Property Rights and Pre-Emption under the National Labor Relations Act

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I. INTRODUCTION

Traditionally, states have defined and protected the rights of real property owners. While the National Labor Relations Act does not purport to regulate property rights, activities of employees or labor organizations sometimes conflict with these rights. Employees and nonemployees alike may encroach on private property while picketing, patrolling, handbilling, or distributing literature in furtherance of primary economic strikes, membership campaigns, or consumer boycotts. Shopping centers with large parking lots and enclosed malls offer an attractive place for these activities; business and office complexes add new dimensions to the problem. The clash between the right to engage in these activities, which the National Labor Relations Act delineates, and the rights of the private property owner, which the states define and protect, has been intense. Recent decisions exemplify the procedural and substantive difficulties that arise. This Article will review these cases and examine their impact on state-created property rights and...
on federal pre-emption, based on the National Labor Relations Act, of state
court jurisdiction. This Article concludes that the National Labor Relations
Board erroneously values nonemployee rights above private property rights.
The issues presented in the pre-emption cases have not been resolved,
sometimes leaving the private property owner no remedy by which to en-
force his property rights and sometimes creating situations in which the states
may freely enforce state laws that diminish private property rights, but may
lose jurisdiction by federal pre-emption to enforce state laws that protect prop-
erty rights.

II. EMPLOYEE RIGHTS, NONEMPLOYEE RIGHTS, AND
PRIVATE PROPERTY RIGHTS UNDER THE ACT

Section 7 of the National Labor Relations Act (the Act) provides that
"[e]mployees shall have the right to self-organization, to form, join or assist
labor organizations . . . and to engage in other protected activities for the
purpose of collective bargaining or other mutual aid or protection." Under
section 8(a)(1) of the Act, an employer commits an unfair labor practice if
it "interfere[s] with, restrain[s], or coerce[s] employees in the exercise of
the rights guaranteed in Section 7." The National Labor Relations Board
(the Board) and the courts recognize that communication is essential to the
free exercise of organizational rights by employees so that they may "learn
the advantages and disadvantages of organization from others." Unions
deem picketing and handbilling essential to publicizing disputes with
employers, to gaining recognition as bargaining agents, to boycotting
retailers or the sale of a particular product, and to distributing information
to consumers or the general public.

Because employers invite or license employees to enter their premises
to perform work, employees rightfully on the property generally do not
trespass on the employer’s property when they engage in membership
solicitation, communication, or distribution of literature on the employer’s
property. If the employer adopts a “no access” rule, striking employees

2. Id. § 158(a)(1).
3. Central Hardware Co. v. NLRB, 407 U.S. 539, 543 (1972). See also
Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945); LeTourneau Co., 54
N.L.R.B. 1253 (1944).
4. See Eastex, Inc. v. NLRB, 437 U.S. 556 (1978) (employee handbilling);
NLRB v. Fruit & Vegetable Packers (Tree Fruits), 377 U.S. 58 (1964) (handbill-
ing pursuant to product boycott); Local Joint Executive Bd. (Crown Cafeteria),
135 N.L.R.B. 1183 (1962) (recognition picketing); Hod Carriers Local 41 (Calumet
Contractors Ass’n), 133 N.L.R.B. 512 (1961) (area standards picketing). For a
general discussion of picketing for organization and recognition, handbilling, and
consumer picketing, see THE DEVELOPING LABOR LAW 557-603 (C. Morris ed.
1971).
5. The validity of employer rules concerning solicitation and distribution by
and nonemployees usually have no right to enter the employer’s property because the employer is entitled to the enjoyment of his private property rights. When privately owned multiple tenant shopping centers or business complexes are involved, however, recent decisions indicate possible exceptions to this general rule.

A. NLRB v. Babcock & Wilcox Co.

In the 1956 benchmark case of *NLRB v. Babcock & Wilcox Co.*, the employer adopted a rule against nonemployee distribution of materials on company property and enforced the rule when nonemployee union organizers sought to distribute organizational materials in the parking lot surrounding the plant. The Board alleged that the rule violated section 8(a)(1) of the Act because it interfered with the employees’ right or that of a potential agent to engage in organizational activity. The United States Supreme Court recognized that in certain circumstances nonemployee union organizers may have a limited right of access to an employer’s premises to engage in organizational solicitation.

The Court reasoned:

[A]n employer may validly post his property against nonemployee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employees on company property is beyond the scope of this Article.

The distinction between employees and nonemployees is “one of substance. 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.... But no such obligation is owed nonemployee organizers.” *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956). *See also* Eastex, Inc. v. NLRB, 437 U.S. 556 (1978); Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945).

Employees employed in one building do not have a right of access to a separate building. *NLRB v. Visceglia*, 498 F.2d 43 (3d Cir. 1974). Off-duty employees have less rights than on-duty employees, *Diamond Shamrock Co. v. NLRB*, 443 F.2d 52 (3rd Cir. 1971), and off-duty employees have no greater rights of access than nonemployees, *GTE Lenkurs*, Inc., 204 N.L.R.B. 921 (1973). For these reasons, employees on strike and picketing are treated as off-duty employees with no rights of access as invitees or licensees. *Pickets* have no right to picket within a place of business. *Marshall Field & Co. v. NLRB*, 200 F.2d 375 (7th Cir. 1953).


employer’s notice or order does not discriminate against the union by allowing other distribution . . . .

