Unions: An End or A Means?

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Doctrine resulting from the decision of the legal problem of general interest presented by *Marshall Field & Co. v. National Labor Relations Board,*¹ can be only narrowly distinguished from other established doctrine apparently antagonistic to the results of that case. The distinction, although fine, may be regarded as valid, and it presents underlying considerations fundamental to our jurisprudence of labor relations. The important issue for decision in the *Marshall Field* case was whether an employer can exclude non-employee union organizers from parts of its premises not open to the public, when those organizers seek to enter for the purpose of persuading employees, who are not on duty at the time, to join the union.² In reversing the National Labor Relations Board on that issue³ the United States Court of Appeals held that the making of such an exclusion falls within the employer's power and therefore does not constitute an unfair labor practice. Prior to this decision it had become well settled by the United States Supreme Court⁴ that an employer cannot forbid employee union organizers from using the employer's premises to solicit union membership from other employees.⁵ As the distinction between employee union organizers and non-employee union organizers seems to be narrow, the *Marshall Field* decision might appear to be antagonistic to Supreme Court doctrine. That the distinction, even if fine, is fundamental, and that no doctrinal inconsistency has resulted from this

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¹*a Professor of Law, Washington and Lee University.
²200 F. (2d) 375 (C. A. 7th, 1952) (no application for certiorari).
³There were a number of other issues presented to the court which were undoubtedly important to the litigating parties. However, the problems presented were primarily factual in their nature, and not deemed to be of sufficient doctrinal value to merit discussion in this article. It is believed that to discuss those questions would divert attention from the particular issue of the case thought to be fundamental to our labor law thinking.
⁴The Labor Board order in *Marshall Field & Co., and Retail Clerks of International Association, Local No. 1515—M.F. A.F.L., 98 N.L.R.B. 88 (1952),* was modified by the Court of Appeals, and, as modified, enforced. The court eliminated that part of the order pertinent to the problem here discussed.
⁶There are several qualifications to this doctrine which will be discussed more fully infra. It may be mentioned at this point that the most important qualification is that solicitation must be during non-working periods—i.e., both the soliciting and the solicited employees must be off duty.
recent judicial pronouncement, must be shown by development. Such an exposition is here attempted.

Possibly it is accurate to assert that only two prior historical events have presented as fundamental an impact upon our labor law as the enactment of Section 7 of the National Labor Relations Act. First, the Statute of Laborers was enacted in the fourteenth century to counteract the advantageous position in which such workers as survived the Black Death found themselves. By enactment the duty to work was established, and wages were fixed. Since no worker could individually ask for more than the government allowed, any notion of collective bargaining was unthinkable. Second, following the decision in Commonwealth v. Hunt, the doctrine that the formation of a labor union constituted a criminal conspiracy rapidly disappeared. Thus, employees acquired the privileges of forming unions and collectively bargaining for higher wages. Referring to Hohfeldian terminology, the word "privileges" is used advisedly in contrast to the word "rights." Collective bargaining through unions was no longer illegal, per se, and could be indulged in to the extent that employers were willing to bargain collectively. There was no duty upon an employer to do so. True "rights" to self organization and to bargain collectively are conferred upon all employees in industries affecting interstate commerce by Section 7 of the National Labor Relations Act. Section 8 of said Act imposes upon employers the duty of respecting the rights guaranteed to employees in Section 7 by declaring, among other things, that it is an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7." Thus the rights conferred by Section 7 are really "rights" and not mere "privileges." Section 7 is the fundamental feature of the Labor Relations Act. The balance of the Act is elaborative.

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25 Edw. 3, St. 1.
There was no concept of involuntary servitude in those days.
See Landis, Historical Introduction to Cases on Labor Law (1934) c. I. This same historical introduction appears in the Second Edition (1942) of the compilation of cases edited by James M. Landis and Marcus Manoff.
1045 Mass. 111 (1842).
See Hohfeld, Some Fundamental Legal Conceptions As Applied In Judicial Reasoning (1913) 23 Yale L. J. 16.
Contrary to much popular opinion, this fundamental of the National Labor Relations Act (the so-called "Wagner Act") is in no way mutilated by the Labor Management Relations Act (the so-called "Taft-Hartley Act"). 61 Stat. 136 (1947).
It is axiomatic that the law protects the interests of employers in conducting their enterprises as they see fit. This legal protection is usually referred to as the employers' "property rights." Historically there was little legal limitation upon the capacity of employers to govern their relationships with their employees. Adair v. United States and Coppage v. Kansas properly understood, recognize that employers had extensive privileges supported by an immunity against legislative interference. This privilege-plus-immunity type of protection which the law gave to employers finally developed into a true right in Hitchman Coal & Coke Co. v. Mitchell.

