UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

ROUNDY'S INC.,	)	
	)	
Respondent	)	
	)	
And	)	30-CA-17185
	)	
MILWAUKEE BUILDING AND CONSTRUCTION TRADES COUNCIL. AFL-CIO	)	
	)	
Charging Party	)	

AMICUS CURIAE BRIEF ON BEHALF OF
CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA
IN SUPPORT OF RESPONDENT ROUNDY'S, INC.

INTEREST OF THE AMICUS CURIAE

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation, representing approximately 300,000 direct members with an underlying membership of over three million businesses and organizations of every size and in every industry sector and geographical region of the country. A principal function of the Chamber is to represent the interests of its members by filing amicus curiae briefs in cases involving issues of vital concern to the nation's business community. The Chamber has participated as amicus curiae in dozens of cases before the National Labor Relations Board. Pursuant to the Board's Notice and Invitation to File Briefs dated November 12, 2010, the Chamber files this brief setting forth its views.

QUESTIONS ADDRESSED

1. In cases alleging unlawful employer discrimination in nonemployee access, should the Board continue to apply the standard articulated by the Board majority in ***Sandusky Mall Co.,*** [329 NLRB 618, 623 (1999), ***enf. den.***, 242 F.3d 682 (6th Cir. 2001)]?

The Chamber contends that *Sandusky Mall* should be overruled.

2. If not, what standard should the Board adopt to define discrimination in this context?

The Chamber contends that because nonemployees do not possess § 7 rights and an employer, as a general rule, may regulate access to his property, the discrimination inquiry should be narrowly confined. The concept of discrimination should be limited to disparate treatment of labor organizations seeking to engage in organizing activity of the employer's employees.

3. What bearing, if any, does ***Register Guard,*** 351 NLRB 1110 (2007), ***enf. den. In part,*** 571 F.3d 53 (D.C. Cir. 2009), have on the Board's standard for finding unlawful discrimination in nonemployee access cases?

The Chamber contends that *Register Guard* is not directly applicable because it addresses discrimination among employees, and the employer's property rights are not usually in issue. However, *Register Guard* does correctly identify the essential premise of "discrimination," which is dissimilar treatment of similar conduct. Further, *Register Guard* properly recognizes that the Act is not a general non-discrimination statute and that the focus must be on whether there was discrimination along § 7 lines.

DISCUSSION

A. The Board Should Not Continue To Apply Sandusky Mall In Nonemployee Access Cases.

The Chamber contends that the Board should abandon any reliance on *Sandusky Mall* in nonemployee access cases. We first examine the two primary Supreme Court decisions addressing access to private property by nonemployee union organizers. Next we discuss the competing opinions in *Sandusky Mall*. Finally we explain why *Sandusky Mall* was wrongly decided and should be abandoned.

1. Babcock and Lechmere

The Supreme Court first addressed the issue of nonemployee access in the union organizing context in 1956. The specific issue presented in *NLRB v. Babcock & Wilcox Co.,* 351 U.S. 105 (1956) concerned the right of nonemployee union organizers to access the parking lots of a manufacturing facility located on a 100-acre tract. There was no contention that the employer had enforced its no-access policy discriminatorily. Nevertheless, the Board held that because union literature could not be safely or practically distributed to employees except on the employer's parking lots, the employer violated § 8(a)(1) by denying access. The Fifth Circuit denied enforcement, and the Supreme Court affirmed. The Court noted that the Board had failed to properly distinguish between the rights of employees and those of nonemployees:

> The distinction 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. [citation omitted]. But no such obligation is owed nonemployee organizers. Their access to company property is governed by a different consideration. The right of self-organization depends in some measure on the ability of employees to learn the advantages of self- organization from others. Consequently, if the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them, the employer must allow the union to approach his employees

> on his property. No such conditions are shown in these records.
>
> The plants are close to small well-settled communities where a large percentage of the employees live. The usual methods of imparting information are available. See, e.g., note 1, supra. The various instruments of publicity are at hand. Though the quarters of the employees are scattered they are in reasonable reach. The Act requires only that the employer refrain from interference, discrimination, restraint or coercion in the employees' exercise of their own rights. It does not require that the employer permit the use of its facilities for organization when other means are readily available.