This is not a problem of always open or always closed doors for union organization on company property. . . . Accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other.  

The Court emphasized that the rights involved were not the rights of the union organizer because the Act grants no rights to nonemployee organizers. Whatever rights the nonemployee has are derivative of the employees’ right to organize effectively. Section 7 does not grant independent statutory rights to a union or its agents.

The location of the activity and the employer rule prohibiting such activity on his property was the focus of the Babcock & Wilcox-type cases, not the object of the activity, which may have been lawful, even protected, under the Act. While the employees may have had a right to receive the communication or literature from nonemployees, the real question was whether this right could be exercised on the employer’s property in the face of his nondiscriminate exercise of his property right to bar the trespass.

Following Babcock & Wilcox, absent evidence of discriminatory implementation of a no access rule, the right of nonemployees to enter a private employer’s property for organizational activity generally was denied, except when unique obstacles prevented nontrespassory methods of communication with the employees. In 1970, one commentator concluded, “In fact a Union’s right of access actually has been upheld only when a substantial number of the employees reside on company property. . . . [T]hus, only in rare cases has union intrusion been held protected under the NLRA.”

B. Food Employees Local 590 v. Logan Valley Plaza, Inc.

Based on the limited federal regulation of the location of nonemployee or labor organization trespass, some state courts exercise their traditional equity jurisdiction to enjoin trespasses, even though they arose in a labor

8. Id. at 112.
9. Id. at 113.
11. 351 U.S. at 113.
12. If the employer’s rule is applied discriminatingly to permit some communication or activity, such as that engaged in by charitable or civic organizations, but to bar union activity, the rule generally is attacked under section 8 as discriminatory and therefore invalid.
In Food Employees Local 590 v. Logan Valley Plaza, Inc., this exercise of jurisdiction and the issuance of injunctive relief by the state court was challenged on the basis of interference with first amendment rights under the Constitution. Nonemployees had picketed peacefully on shopping center property in the immediate vicinity of a retail store that employed a wholly nonunion staff. The union members carried signs announcing that the employees were nonunion and were not receiving union wages or other union benefits. The Pennsylvania state court issued an injunction confining the picketing to public areas along the public roads at the outer edges of the shopping center parking lots.

The United States Supreme Court reversed, holding that the picketing was protected under the first and fourteenth amendments of the Constitution. Citing Marsh v. Alabama, the Court found that the shopping center in Logan Valley was the “functional equivalent” of a business district. The Court concluded:

It is clear that if the shopping center premises were not privately owned but instead constituted the business area of a municipality, which they to a large extent resemble, petitioners could not be barred from exercising their First Amendment rights there on the sole ground that title to the property was in the municipality. . . . Streets, sidewalks, parks and other similar public places are so historically associated with the exercise of First Amendment rights that access to them for the purposes of exercising such rights cannot constitutionally be denied broadly and absolutely.

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15. 391 U.S. 308 (1968) (overruled in Hudgens v. NLRB, 424 U.S. 507 (1976)).

16. 391 U.S. at 311-12.

17. Id. at 325.

18. 326 U.S. 501 (1946). In Marsh, a Jehovah’s Witness distributed literature on a sidewalk in a company-owned town. When she refused to leave the sidewalk as requested, she was arrested and convicted of violating a state law that prohibited remaining on the premises of another after a warning to leave. The Supreme Court reversed the conviction, holding that the company’s ownership of the sidewalk did not justify the deprivation of first and fourteenth amendment freedoms. Id. at 508-10.


20. Id. at 315.
Justice Black, who authored the Court's opinion in Marsh, dissented strongly, stating that "[t]o hold [that] store owners are compelled by law to supply picketing areas for pickets to drive store customers away is to create a court-made law wholly disregarding the constitutional basis on which private ownership of property rests in this country." \(^{21}\)

The first application of Logan Valley arose in Lloyd Corp. v. Tanner. \(^{22}\) Lloyd Corporation operated a shopping center with a strict policy against the distribution of handbills within the building complex and its malls. When the respondents entered the mall distributing handbills objecting to the ongoing American military operations in Vietnam, security guards told them to leave, which they did to avoid arrest. The protesters brought suit in a federal district court, claiming interference with their first and fourteenth amendment rights and seeking declaratory and injunctive relief. Relying on Logan Valley, the trial court granted the relief sought, and the United States Court of Appeals for the Ninth Circuit affirmed. \(^{23}\)

The Supreme Court reversed, and although it did not expressly overrule Logan Valley, the Court's analysis in Lloyd demonstrated that the rationale of Logan Valley was incompatible with the holding in Lloyd. While a major segment of the Court's opinion in Lloyd was devoted to distinguishing the two cases, emphasizing the distinction between the handbilling in Lloyd and the picketing in Logan Valley and noting that the Logan Valley picketers had no other reasonable opportunity to reach their intended audience, the basic issue was whether the plaintiffs had a first amendment right to distribute handbills on the shopping center property, contrary to the shopping center's policy against all handbilling. The Court concluded that the shopping center owner had not dedicated his private property to public use to such an extent that his private property rights gave way to the plaintiffs' first amendment rights. \(^{24}\)