The rights of employees to organize and bargain collectively, created by Section 7 of the Labor Relations Act, are bound to conflict with and limit, the pre-existing privileges, immunities, and rights of employers to govern their relations with their employees. Clearly the United States Supreme Court has recognized that these management prerogatives have not been entirely swept away. The Labor Relations Act was construed as not interfering with "the normal exercise of the right of the employer to select its employees or to discharge them." The problem has been to draw the line between the rights conferred upon employees by Section 7 of the Labor Relations Act, and the "normal" so-called property rights of employers. In no category of labor law problems is this problem more manifest than in questions arising out of the antagonism between the claims of employees to increase the power of their unions by unrestrained proselyting of new members, and the claims of employers for the exclusive control of their premises and of such of their employees' time as they have paid for.

Under Section 8 of the Labor Relations Act, maneuvers of employers designed to frustrate employees in the exercise of their rights guaranteed by Section 7 are declared to be "unfair labor practices." In understanding the specific issue presented by the Marshall Field...
case it is important to realize that these unfair labor practices fall into two general categories. First, some acts are considered as unfair *per se*—i.e., irrespective of the employer's motives in committing such acts. Second, other acts are normally lawful and become unfair only if performed for the purpose of frustrating employees in their attempts at unionization.

In connection with the first of the aforementioned categories, it would seem to be self evident that some acts directly and obviously interfere with the rights of employees to organize and bargain collectively. Such acts are properly proscribed irrespective of the employer's motives. Thus, in *National Labor Relations Board v. Star Pub. Co.* the employer transferred all members of one union and replaced them with members of a rival union. There was no evidence that the employer had any animosity against unions in general or against any particular union. The action was taken because the transferred employees could not perform their assigned duties because of the refusal of an independent contractor's employees, belonging to a different union, to cooperate with them. The act of transfer was regarded as an unfair labor practice, irrespective of the employer's motive.

Examples of acts (pertinent to the problem at hand) which are unfair labor practices irrespective of motive may be found in the cases of *Republic Aviation Corp. v. National Labor Relations Board* and *National Labor Relations Board v. Le Tourneau Co. of Georgia.* In the former case an employee solicited union membership during his own time but on company premises. The latter case differs only in the fact that union literature was passed out under the same circumstances. In both cases the employees were discharged for violating rules against solicitation and against the distribution of literature on the employer's premises. The employer's rules were general rules against all types of solicitation and against the distribution of any literature. There was no evidence that they were aimed particularly against the solicitation of union membership or the distribution of union literature. Here, however, motive or purpose made no difference. To prevent a union employee from soliciting other employees to join the union is an interference with the right of organization guaranteed by Section 7 of the Act. It has long been recognized that the employer may make and enforce rules deemed necessary for the efficient administration
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of its business and premises. Thus, an employer may forbid its employees from using its premises to solicit membership in any ordinary political, fraternal, religious or other type of non-labor organization. The difference between such organizations and labor unions is that such organizations are protected by no positive law comparable to Section 7 of the Labor Act.

The Labor Board has recognized that in drawing a line between those types of employer prohibitions which are unfair labor practices *per se* and those which are not, it and the courts must balance the "statutory rights of employees" against "the property rights of management to conduct its business with efficiency and discipline." Therefore, an employer may forbid all types of solicitation, including union solicitation, during periods its employees are required to work. Thus, the right of employees to solicit union membership upon the employer's premises must be qualified by the proposition that such right exists only if both the soliciting employee and the solicited employee are off-duty at the time—e.g., in the morning before work starts, in the evening after work has ceased, or during authorized rest periods. It may be concluded that the courts and the Labor Board have placed the statutory right of employees above the property rights of the employer in its premises but below the property rights of the employer as regards that portion of its employees' time for which it has contracted. It is doubtful that the employer would have to make its premises available to the union for organizational purposes at any time except when employees would be there in the course of their employment. Even the duty of the employer to permit off-duty so-

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26N.L.R.B. v. William Davies Co., Inc., 105 F. (2d) 319 (C. C. A. 7th, 1943), cert. den. 332 U. S. 770, 64 S. Ct. 82, 88 L. ed. 450 (1943); Peyton Packing Company, Inc., 49 N.L.R.B. 828, 843 (1943). In the last cited case the Labor Board used the following language: "The Act, of course, does not prevent an employer from making and enforcing reasonable rules covering the conduct of employees on company time *working time is for work*. It is therefore within the province of an employer to promulgate and enforce a rule prohibiting union solicitation during working hours..." [italics supplied].