Id. at 113-114.

Some thirty-five years later, the Supreme Court revisited the issue in the context of a shopping plaza. *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992). The owner of the plaza maintained a consistently-enforced policy that excluded non-employees from accessing the non-public and non-selling areas of the store. The Court rejected the Board's *Jean Country* analysis, which balanced the employer's property rights against the employees' § 7 rights, as inconsistent with *Babcock:*

> To say that our cases require accommodation between employees' and employers' rights is a true but incomplete statement, for the cases also go far in establishing the *locus* of that accommodation where nonemployee organizing is at issue. So long as nonemployee union organizers have reasonable access to employees outside an employer's property, the requisite accommodation has taken place. It is *only* where such access is infeasible that it becomes necessary and proper to take the accommodation inquiry to a second level, balancing the employees' and employers' rights . . . . At least as applied to nonemployees, *Jean Country* impermissibly conflates these two stages of the inquiry-thereby significantly eroding *Babcock's* general rule that "an employer may validly post his property against nonemployee distribution of union literature," [citation omitted] We reaffirm that general rule today, and reject the Board's attempt to recast it as a multifactor balancing test.

Id. at 538.

2. Sandusky Mall

The specific issue presented in *Sandusky Mall* was "whether the Respondent violated Section 8(a)(1) of the Act by refusing to permit nonemployee representatives of the Union to distribute 'area standards' handbills in the Respondent's shopping mall while permitting access for other commercial, civic, and charitable purposes." 329 NLRB at 618. The record reflected that the employer permitted nonemployee access for a variety of "special events and community related events because it believes that they enhance the public image of the mall and provide a valuable service to the community." *Id.* at 620. Examples included, among others, "an Arthur Murray dance marathon, the Young American Miss Pageant, a United Way Donation Thermometer, a fire escape demonstration, a Fall Craft show, [and] an Easter Seals cake auction," as well as charitable organizations such as the Salvation Army, the American Red Cross, and the American Lung Association. *Id.* On the other hand, the employer had "prohibited the distribution of flyers for commercial interests unrelated to or in competition with the mall's tenants, removed political campaign signs, denied permission to circulate political campaign stickers and pins, and notified a group seeking access to a health & fitness show at the mall that it could not distribute what the Respondent deemed to be sensitive material." *Id.*

On these facts the Board majority (Chairman Truesdale and Members Liebman and Fox) held that the employer had violated § 8(a)(1). The majority acknowledged that the Supreme Court in *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), "held as a general rule that an employer cannot be compelled to allow the distribution of union literature by nonemployee organizers on its property," *Id.* at 620, but noted that *Lechmere* had not overruled the "discrimination" exception set out in *NLRB v. Babcock & Wilcox,* 351 U.S. 105, 112 (1956), where the Court held that "an employer may validly post his property . . . if [it] does not discriminate against the union

by allowing other distribution." 329 NLRB at 620. The majority concluded that the employer's practice of "distinguishing among solicitation based on its own assessment of the message to be conveyed according to its purely subjective standard" could not justify discrimination against union representatives: "What the Respondent cannot do, however, is prohibit the dissemination of messages protected by the Act on its private property while at the same time allowing substantial civic, charitable, and promotional activities." *Id.* at 621.

Members Hurtgen and Brame dissented. Member Hurtgen was persuaded that there was no unlawful discrimination because "the union agents sought to persuade the public to boycott a mall tenant;" the employer "forbade boycott activity by the union, just as it would forbid boycott activity by anyone;" and "[t]he Act does not require that a property owner have a precise set of objective criteria for ousting trespassers. . . [but] only requires that the owner not discriminate on a 'union' basis." *Id.* at 623.