Logan Valley was further questioned in Central Hardware Co. v. NLRB, \(^{25}\) which involved an organizing campaign by nonemployee organizers on the parking lot surrounding a free-standing retail store. The Supreme Court held the Babcock & Wilcox test to be applicable and expressly found that Logan Valley, on which the Board had relied, was inapplicable. \(^{26}\) The Court also defined the narrow scope of the Babcock & Wilcox limitation on property rights: "In short, the principle of accommodation announced in Babcock is limited to labor organization campaigns, and the 'yielding' of property rights it may require is both temporary and minimal." \(^{27}\)

\(^{21}\) Id. at 332-33 (Black, J., dissenting).
\(^{22}\) 407 U.S. 551 (1972).
\(^{23}\) Id. at 552-57.
\(^{24}\) Id. at 569-70.
\(^{26}\) Id. at 542, 547-48.
\(^{27}\) Id. at 545.
C. Hudgens v. NLRB

The last vestiges of Logan Valley, at least in a labor relations case, were swept away in Hudgens v. NLRB.\(^2\) The balancing test that emerged, however, may have for a time obscured the general exclusionary rule approved in Babcock & Wilcox and reaffirmed in Central Hardware. In Hudgens, union employees engaged in peaceful primary picketing in furtherance of their contract negotiation demands with Butler Shoe Company. The strikers picketed not only Butler’s warehouse, the location of their employment, but also a Butler retail store located in a shopping center owned by Hudgens. The striking employees entered the center’s enclosed mall and picketed in front of Butler’s shoe store. An agent of the shopping center owner twice informed the strikers that they could not picket within the mall or on the surrounding parking lots and threatened them with arrest for trespass if they did not leave. The union filed unfair labor practice charges against the shopping center owner, alleging interference with rights protected by section 7 of the Act.\(^3\)

The Board, relying on Logan Valley and Babcock & Wilcox, entered a cease and desist order against the mall owner, stating that the warehouse employees enjoyed a first amendment right to picket on the shopping center property and that the owner’s threats of arrest violated section 8(a)(1). The Board concluded that the pickets were within the scope of the owner’s invitation to the public to do business at the shopping center and, therefore, that it was immaterial whether alternate means of communicating with the customers and employees of the Butler store existed. The United States Court of Appeals for the Fifth Circuit affirmed, employing a hybrid Logan Valley/Babcock & Wilcox test.\(^4\)

The question presented to the Supreme Court was whether the rights of the parties were to be decided under the National Labor Relations Act, under the first amendment, or under some combination of the two standards. The Court noted that the constitutional guarantee of free speech was a guarantee only against abridgement by government and made it clear that Logan Valley did not survive Lloyd.\(^5\) The Court concluded:

> [I]f the respondents in the Lloyd case did not have a First Amendment right to enter that shopping center to distribute handbills concerning Vietnam, then the pickets in the present case did not have a First Amendment right to enter this shopping center for the purpose of advertising their strike against the Butler Shoe Co.\(^6\)

After stating that the “constitutional guarantee of free expression has no

29. Id. at 509-10.
31. 424 U.S. at 518.
32. Id. at 520-21.
part to play in a case such as this," the Court concluded that the standard was the Babcock & Wilcox "accommodation" of section 7 rights and property rights "with as little destruction of one as is consistent with the maintenance of the other."  

The shopping center owner argued that Babcock & Wilcox permitted only organizational communication, not picketing. Noting possible distinctions between organizational activity and primary picketing in furtherance of an economic strike, the Court held that the primary responsibility for making the accommodation rested with the National Labor Relations Board. The Court noted that "[t]he locus of that accommodation, however, may fall at differing points along the spectrum depending upon the nature and strength of the respective § 7 rights and private property rights asserted in any given context." On remand, the Board found that the striking employees had a section 7 right to engage in lawful primary picketing in the shopping center mall at the entrance to the Butler retail store, emphasizing that this was the only entrance to the Butler store and that picketing elsewhere would not insure that the message sought to be conveyed would reach customers of Butler.

