ¶ 18,290.

PROPOSED STANDARD FOR PICKETING ON PRIVATE PROPERTY

Because of the history of Congressional support for peaceful picketing, the Board should have fashioned a standard in *Scott Hudgens* that would have given picketers a presumptive right of access to private property.⁵⁰ This presumptive right would be granted to all employees engaged in peaceful picketing protected by Section 7. An employer or mall owner could rebut this presumption by meeting the same standards now set for overriding employees' Section 7 organizational rights: a showing that the activity endangered customers, impeded security, or dangerously interfered with the essential operation of the property.⁵¹ By focusing on a balance between property and picketing rights, the presumption would be that employees have access to the property. At the same time, the proposed standard would serve a dual purpose: protecting peaceful picketing by ensuring that laborers in private malls be subject to the same NLRA protections as those employed in municipally owned business districts and giving employers a reasonable means of stopping any picketing that could prove dangerous to the public or the property involved.⁵²

Since the Board apparently was reluctant to fashion a new standard, it should have chosen a more appropriate existing standard. For example, the Board could have relied on case precedent governing common situs situations. Common situs situations are those which involve more than one employer occupying the same physical loca-

50. See Comment, *The First Amendment and Section 7 of the National Labor Relations Act: A Union's Right to Picket in the Privately Owned "Public" Forum*, 8 U. TOL. L. REV. 437, 468 (1977).

51. See notes 31-33 and accompanying text *supra*.

52. Ownership of private property has never been free from government restriction. However, the degree of regulation over property has changed over the years. For a comparison of this ever-changing concept of the nature of property, compare 1 W. BLACKSTONE, COMMENTARIES 139.

So great is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. . . . In vain may it be urged that the good of the individual ought to yield to that of the community; for it would be dangerous to allow any private man, or even any public tribunal, to be the judge of this common good, and to decide whether it be expedient or no.

with B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 87-88 (1921):

Property, like liberty, though immune under the Constitution from destruction, is not immune from regulation essential for the common good. What the regulation shall be, every generation must work out for itself. . . . Enough for my purpose at present that new times and new manners may call for new standards and new rules. . . .

tion.⁵³ *Scott Hudgens* was a clear common situs situation. Hudgens was a neutral mall owner whose property interests were affected because of a dispute that arose between one of his employer/tenants and the tenant's union. Equally neutral were the other employers leasing in the mall. Accordingly, the Board in *Scott Hudgens* should have applied the standard it fashioned for itself in *Sailors' Union (Moore Dry Dock Co.)* for guidance in such situations.⁵⁴ In *Moore Dry Dock*, the Board made it clear that primary picketing at a situs owned by a secondary employer could be allowed only if four conditions were met. The picketing must be limited to times during which the employer was actually at the site. The primary employer must be engaged in his ordinary course of business at the site. The picketing must be reasonably close to the actual location of the primary employer. Finally, any picketing signs used must clearly state that the dispute was only with the primary employer.⁵⁵ The courts have interpreted common situs guidelines to mean that a union must exercise its right to picket in common situs situations with restraint consistent with the right of neutral employers to remain uninvolved in the dispute.⁵⁶ Applying the *Moore Dry Dock* guidelines in *Scott Hudgens*, Local 315 would have been allowed to picket Butler in the mall while Butler was open for business. The pickets would carry signs that clearly disclosed that the dispute was with Butler and none of the other fifty-nine stores in the mall. The pickets would be as close to Butler as was reasonably possible. These guidelines fit the *Hudgens* facts comfortably without the strain that accompanies the application of the *Babcock & Wilcox* test to the same facts.

53. Common situs situations present the problem of determining whether a union is engaged in illegal action against an employer who is uninvolved in the labor dispute and therefore neutral. The problem is that any primary strike activity directed toward one employer at the site can very well affect all. The NLRA protects primary picketing, which is the term used when the union's object is to put pressure directly on the person who employs the union members. If the union's object is primary, any secondary effects do not make the picketing illegal under Section 8(b)(4), 29 U.S.C. § 158(b)(4) (1970), which is the secondary boycott provision of the NLRA. See generally Duerr, *Developing a Standard for Secondary Consumer Picketing*, 26 LAB. L.J. 585 (1975).

54. 92 N.L.R.B. 547 (1950). *Moore Dry Dock Co.* is a case in which crewmen of a ship picketed at the entrance gate to the Moore shipyard. Moore was the neutral employer.

55. *Id.* at 549.