Member Brame criticized the vagueness of the majority's standard and the lack of guidance provided to employers. He noted that in *Lechmere,* "the Court unquestionably erected a high barrier to the Board's invasion of employer property rights." *Id.* at 626. Member Brame further opined:

> The majority thus turns *Lechmere* on its head. The Court there established a sweeping general rule that an employer may exclude third parties from its property. This broad rule, in turn, has two very narrow exceptions applicable only when employees are truly otherwise inaccessible or a no-solicitation rule is found to be discriminatory. The majority, however, has transformed the narrow discrimination exception into one that is really quite broad by, in effect, defining it by reference to an extremely narrow exception within the exception for isolated beneficent activity. The effect of this exception-within-the-exception is that if an employer permits almost any solicitation other than isolated appeals by charities, it will be found to have an unlawful discriminatory rule if it would under the same rule exclude solicitation by union representatives. The exception thereby swallows up the general rule and

> *Lechmere's* broad sanction of employer no-solicitation rules is reduced to a narrow one.

Id. at n. 22.

In Member Brame's view, "[t]he key question, then, is what are comparable solicitations within the meaning of the exception." Member Brame offered the following analytical framework:

> On its face, comparability has at least two obvious components: the nature of the persons or organizations being excluded and the nature of the activities which the property owner would prohibit. Discrimination must be established by the General Counsel on both grounds. By the same token, if the General Counsel cannot establish that comparable groups or activities were affirmatively permitted to solicit while the Union was excluded, the alleged violation must fail.

Id. at 627.

Following the Board's decision, the Employer sought review in the United States Court of Appeals for the Sixth Circuit, which denied enforcement to the Board's order. The court found Member Brame's dissent persuasive and also relied upon its prior decision in *Cleveland Real Estate Partners v. NLRB,* 95 F.3d 457 (6th Cir.1996), where it had held:

> *Babcock* and its progeny, which weigh heavily in favor of private property rights, indicate that the Court could not have meant to give the word "discrimination" the import the Board has chosen to give it. To discriminate in the enforcement of a no-solicitation policy cannot mean that an employer commits an unfair labor practice if it allows the Girl Scouts to sell cookies, but is shielded from the effect of the Act if it prohibits them from doing so. *Cf. Guardian Indus. Corp. v. NLRB,* 49 F.3d 317, 320-22 (7th Cir.1995). Although the Court has never clarified the meaning of the term, and we have found no published court of appeals cases addressing the significance of "discrimination" in this context, we hold that the term "discrimination" as used in *Babcock* means favoring one union over another, or allowing employer-related information while barring similar union-related information.

95 F.3d at 464-465.

3. Sandusky Mall Should Be Overruled.

Sandusky Mall's broad definition of discrimination, as applied to nonemployee access and solicitation cases, should be abandoned for two reasons. First, it does severe violence to the essential holding of *Babcock* and *Lechmere* that nonemployee access rights to private property are the exception rather than the rule and effectively grants § 7 rights to nonemployees. Second, it is inconsistent with the long-established concept of actionable discrimination, which focuses on dissimilar treatment of similar conduct.

In defining the level of discrimination required, the Board cannot surreptitiously circumvent *Babcock* and *Lechmere*. Indeed, although the Supreme Court made reference to the "discrimination" exception, in neither case did the Court ***hold*** that discrimination among groups of nonemployees was a valid basis for requiring an employer to grant access to nonemployee union organizers. Thus, in both cases, it was conceded that the employer had not engaged in discrimination and the sole issue was whether access was necessary to effectuate employees' section 7 rights.

The essential holding of *Babcock* and *Lechmere* is that nonemployees do not possess § 7 rights. Their rights are purely derivative of employees' section 7 rights. And in balancing the employer's property rights against the purely derivative rights of employees, the Court's decisions establish that "[s]o long as nonemployee union organizers have reasonable access to employees outside an employer's property, the requisite accommodation has taken place." *Lechmere,* 502 U.S. at 538.