D. Recent Developments: Clashes Between the Board and the Courts of Appeals

Any suggestion that the general rule permitting exclusion of nonemployees was modified by the Supreme Court's Hudgens restatement of the Babcock & Wilcox rule seemingly was rejected by the Court in 1978 when it summarized the decisions applying Babcock & Wilcox and reaffirmed its strength in Sears, Roebuck & Co. v. San Diego County District Council of Carpenters:

While Babcock indicates that an employer may not always bar nonemployee union organizers from his property, his right to do so remains the general rule. To gain access, the union has the burden of showing that no other reasonable means of communicating its organizational message to the employees exists or that the employer's

33. Id. at 521.
34. Id. at 522 (quoting NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 112 (1956)).
35. Section 8(a)(1) prohibitions apply only to "employers." The shopping center owner contended that he was not an employer subject to section 8 because he did not employ the striking employees. The Supreme Court stated that "[w]hile Hudgens was not the employer of the employees involved in this case, . . . he was an employer engaged in commerce within the meaning of §§ 2(6) and (7) of the Act, 29 U.S.C. §§ 152(6) and (7) . . . . [A] statutory 'employer' may violate § 8(a)(1) with respect to employees other than his own." 424 U.S. at 510 n.3.
36. 424 U.S. at 522.
37. Id.
access rules discriminate against union solicitation. That the burden imposed on the union is a heavy one is evidenced by the fact that the balance struck by the Board and the courts under the Babcock accommodation principle has rarely been in favor of trespassory organizational activity.40

Nevertheless, the shopping center cases have caused disagreement between the Board and the courts, with the office building and industrial park cases also presenting some difficulties.41 The Board and the courts have disagreed on what constitutes inaccessibility or whether substantial evidence supported the Board’s conclusions of inaccessibility in the trespass cases.42 In the two recent cases discussed below, the Board has taken a more expansive view of statutory protection than the courts seem willing to accept, although the rationales of the reviewing courts differ.

In Hutzler Brothers Co. v. NLRB,43 nonemployee organizers sought to distribute handbills at entrances to a free-standing retail store from a lower level parking lot. When security guards requested the organizers to leave, the union filed unfair labor practice charges, which were upheld by the Board. The Board concluded that access, by other means, to the store employees was so difficult “that only by access to Respondent’s property . . . could meaning be given to the Section 7 rights of Respondent’s employees.”44 The United States Court of Appeals for the Fourth Circuit reversed, finding that the evidence did not support the Board’s conclusion that access to store property was required by the absence of other reasonable available avenues of communication.45 The court relied on the strong reaffirmation of Babcock & Wilcox in Sears and held that “[t]he ultimate question . . . is not whether organizational contact of employees is difficult but whether the difficulty can be reasonably overcome.”46

In Giant Food Markets, Inc.,47 the Board focused on the effectiveness of alternate means of communication as well as the strength of the section 7

40. Id. at 205. See also United Steelworkers v. NLRB, 646 F.2d 616, 628-29 (D.C. Cir. 1981) for a similar restatement of the rule.
41. For cases involving industrial parks, see, e.g., Eisenberg v. Holland Rantos Co., 583 F.2d 100 (3rd Cir. 1978); NLRB v. Visceglia, 498 F.2d 43 (3rd Cir. 1974). For a case involving an office building, see Seattle-First Nat’l Bank v. NLRB, 651 F.2d 1272 (9th Cir. 1980).
43. 630 F.2d 1012 (4th Cir. 1980).
45. 630 F.2d at 1017-18.
46. Id. at 1017.
47. 241 N.L.R.B. 727 (1979), enforcement denied, 633 F.2d 18 (6th Cir. 1980).
rights involved. This case involved area standards picketing and handbilling, rather than the primary economic picketing of Hudgens. As in Babcock & Wilcox and Central Hardware, nonemployees intruded on the private property; in both Babcock & Wilcox and Central Hardware, however, the purpose was communication pursuant to organizing activities. Thus, in Giant Food the Board could place the activity involved on the "spectrum" of Hudgens and distinguish employees engaged in primary economic activity, nonemployees engaged in organizational activity, and nonemployees engaged in a consumer boycott, as it sought to accommodate the section 7 rights and the private property rights. Because area standards picketing, certain publicity boycotts, and primary economic picketing usually are protected by section 7 if properly conducted, the question presented to the Board in view of Hudgens was where the locus of the accommodation in this case fell on the statutory spectrum, based on the relative strengths of these rights.

While area standards picketing generally is intended to benefit and protect strangers to the employment relationship, the Board emphasized that it was "this employer which the Union charges is undermining the livelihood of the represented employees in the area" and that there was "a strong possibility in such a situation that such union activity, if successful, would inure to the benefit of the employer’s employees through increased compensation." Having given such stature to the area standards activity, the Board considered the intended audience and the "effectiveness of the communication," using a Logan Valley analysis, albeit disguised by citation to Hudgens. The Board concluded that requiring the nonemployees to picket off private property at the entrances to the parking lot of the shopping center "would too greatly dilute the Union's message for it to be meaningful." Based on this slim reed, the Board thus granted to the nonemployees engaged in area standards picketing greater rights than nonemployees engaged in organizational activity and the same rights as employees engaged in primary economic activity.49