27I have been able to find no authority either for or against this proposition. The language of the Board seems to place particular emphasis upon "rest periods" which would imply that the right of employees to use the employer's premises
licitation upon its premises is not absolute. The employer may be able to show special circumstances in which an anti-solicitation rule will be considered legitimate. It has been consistently held that the proprietor of a store may forbid all solicitation upon the selling floor, because members of the public might be inconvenienced. Likewise, a past history of inter-union violence may justify a rule forbidding all union solicitation upon the employer's premises when reasonably believed to be necessary to prevent a renewed outbreak of the trouble. However, it has been held that any rule prohibiting solicitation by employees upon the employer's premises during their off-duty time is presumed to be unfair, thus imposing upon the employer the burden of showing special circumstances sufficient to support the rule. The distinction must be kept clearly in mind between a non-absolute rule, and a rule in which the question of whether conduct is unfair or not is dependent upon motive. The distinction will become important later. Thus the rule which makes it an unfair labor practice for an employer to forbid employee organizers from soliciting union membership during their free time but on company premises is not absolute—i.e., the application of said rule to any particular case will depend upon the circumstances of that case. However, in situations in which the rule is deemed applicable, the employer's motive, whether or not anti-union, is utterly immaterial.

As indicated above, there is another grand category of employer unfair labor practices. Acts of management, such as the promulgation of reasonable rules for the administration of a plant, may not be unfair per se. But the promulgation and enforcement of such a rule may become unfair labor practices if done for the purpose of interfering with the exercise of rights vested in employees by the Labor Act. Thus, the employer in Edward G. Bund Mfg. Co. v. National Labor Rela-

for proselyting purposes is restricted to occasions when they are normally there. N.L.R.B. v. Stowe Spinning Co., 336 U. S. 226, 69 S. Ct. 541, 93 L. ed. 638 (1949) will be discussed infra. In that case the employer was required to permit the union to use a meeting hall owned by the employer. However, it is believed that this decision was based upon discrimination and not upon the premise that the employer owes an absolute duty to make its premises available to its employees.


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Discussions Board discharged an obviously worthless employee. There were grounds that justified his discharge, such as intoxication on the job and consistently reporting for work at times most suitable to himself. The trouble was that his conduct had been long tolerated until he became active in the C. I. O. Then he was immediately discharged. The various prior malfeasances were assigned as the reason for such action. The timing of the employer's action made the inference that the worker was really fired because of his union activity inescapable. There is an old quip: "He wasn't fired because he belonged to the union but because he left the hammer on the wrong side of the work bench." Undoubtedly an employer may prescribe rules as to where tools are to be placed at the end of a working day and can discharge employees for failure to comply with such rules. The question in such cases always is: why was the employee discharged? Was it really because he failed to comply with the rule, or was that just an excuse? Was the employer's real motive, for the action taken, the employee's union participation? It is not to be assumed that membership in a union renders an employee immune to the employer's disciplinary powers. Union members are as subject to rules as non-union members, but there is always the question as to why the rules were enforced.

The rule that bad motive on the part of an employer will render conduct unfair which might otherwise be legitimate, may be regarded as analogous to the illegal purpose doctrine which has long been applied to employees. Said doctrine in effect holds that species of labor activity which do not fall into any established criminal or tort law category may still be illegal if performed for the purpose of accomplishing an end regarded by the court as socially undesirable, or as outside the scope of proper labor objectives. Propositions regard-

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3Gregory, Labor and The Law (1946) 50.