Discrimination among *employees* on the basis of their union activities clearly coerces employees in the exercise of their § 7 rights. But mere discrimination among outside groups seeking access to an employer's property cannot create § 7 rights for persons who are not

protected by the Act. Such discrimination can violate § 7 only if it is of such a nature and character as to interfere with or coerce employees in the exercise of their § 7 rights. The majority's holding in *Sandusky* that an employer cannot "prohibit the dissemination of messages protected by the Act on its private property while at the same time allowing substantial civic, charitable, and promotional activities," 329 NLRB at 621, proceeds on the notion that discrimination against nonemployee union representatives independently violates the Act irrespective of the impact upon employees' § 7 rights. The Board made no effort in *Sandusky* to assess the specific impact that the discrimination had upon employees. Nor did it attempt to balance that impact against the impact upon the employer's private property rights. Further, it is not the messages themselves that are protected by the Act. It is the employees who are the target of the messages who are protected, and when a union has adequate outside opportunities to communicate its messages to employees, the employer is not required to provide a forum for the union.

One might reasonably ask why an employer who allows "substantial civic, charitable, and promotional activities" must open his property to nonemployee union organizers. How do such activities adversely impact the § 7 rights of employees when the employees themselves remain free to engage in union activities on the employer's property during nonwork time and when the union itself has access to employees away from the employer's premises? The answer is not readily apparent. As Member Brame recognized in his dissent in *Sandusky Mall*, the majority's definition of discrimination is so broad that it "swallows up the general rule and *Lechmere's* broad sanction of employer no-solicitation rules is reduced to a narrow one."

A second problem with the *Sandusky Mall* analysis is that it is inconsistent with the basic notion of actionable "discrimination," which is disparate treatment of similar activity. As the

United States Court of Appeals for the Seventh Circuit has held, "solicitations for girl scout cookies, Christmas ornaments, hand-painted bottles . . . certainly cannot, under any circumstances, be compared to union solicitation." *6 West Limited Corp. v. NLRB,* 237 F.3d 767, 780 (7th Cir. 2000). And in *NLRB v. Southern Maryland Hospital Center,* 916 F.2d 932 (4th Cir. 1990), the United States Court of Appeals for the Fourth Circuit held that a hospital lawfully denied cafeteria access to a non-employee union organizer even though the evidence reflected that the employer had repeatedly and knowingly permitted visitors and non-employees to use the cafeteria. The court explained:

> However, the policy here was a *no-solicitation* policy designed to keep out union representatives and other salesmen. Claims of disparate enforcement inherently require a finding that the employer treated similar conduct differently . . . and we see a difference between admitting employee relatives for meals and permitting outside entities to seek money or memberships.

916 F.2d at 937.

Similarly, the United States Court of Appeals for the Sixth Circuit held in *Oakwood Hospital v. NLRB*, 983 F.2d 698 (6th Cir. 1993), that a hospital lawfully sought to bar a union organizer from using the hospital cafeteria to engage in union organizing. The court explained:

> On its face, Oakwood Hospital's anti-solicitation rule applies to all nonemployees – and there has been no showing here that nonemployees other than union organizers are permitted to solicit in the cafeteria. *Lechmere* thus leaves no room for doubt that the hospital was entitled to prohibit Mr. Gonzalez from using the hospital's cafeteria as a place to conduct his organizing activities. If the owner of an outdoor parking lot can bar nonemployee union organizers, it follows a fortiori that the owner of an indoor cafeteria can do so.

Id. at 703.

The Chamber suggests that the proper focus is that espoused by Member Brame in his dissenting opinion in *Sandusky Mall*:

> On its face, comparability has at least two obvious components: the nature of the persons or organizations being excluded and the nature of the activities which the property owner would prohibit. Discrimination must be established by the General Counsel on both grounds. By the same token, if the General Counsel cannot establish that comparable groups or activities were affirmatively permitted to solicit while the Union was excluded, the alleged violation must fail.

329 NLRB at 627.

This analysis properly recognizes that an employer has a right to control access to his property and can draw reasonable distinctions based both on the nature of the organization that is seeking access and the nature of the activities in question. An employer need not exclude all nonemployees in order exclude any nonemployees.