48. 241 N.L.R.B. at 728 (emphasis added).
49. Id.
50. Id. at 729.
52. In Seattle-First Nat'l Bank v. NLRB, 651 F.2d 1271 (9th Cir. 1980), a case involving primary economic picketing, the court was concerned with the dilution of the message resulting from confining the picketing to the building entrances rather than allowing picketing on the 46th floor foyer of the restaurant with which the union had a dispute. "Restricting picketing to the entrances to the building would substantially dilute the union’s section 7 rights since the effectiveness of a picket line depends on the location." Id. at 1276. The court concluded that "allowing picketing on the 46th floor permits the union to implement its section 7 rights effectively... while accommodating the petitioner’s private property rights..." Id.
The Board’s failure in Giant Food to accept the Supreme Court’s announcements is brought into sharper focus as the Board was confronted with the Supreme Court’s strong suggestion in Sears that area standards picketing may be entitled to less protection than was given to the organizational solicitation of Babcock & Wilcox and the primary economic picketing of Hudgens. The Board suggested that the Supreme Court in Sears “did not fully examine and set forth the differences between such oral solicitation and consumer picketing and the Union’s substantial justification for seeking to maintain area standards.” Nevertheless, because “the right to organize is at the very core of the purposes for which the NLRA was enacted,” and primary economic picketing by employees is an indispensable companion to collective bargaining, the Board’s grant of equal or preferential status to the at best, implied right of unions to engage in area standards picketing is difficult to reconcile with the Supreme Court decisions.

A review of the cases since Hudgens demonstrates that the Board continues to misperceive the pronouncements of the Supreme Court, as it did earlier in its initial decisions in Central Hardware and Hudgens, and continues

53. In Sears, the Court questioned whether area standards picketing is entitled to the same protection as organizational solicitation. The Court noted that the right to organize is at the very core of the purpose for which the NLRA was enacted. Area-standards picketing, in contrast, has only recently been recognized as a § 7 right. . . . [and] has no . . . vital link to the employees located on the employer's property. While such picketing may have a beneficial effect on the compensation of those employees, the rationale for protecting area-standards picketing is that a union has a legitimate interest in protecting the wage standards of its members who are employed by competitors of the picketed employer.


54. 241 N.L.R.B. at 729 n.11.


56. On appeal, the United States Court of Appeals for the Sixth Circuit noted that the Board’s grant of such status to area standards activity “leads to a rather anomalous conclusion that private property rights may have to yield more often to the protected right to engage in area standards picketing than to other union activities for which the law has forged a long-standing protected status.” Giant Food Markets, Inc. v. NLRB, 633 F.2d 18, 24 (6th Cir. 1980). Nevertheless, the court did not deny enforcement for this reason, but rather because it could not find substantial evidence on the record to support the Board’s findings that the message would be diluted if the activity were confined to the outer edge of the shopping center and that conducting the activity at that location would also involve neutral employers in the dispute. Id. at 26.

57. On remand in Hudgens, the Board demonstrated continued allegiance to
to push for an overly expansive view of nonemployee rights at the expense of property rights. 

Statutory analysis may support the right of striking employees to focus their primary economic weapons on the employer with whom they have a dispute, even when it is but one tenant among many in an office building or a shopping center, as in Hudgens. Nevertheless, careful factual analysis and substantial evidence concerning the lack of other reasonable means of communication is necessary to justify nonemployee organizational communication on private property in the shopping center, office complex, or industrial park. With respect to appeals by nonemployees not to buy merchandise or not to patronize a particular store—the message inherent in area standards picketing—and other forms of consumer picketing and handbilling, Babcock & Wilcox, Central Hardware, and Hudgens require

Logan Valley, emphasizing that "the walkways on the common areas of the Mall near the Butler Store, although privately owned, are, during business hours, essentially open to the public and . . . are the equivalent of sidewalks for the people who come to the Center." Scott Hudgens, 230 N.L.R.B. 414, 417 (1977).

In a recent case involving a retail store that also operated a restaurant, the Board found Babcock & Wilcox inapplicable, stating that "the Babcock & Wilcox rationale typically controls in situations where union organizers use 'private' property to which the public is not invited in a manner inconsistent with the property's intended purpose, rather than use of a public restaurant for personal discussion while dining." Montgomery Ward & Co., 256 N.L.R.B. No. 134, 107 L.R.R.M. 1307, 1308-09 (June 22, 1981) (footnote omitted).

58. The rationale of the Board's post-Hudgens holdings in the shopping center cases is clear. The activity is permitted on the shopping center private property rather than the outer perimeters of the center because the intended audience first must be identified for effective communication, which can only be done near the specific store. This also will avoid involving neutral employers in the dispute. The flaw in this rationale is that identification is difficult, even near the specific store, because of the flow of customers to and from that store and others. Also, the Board has not demonstrated a similar concern for neutral employers in cases arising under the secondary boycott provisions of the Act, which were designed to insulate neutral employers from primary activity. See Florida Gulf Coast Bldg. Trades Council, 252 N.L.R.B. 99 (1980), aff'd sub nom. Edward J. DeBartolo Corp. v. NLRB, 108 L.R.R.M. 2729 (4th Cir. Oct. 20, 1981); Pet, Inc., 244 N.L.R.B. 96 (1979), enforcement denied, 641 F.2d 545 (8th Cir. 1981).

59. In Seattle-First Nat'l Bank v. NLRB, 651 F.2d 1272 (9th Cir. 1980), the court permitted primary economic picketing on the 46th floor of an office building in front of the primary employer restaurant and stated:

The right to picket in support of an economic strike is at the core of section 7 . . . Accordingly, unions should be allowed to picket in support of a strike in an effective manner whenever possible. A different accommodation might be appropriate if some activity not at the core of section 7, such as area standards picketing, were at issue.