4Perhaps the illegal purpose doctrine has been applied more to the concerted pressure of unions than to individual activity. Compare Allen v. Flood, [1898] A. C. 1 (House of Lords, 1897) with Quinn v. Leatham, [1901] A. C. 495 (House of Lords, 1901). The illegal purpose doctrine has been the focal point of stormy controversy, and has been followed to the bitter end, rejected in toto, or accepted with varying interpretations as to what purposes are proscribed. For sources indicating the third, and middle course, approach see Crofter Hand Woven Harris Tweed Co., Ltd. v. Veitch, [1942] A. C. 435, (House of Lords, 1942); Holmes, dissenting in Vegelahn v. Guntner, 167 Mass. 92, 44 N. E. 1077 (1896); and Gregory, Labor and the Law (1946) 51. It is doubtful to what extent it can be said that the illegal purpose doctrine is part of the fabric of our modern labor jurisprudence. The reasoning underlying the doctrine has been used in diverse situations, however, by modern courts of the highest standing. For example, in Opera On Tour v. Weber,
ing motive are always difficult to prove. For that reason the operative facts of the law are usually capable of an objective determination. Difficulties in this regard cannot always be avoided, and requirements of justice will sometimes impose upon a fact-determining body the problem of ascertaining an actor's subjective intention. If an employer's motives were to be disregarded because difficult to prove, it would be possible for anti-union employers to deny their employees their rights under the Labor Act while performing acts which in and of themselves do not constitute unfair labor practices.

Discrimination is often made the test as to whether an otherwise innocent act will become unfair. For instance, the National Labor Relations Board has recently said:35

"Moreover, an employer violates the act by enforcing an otherwise valid rule in a discriminatory manner."36 Such discrimina-

285 N. Y. 348, 34 N. E. (2d) 349 (1941) an anti-injunction statute was so construed as to limit the concept of a "labor dispute," upon which the applicability of the statute depended, to controversies in which the union purpose was regarded as legitimate. Likewise, it has been held, in effect, that the purpose for which a strike is called will be considered in determining whether it is a protected type of labor activity. N.L.R.B. v Reynolds International Pen Co., 162 F. (2d) 680 (C. C. A. 7th, 1947). The Labor Board followed a modified version of the same reasoning in Matter of American News Company, 55 N.L.R.B. 1902 (1944). A striking instance of the point here made is found in the metamorphosis of the United States Supreme Court doctrine of Thornhill v. Alabama, 310 U. S. 88, 60 S. Ct. 736, 84 L. ed. 1093 (1940)—i.e., that peaceful picketing is a form of free speech and thus is protected against adverse state action by the Fourteenth Amendment to the United States Constitution. After undergoing various mutilations the doctrine received a mild limitation in Giboney v. Empire Storage Co., 336 U. S. 490, 69 S. Ct. 684, 93 L. ed. 834 (1949) in which it was held that such protection does not extend to peaceful picketing aimed at compelling an employer to perform acts which cannot legally be done. The limitation which the Giboney decision placed upon the Thornhill doctrine is unquestionably sound. However, the next step has logically followed, and the United States Supreme Court now regards peaceful picketing as constitutionally protected only if the purpose of the picketing is one which the court regards as legitimate. Hughes v. Superior Court, 339 U. S. 460, 70 S. Ct. 718, 94 L. ed. 985 (1950); Teamsters Union v. Hanke, 339 U. S. 470, 70 S. Ct. 773, 94 L. ed. 995 (1950).
tion occurs when a valid no-solicitation rule is enforced so as to prevent union solicitation without also prohibiting other forms of solicitation, or when a valid rule is enforced against one union while solicitation by another union is permitted.\textsuperscript{37}

The idea seems to be that even though the promulgation of a rule is not an unfair labor practice \textit{per se}, it will become one if the rule is enforced against union organizers but not against other types of solicitors. This factor of discrimination seems to be the basis for the United States Supreme Court's holding in the recent, leading, and somewhat controversial decision in \textit{National Labor Relations Board v. Stowe Spinning Co.}\textsuperscript{38} In that case the employer owned a meeting hall which was entirely separate from those portions of its premises where employees did their work. In the Southern mill town where the plant was located this hall appeared to be the only place suitable for union meetings. Said hall was under the immediate custody of a local fraternal order which held under some sort of a vague oral understanding. The fraternal order permitted the hall to be used for all kinds of local organizational activity upon payment of a nominal fee sufficient to defray the additional janitor cost. At the instance of the employer, use of the hall was forbidden for union meetings, but its use for other types of community activities was still permitted. The holding of the Labor Board that such action by the employer constituted an unfair labor practice was upheld, with modifications, by the United States Supreme Court. It seems clear from reading the majority opinion that the Supreme Court based its decision on the ground that the employer's unfair labor practice consisted of discrimination between unions of its vitality. However, it must be said in favor of the Board's statement that implicitly the Board clearly regarded the conduct of the employer, which it proscribed, as constituting an unfair labor practice, \textit{per se}, and thus not dependent upon motive or upon discrimination as the Board puts it. It was in that regard that the Board was reversed by the Court of Appeals. This issue between the Board and the Court is regarded as the crucial problem of this case and will be discussed fully later in this article. It is here conceded that, if the Board is correct in its position that (under the circumstances of the Marshall Field case) an employer cannot exclude non-union organizers from its premises, the fact that the employer's exclusionary rule is applied without discrimination against union and all outside organizers will not prevent the existence of an unfair labor practice. It should be noted that even under the court's holding, Marshall Field & Co. would have been guilty of an unfair labor practice if it had enforced its exclusionary rule against outside union organizers only and not against all types of non-employee solicitation.