B. Discrimination In Nonemployee Access Cases Should Be Narrowly Defined As Limited To Differential Treatment Of Different Labor Organizations While Engaged In Solicitation Or Organizing Activity.

In defining discrimination in the context of nonemployee access cases, the proper focus is on both the type of organization seeking or granted access and the nature of the activities permitted or prohibited. Further, it must be remembered that the Act is not a general nondiscrimination statute, and it protects *employees'* rights, not the rights of labor organizations.

The Chamber agrees with the view adopted by the Sixth Circuit that actionable discrimination in nonemployee access cases is generally limited to dissimilar treatment among labor organizations. Thus, in *Cleveland Real Estate Partners v. NLRB,* 95 F.3d 457, 464-65 (6th Cir.1996), the court held "that the term 'discrimination' as used in *Babcock* means favoring one union over another, or allowing employer-related information while barring similar union-related information." This is particularly true when two unions are seeking to organize the same group of employees. When an employer grants access to one labor organization while denying access to a different labor organization, both seeking to engage in organizational activity, there is

obvious coercion of employees in the exercise of their § 7 activities. Employees are sent the message that union activity in support of one union is favored, while union activity in support of the other union is disfavored. Further, as one union is provided an unfair advantage, coercion is inevitable.

However, discrimination among unions may not be actionable when they are not engaged in organizing activity. "A long history of cases manifests a hierarchy among § 7 rights, with organizational rights asserted by a particular employer's own employees being the strongest, the interest of non-employees in organizing an employer's employees being somewhat weaker, and the interest of uninvited visitors ... attempting to communicate with an employer's customers, being weaker still." *United Food & Comm. Workers v. NLRB,* 74 F.3d 292, 298 (D.C.Cir.1996). "Employees are accorded greater protection under the Act than non-employees, but they are accorded even greater protection under the Act when they are engaged in organizational activity." *Meijer, Inc., v. NLRB,* 130 F.3d 1209, 1213 (6th Cir. 1997). Thus, an employer might lawfully deny access to a union seeking to engage in handbilling or picketing relating to area standards or boycott activity even if it had granted access to a different union for organizing purposes.

But outside of discrimination among different labor organizations, there is no lawful basis for regulating an employer's decisions regarding who it will or will not admit to its property. "No relevant labor policies are advanced by requiring employers to prohibit charitable solicitations in order to preserve the right to exclude nonemployee distribution of union literature when access to the target audience is otherwise available." *Cleveland Real Estate Partners v. NLRB,* 95 F.3d 457, 465 (6th Cir.1996). If an employer wishes to admit the Girl Scouts or the Salvation Army to its property, while excluding all other groups, including labor organizations,

there is no impact at all on § 7 rights. The employees themselves have organizing rights within the workplace and unions have organizing rights outside the workplace. Thus, employee rights are fully protected. The Act simply does not come into play.

The Chamber contends that discrimination between a labor organization and any other type of organization is simply not actionable. The activities of non-labor organizations do not relate in any fashion to the relationship between the employees and their employer. A union engaged in organizing activity, however, seeks to change the employer-employee relationship and to impose substantial, ongoing legal obligations on the employer. These differences justify an employer viewing a labor organization differently than it views other types of organizations who do not seek to impact the employer-employee relationship. The law does not require an employer to make it easy for a union to organize the employer's employees.

However, if the Board believes that a broader definition of discrimination is warranted, the Chamber suggests, alternatively, that the Board limit the concept to differential treatment of other membership organizations who are seeking to solicit employees as members. Under no circumstances should non-membership organizations be viewed as similar to a labor organizations. These groups do not solicit memberships from employees and if, for whatever reason, an employer wishes to favor one or more of these organizations by granting access to his property, there is no discernible effect on employee § 7 rights. And nothing in the Act precludes him from doing so. There is no principle of law that says that a property owner who allows one group to have access must allow all groups to have access.