Id. at 1276. The court concluded that, in order to accomplish the Hudgens accommodation of union rights under section 7 and private property rights, the Board had to revise its order to restrict properly the number of pickets and their behavior on the 46th floor. Id. at 1277.
that private property rights prevail. Such appeals are decidedly different from the communication directed to employees in an organizing campaign. If conducted for substantial periods of time, such publicity campaigns can have a dramatic impact on business. Thus, the interference is not "temporary or minimal" under Central Hardware. To paraphrase the Logan Valley dissent of Justice Black, whose credentials as an advocate of free speech cannot be questioned, to hold that store owners or shopping center owners are compelled by law to supply picketing areas for pickets to drive customers away is to create Board-made law wholly disregarding the constitutional rights on which private ownership of property rests in this country.

III. FEDERAL PRE-EMPTION OF STATE COURT JURISDICTION IN TRESPASS CASES

When confronted with picketing on their shopping center private property, employers may resort, as those in Logan Valley and Giant Food, to a traditional remedy to end the trespass: the state court injunction. Having lost the first amendment substantive bar to such suits in Hudgens, defendants may advance the doctrine of federal pre-emption to bar state court jurisdiction.

A. Sears, Roebuck & Co. v. San Diego County District Council of Carpenters

Federal pre-emption of state court jurisdiction based on the Act stems from the supremacy clause of the Constitution and the desire to avoid conflicts in overlapping federal and state jurisdiction. While the pre-emption doctrine has had a long and tortuous history, the Supreme Court did not decide whether a state court can enforce local trespass laws against peaceful picketing in the labor relations context until Sears, Roebuck & Co. v. San Diego County District Council of Carpenters.

61. See cases cited note 14 supra; Broomfield, supra note 13.
62. Missouri cases have contributed significantly to the development of the pre-emption doctrine. See, e.g., Anheuser-Busch, Inc. v. Weber, 364 Mo. 573, 265 S.W.2d 325 (1954), rev'd, 348 U.S. 468 (1955); Empire Storage & Ice Co. v. Giboney, 357 Mo. 671, 210 S.W.2d 55 (En Banc 1948), aff'd, 336 U.S. 490 (1949).
63. 436 U.S. 180 (1978). The Court had left the issue open in Meatcutters v. Fairlawn Meats, Inc., 353 U.S. 20 (1957). In Taggart v. Weinacker's, Inc., 283 Ala. 171, 214 So. 2d 913 (1968), cert. dismissed per curiam, 397 U.S. 223 (1970), the Supreme Court had granted certiorari to review an Alabama state court injunction against peaceful picketing on private property, but later dismissed certiorari as improvidently granted. Chief Justice Burger and Justice Harlan, in separate memoranda, explored the issue of federal pre-emption. See 397 U.S. at 227 (Burger, C.J., concurring); id. at 229 (Harlan, J., dissenting).
In *Sears*, the carpenters' union claimed that work at the Sears retail store should have been performed by men dispatched from the union hall or performed by a contractor who employed carpenters dispatched under the terms of the union's master labor agreement. When Sears disagreed, the union picketed on private walkways next to the free-standing building, which was surrounded by a large parking lot. Sears obtained an injunction in a California state court against the picketing. On appeal, the California Supreme Court determined that the picketing was either "arguably protected" by section 7 or "arguably prohibited" by section 8 of the Act and held that state jurisdiction was thus pre-empted under *San Diego Building Trades Council v. Garmon.*

Garmon had held that "[w]hen an activity is arguably subject to Section 7 or Section 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." The United States Supreme Court in *Sears* cited Garmon with approval, but noted that "the history of the labor pre-emption doctrine in this Court does not support an approach which sweeps away state court jurisdiction over conduct traditionally subject to state regulation without careful consideration of the relative impact of such a jurisdictional bar on the various interests affected." The Court noted it had allowed state enforcement of certain laws of general applicability, even though aspects of the challenged conduct were arguably prohibited by section 8 of the Act, and had upheld state court jurisdiction over conduct that touches "interests so deeply rooted in local feeling and responsibility, that in the absence of compelling congressional direction, . . . [the Court] could not infer that Congress had deprived the States of the power to act." The Court in *Sears* concluded that the only focus of the state court action was the location of the picketing and not its object or purpose. Thus, whether the conduct was arguably prohibited by section 8 of the Act was not important because "no realistic risk of interference with the Labor Board’s primary jurisdiction to enforce the statutory prohibition against unfair labor practices . . . [existed. The reasons for pre-emption were] insuffi-
Whether the "arguably protected" character of the picketing justified pre-emption of the state court's jurisdiction involved somewhat different considerations. Nevertheless, the Court found that this character also was insufficient to deprive the state court of jurisdiction, holding that