56. See, e.g., *NLRB v. Fruit & Vegetable Packers Local 760*, 377 U.S. 58 (1964) (NLRA protected economic picketing of a secondary employer when picketers narrowly confined the message to the product of the primary employer); *Retail Fruit and Vegetable Clerks Local 1017*, 116 N.L.R.B. 856, enforced 249 F.2d 591 (9th Cir. 1957) (the secondary boycott ban does not, *per se*, bar common situs picketing; however, such picketing must be performed with restraint that preserves the right of a neutral employer to remain uninvolved).

IMPLICATIONS OF THE *HUDGENS* BOARD DECISION

The most obvious effect of the Board decision in applying the *Babcock & Wilcox* test as the standard for economic strike activity on private mall property is that the balance virtually is certain to be weighted in favor of the employees. In contrast, organizational activity usually involved the balance being struck in favor of the employer because it was felt that organizers usually could reach the unorganized employees through other means.⁵⁷ However, because the nature of picketing requires that workers be close to the employer's location during the strike and because picketing traditionally has been regarded with such profound respect by Congress and the judiciary, it would be unreasonable to predict anything but an almost guaranteed right of access for employees.⁵⁸

Thus, the *Scott Hudgens* decision caused a clear erosion of employer property rights and a corresponding reinforcement and strengthening of employee picketing rights. Employees can now picket in front of a store in a privately owned mall with the same impunity they would enjoy if the store were in a municipal district. They can picket the store in the mall even if the labor dispute with the employer arose at a location outside of the mall.⁵⁹

This result seems clearly reasonable and consistent with labor law precedent. Any other interpretation would result in the anomalous situation of downtown retailers being required to allow picketing while exempting retailers in private malls. Merchants in malls should be subject to the same legislation on labor issues that now governs their colleagues in public business districts. To immunize merchants in malls from picketers might create a situation in which employers could evade the law by seeking mall locations.⁶⁰

57. See note 34 and accompanying text *supra*.

58. See notes 42, 43, 47 and accompanying text *supra*.

59. 1977-78 N.L.R.B. Dec. (CCH) ¶ 18,290. The labor dispute originally arose at the Butler warehouse. Thereafter, the warehouse employees picketed Butler's retail outlet in the mall.

60. The *Scott Hudgens* Board's holding specifically was designed to prohibit employers from insulating themselves from Section 7 activities by relocating to leased locations in private malls. 1977-78 N.L.R.B. Dec (CCH) ¶ 18,290. If the current business trend of moving to shopping centers continues, as it is expected to, hundreds of thousands of employees would go without benefit of picketing rights if the Board had held that property rights should outweigh labor rights. In *Logan Valley*, a 1968 decision, the Court took note that by the end of 1966 there were between 10,000 and 11,000 shopping centers in the United States and Canada. This accounted for approximately 37 per cent of the total retail sales in those two countries. 391 U.S. 308, 324 (1968). The trend has not yet abated. See Note, *Shopping Center Picketing: The Impact of Hudgens v. National Labor Relations Board*, 45 GEO. WASH. L. REV. 812, 837 n.187 (1977).

Property owners probably can do little, if anything, to alter the effect of this decision on them. If mall owners establish no-solicitation and no-distribution rules and then uniformly enforce them, they probably will avoid charges of discriminatory treatment from unions. What remains unavoidable, however, is the fact that precedent virtually dictates that picketers be granted access to property because no other alternative to communicating their message could be considered reasonable. Thus, property owners not only will be obliged to grant access to picketers but also they probably will be unable to institute any rule limiting picketing to certain areas of the mall because the *Hudgens* Board specifically affirmed the right of the employees to picket in front of the mall.⁶¹

Geraldine R. Fehst

61. 1977-78 N.L.R.B. Dec. (CCH) ¶ 18,290. Although the *Scott Hudgens* decision resolved the question of whether laborers have a right of access to private property to picket their employer, it left unanswered one very important question: to what extent may the state be called in to enforce trespass laws against picketers? That question is expected to be resolved by the Court this term in *Sears Roebuck and Co. v. Council of Carpenters*, 17 Cal. 3d 893, 132 Cal. Rptr. 443 (1976), cert. granted, 430 U.S. 905 (1977) (No. 76-750). See Jay, *Shopping Centers As Battlegrounds Under the National Labor Relations Act*, 2 EMPLOYEE REL. L.J. 189, 201-02 (1976), for the view that the central legal issue in economic picketing in shopping centers is the extent to which states can enter the dispute.