In summary, granting a labor organization access simply because the employer has permitted certain outside groups to access its property effectively grants § 7 rights to nonemployees in contravention of *Babcock* and *Lechmere* and discourages employers from

assisting charitable and other types of organizations. Actionable discrimination should be limited to discrimination between labor organizations while engaged in organizing activity. Insofar as a broader interpretation is adopted, actionable discrimination should be limited to differential treatment of membership organizations.

C. Register Guard Is Not Directly Applicable To Nonemployee Access Cases. [1]

In *Register Guard*, 351 NLRB 1110 (2007), *enforcement denied on other grounds,* 571 F.3d 53 (D.C. Cir. 2009), the Board addressed the concept of discrimination in the context of employee use of email. The Board, in a 3-to-2 decision, held that "unlawful discrimination consists of disparate treatment of activities or communications of a similar character because of their union or other Section 7-protected status." The Board elaborated on the types of distinctions that an employer may lawfully draw:

> For example, an employer clearly would violate the Act if it permitted employees to use e-mail to solicit for one union but not another, or if it permitted solicitation by antiunion employees but not by prounion employees. In either case, the employer has drawn a line between permitted and prohibited activities on Section 7 grounds. However, nothing in the Act prohibits an employer from drawing lines on a non-Section 7 basis. That is, an employer may draw a line between charitable solicitations and noncharitable solicitations, between solicitations of a personal nature (i.e., a car for sale) and solicitations for the commercial sale of a product (i.e., Avon products), between invitations for an organization and invitations of a personal nature, between solicitations and mere talk, and between business-related use and nonbusiness-related use. In each of these examples, the fact that union solicitation would fall on the prohibited side of the line does not establish that the rule discriminates along Section 7 lines. For example, a rule that permitted charitable solicitations but not noncharitable solicitations would permit solicitations for the Red Cross and the Salvation Army, but it would prohibit solicitations for Avon and the union.

351 NLRB at 1118.

[1] The Board did not indicate that it intends to reconsider *Register Guard* in this case. Obviously, any such reconsideration should only occur after giving proper notice to all interested parties.

The Chamber supports *Register Guard* [2] as a reasonable definition of discrimination in employee discrimination cases. Indeed, the basic premise of *Register Guard* that discrimination consists of drawing distinctions along § 7 lines is consistent with the analysis proposed above. The Chamber acknowledges that some members of the Board vigorously disagreed with the decision in *Register Guard.* It is important to recognize, however, that even if the Board were to revisit *Register Guard* at some time, this would not alter the analysis proposed above with regard to nonemployees. Unlike nonemployees, the actors in employee discrimination cases are by definition similarly situated—they are employees. Thus, the only relevant inquiry in employee cases concerns the nature of the activities that are permitted or prohibited. Further, because the employees are lawfully on the employer's property, it is the employer's managerial rights, rather than its property rights, that must be factored into the balancing equation. Thus, even if the Board decides in the future to adopt a broader definition of discrimination in cases involving employees, different considerations are involved in nonemployee access cases.

The Chamber urges the Board to give clear guidance to employers and to permit them to draw reasonable distinctions in nonemployee access cases. Thus, it is well established that "restrictions on employee solicitation during nonworking time, and on distribution during nonworking time in nonworking areas, are violative of § 8(a)(1) unless the employer justifies them by a showing of special circumstances which make the rule necessary to maintain production or discipline." *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 493 (1978). These rules are well understood. Similarly clear guidance should be provided to employers in adopting nonemployee access policies.

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[2] The Chamber filed an amicus brief in *Register Guard.*

CONCLUSION

It is essential that the Board establish clear guidelines regarding the distinctions that will and will not be permitted in nonemployee access cases. This is important in order to give employers, unions, and employees clear direction and to facilitate review of individual cases in the courts of appeals. The Chamber contends that *Sandusky Mall* should be overruled and that the Board should limit the concept of discrimination in nonemployee access cases to differential treatment of labor organizations seeking to organize the employer's employees. Further, *Register Guard* should continue to be applied in employee discrimination cases.

Respectfully submitted this 7th day of January 2011.

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