[a]s long as the union has a fair opportunity to present the protection issue to the Labor Board, it retains meaningful protection against the risk of error in the state tribunal. In this case the Union failed to invoke the jurisdiction of the Labor Board, and Sears had no right to invoke that jurisdiction and could not even precipitate its exercise without resort to self-help. Because the assertion of state jurisdiction in a case of this kind does not create a significant risk of prohibition of protected conduct, we are unwilling to presume that Congress intended the arguably protected character of the Union's conduct to deprive the . . . [state] courts of jurisdiction to entertain Sears' trespass action.\textsuperscript{69}

This implied limitation of the holding to the situation where the union had not filed unfair labor practice charges sparked a controversy that prompted Justices Blackmun and Powell to file concurring opinions. Justice Blackmun would have held that if the union had filed an unfair labor practice charge, the issue of trespassory picketing could have been brought before the Board in a timely fashion without the danger of violence. He concluded, therefore, that the logical corollary of the Court's reasoning is that if the union does file a charge after the employer asks it to leave the employer's property and if the union continues to process the charge expeditiously, "state court jurisdiction is pre-empted until such time as the General Counsel declines to issue a complaint or the Board, applying the standards of \textit{NLRB v. Babcock \\& Wilcox Co.} . . ., rules against the union and holds the picketing to be unprotected."\textsuperscript{70} With respect to this suggestion, Justice Powell sharply disagreed:

In sum, I do not agree with Mr. Justice Blackmun that the "logical corollary of the Court's reasoning" in its opinion today is that state court jurisdiction is pre-empted forthwith upon the filing of the charge by the union. I would not join the Court's opinion if I thought it fairly could be read to that effect.\textsuperscript{71}

A review of the various opinions filed in \textit{Sears} leads to the conclusion that the delicate balance of state and federal jurisdiction in this area has not been resolved decisively.\textsuperscript{72}

\textsuperscript{68} 436 U.S. at 198.
\textsuperscript{69} \textit{Id.} at 207.
\textsuperscript{70} \textit{Id.} at 209 (Blackmun, J., concurring) (citation omitted).
\textsuperscript{71} \textit{Id.} at 214 (Powell, J., concurring).
\textsuperscript{72} Three Justices dissented, finding that state court jurisdiction was pre-
If the mere filing of a charge with the Board pre-empts state court jurisdiction, then "it leaves the employer with a qualified right of exclusion which it is usually unable to enforce." Under existing procedures, several weeks may pass before the Board makes an investigative determination that the employees' section 7 rights outweigh the employer's private property rights, and a final determination may not come for over a year. This "no man's land" concerned Chief Justice Burger in his *Taggard v. Weinacker's, Inc.* memorandum. The superficial application of Garmon's "arguably protected" label results in a hiatus that Justice White also has criticized on at least two occasions. Given this recognition of the problems in applying Garmon when legitimate state claims are asserted and the historical state concern in protecting property rights, the *Sears* Court should have provided a more definitive resolution of the pre-emption issue.

Until *Sears* is revisited, state courts must determine whether substantial federal rights under section 7 arguably outweigh the private property rights, unless the Board has determined to proceed formally to resolve the section 7 issue. Only the shopping center and business complex cases and other unique situations should raise serious questions of pre-emption. In making this determination of state jurisdiction, the state courts must look to *Babcock & Wilcox*. The issue is not whether section 7 protects the activity, but whether section 7 protects the activity at that location. This, in turn, demonstrates the need for more definite federal guidelines in the shopping center and business complex cases.

B. The Missouri Situation: State ex rel. Retail Store Employees Local 655 v. Black

The Missouri Court of Appeals for the Eastern District was recently presented with a pre-emption problem in *State ex rel. Retail Store Employees Local 655 v. Black*. Employees engaged in a primary economic strike against their employer and picketed a retail store in a shopping center of twenty-four retail stores. The employees picketed on the sidewalk directly in front of the store operated by their employer. The employer threatened arrest if the pickets did not leave the premises. The union filed unfair labor practice charges with the Board, and the regional director issued a complaint. Meanwhile, the

empted because the activity was arguably protected under section 7. See id. at 214-15 (Brennan, J., dissenting).

73. Broomfield, supra note 13, at 568-69.
74. The long history of the state and federal litigation in *Giant Foods* amply demonstrates the delays involved. Giant Food Markets, Inc. v. NLRB, 633 F.2d 18, 20 n.6 (6th Cir. 1980).
75. 397 U.S. 223, 227 (Burger, C.J., concurring) (dismissal of certiorari).
77. 603 S.W.2d 676 (Mo. App., E.D. 1980).
picketing resumed and the employer and shopping center owner filed a petition in the circuit court for a temporary restraining order against the picketing. The employer alleged that the picketing obstructed access to the store. The court issued a restraining order prohibiting picketing on the shopping center property. The union filed a petition with the court of appeals for a writ of prohibition to prevent the circuit court from enforcing its order.\textsuperscript{78}

The court of appeals concluded that the state court’s jurisdiction was appropriate to regulate obstruction of access to the property, but that the portion of the order enjoining all picketing on the plaintiffs’ private property was beyond the circuit court’s jurisdiction.\textsuperscript{79} The court concluded:

\begin{quote}
[T]he determination of whether the exigencies of the situation command that picketing be permitted on the employer’s private property must be made by the NLRB in the first instance. . . . It is clear that a decision of this scope is to be made only by the NLRB and that state court jurisdiction is pre-empted in that regard.\textsuperscript{80}
\end{quote}

Significantly, on this important point, the court did not cite the \textit{Sears} analysis and its various opinions.\textsuperscript{81} As authority for this pre-emption of trespass action holding, the court cited \textit{Logan Valley}, which is at best discredited, if not overruled; \textit{Babcock \& Wilcox}, which held that as a general rule trespass on private property is not permitted; and \textit{Hudgens}, which reversed a Board holding under \textit{Logan Valley} that the activity was protected.\textsuperscript{82} Because the regional director had issued a formal complaint rather than dismissing the union’s unfair labor practice charges and because primary economic picketing by employees at a shopping center was involved, the Missouri decision probably is correct. Nevertheless, in this difficult area, the court’s opinion should have elaborated more fully on the criteria and rationale underlying its decision that state jurisdiction was pre-empted.\textsuperscript{83}

\begin{footnotes}
\item 78. \textit{Id.} at 678.
\item 79. \textit{Id.} at 679. The court properly noted that the mere commencement of an action before the Board does not require this conclusion. \textit{Id.} at 681. The court also noted that the doctrine of pre-emption did not affect the state court’s jurisdiction in cases of particular local interest, citing cases involving infliction of emotional distress, defamation of character, libel, and picket line violence. \textit{Id.} at 679.
\item 80. \textit{Id.} at 681.
\item 81. The court did not overlook \textit{Sears}. It cited \textit{Sears} earlier in the opinion for the proposition that the state court did retain jurisdiction to enjoin trespass under the \textit{Garmon} line of cases. \textit{Id.} at 679.
\item 82. \textit{Id.} at 681.
\item 83. The court’s analysis had another flaw. It stated:
\begin{quote}
We concede that the NLRB may decide that this dispute does not involve the requisite factors to permit the union to picket on private property, which would mean that the union’s rights would not be infringed by the Circuit Court’s injunction. But enforcement of that decision would still remain within the realm of the NLRB by a federal district court injunction—not the state court.
\end{quote}
\begin{quote}
\textit{Id.} at 681-82. The Board, however, has only limited authority to seek an injunc-
\end{quote}
\end{footnotes}
C. Pruneyard Shopping Center v. Robins

Application of a strict federal pre-emption doctrine also should be restrained by the holding in Pruneyard Shopping Center v. Robins. There, the Supreme Court upheld a California state court decision that granted the right to engage in certain publicly expressive activities on private property as a matter of state constitutional law. The shopping center owner contended that under federal law individuals have no right to trespass on private property, even to exercise their rights of free speech, citing Lloyd. Nevertheless, the Supreme Court held that the enforcement of state laws that diminished private property rights was not pre-empted by federal law and that the California state court’s decision to protect rights of expression did not infringe on the shopping center owner’s federally recognized property rights.

Because this case did not involve employee rights or union activities under the National Labor Relations Act, it technically can be squared with the concept of pre-emption under the labor relations cases. As the history of the litigation in this area demonstrates, however, the activities of employees, nonemployees, and others in a labor dispute can involve elements of free speech. Therefore, the protection of interests involved cannot be so specifically categorized and segregated. California courts have interpreted state statutes to permit picketing on private property in a labor relations dispute and to deprive the state courts of jurisdiction to issue an injunction in such cases.

When read together, Pruneyard and Sears seemingly create the following dilemma: as a general rule, the states may enforce state laws that limit private property rights when trespassory activities are involved, but because of federal pre-emption considerations, the states lose jurisdiction in certain areas to enforce state laws that protect property rights. To hold that state law may encumber but not protect private property rights is an anomaly, given the traditional role of state regulation and state courts in this area and the limited federal concerns developed from Babcock & Wilcox to Central Hardware.
IV. CONCLUSION

The movement of the population to the suburbs and the concomitant movement of businesses to suburban shopping centers, industrial parks, and office parks portends further clashes between private property rights and labor rights. The National Labor Relations Board’s failure to define the rights and considerations involved under the criteria established by the Supreme Court, i.e., the Board’s erroneous elevation of nonemployee rights over private property rights, raises difficult problems for property owners, unions, and employees alike. Lack of definition in the federal pre-emption cases may leave private property owners no remedy by which to enforce their rights or, at best, will present difficult problems for state courts when they must determine the extent of their jurisdiction to protect private property rights.

with the location of the activity, not its object or purpose, which is the thrust of federal regulation. The Board has demonstrated no special expertise in assessing the strength of the property rights, and for this reason has had difficulty gaining acceptance of its assessments in the courts. Moreover, in cases involving the location of “publicly expressive” activity, the state courts are required to analyze the impact of federal concerns in a number of areas.

88. The Board has not followed suggestions made over 10 years ago that it develop procedures or processes, possibly by advisory opinions or rulemaking, to expedite decision-making and thus eliminate the hiatus in federal-state enforcement of rights in this area. See Broomfield, supra note 13, at 569-76.