\textsuperscript{37}Board's footnote 55: "Statement in Bonwit Teller, Inc., 96 NLRB 608. . . ."

\textsuperscript{38}336 U. S. 226, 69 S. Ct. 541, 93 L. ed. 638 (1949).
and other types of organizations. It has been seen above that an employer may forbid its employees from soliciting union membership during periods they are supposed to be working. It would seem clear, however, that an employer who permitted employees to do other types of solicitation during working hours—e.g., for the Red Cross or community chest, but forbade them to solicit union membership at such times, would be guilty of an unfair labor practice.

It might seem that instead of the two categories of unfair labor practices specified above there are really three: (1) those practices which are unfair, per se; (2) those which are unfair because of the employer's anti-union motive; and (3) those which are unfair because of the employer's practice of discrimination in the enforcement of an otherwise legitimate rule. However, it is believed that such is not actually the case but rather that the classification is really twofold rather than threefold. The third category appears to be really an important special instance of the second. In other words, motive and not discrimination is the operative fact. Although the Board and the courts talk in terms of discrimination more frequently than in terms of motive, it would seem that discrimination is legally significant as evidence of an anti-union purpose.

The majority uses the following language, 336 U. S. 226, 233, 69 S. Ct. 541, 544, 93 L. ed. 638, 644 (1949):

"In this case, however, the Board did not find that the very denial of the hall was an unfair labor practice. It found that the refusal by these respondents was unreasonable because the hall had been given freely to others.... What the board found, and all we are considering here, is discrimination...."

In his dissent (concurred in by the Chief Justice) Mr. Justice Reed indicates a belief that, absent circumstances of unusual hardship, an employer's property rights in premises, entirely separate from its productive plant, are so superior to the employee's organizational rights that the union may even be discriminatorily excluded from said premises. Mr. Justice Jackson, in an opinion separately concurring with the majority, would seem to agree with Mr. Justice Reed except for his belief that the employer had effectively placed the hall beyond its control by its agreement with the lodge.

Of course, many of the acts which are expressly made unfair labor practices by Section 8 of the National Labor Relations Act are described in terms of "discrimination." In such cases discrimination, irrespective of motive, is the operative fact. But such types of discrimination as are expressly made unfair labor practices by Section 8 really fall into the first category—i.e., they are unfair labor practices per se.

Compare Note (1949) 27 N. C. L. Rev. 562. There a comment on the Stowe Spinning Co. case, interprets the decision in that case as being based on "anti-union bias." The court itself had based its decision upon discrimination. The North Carolina Law Review correctly sees that the significance of discrimination is as evidence of a bad motive. See also Daykin, Employees' Rights to Organize on Company Time and Company Property (1947) 42 Ill. L. Rev. 301, at 305, 306.
shown, the existence of an anti-union motive would seem to follow almost conclusively. The obverse, however, is not necessarily true. A question of importance in this case is whether the absence of discrimination is affirmative evidence of the absence of an anti-union bias, or whether it merely constitutes a lack of one important type of evidence showing hostility to unionism. This question will be considered shortly. It is certainly true that an employer's anti-union bias may be shown in other ways than by showing discrimination. For instance, an employer may have expressed a hostile attitude toward unions, or may have been guilty of espionage activity, or may have consistently refused to bargain collectively.

In the Marshall Field case the Labor Board, in its decision adverse to the employer, conceded that the company did not discriminate in the enforcement of its rule against the entrance of non-employees into its restricted cafeterias. If it had forbidden solicitation by non-employee union organizers in such proscribed areas but had permitted non-employees to solicit in those places for other purposes, there is no question but that such discrimination would have established the necessary anti-union purpose to make the enforcement of the rule against unions an unfair labor practice. Can an anti-union motive be inferred from any evidence in the case? There was no affirmative evidence which would support a holding adverse to the employer. The troublesome problem is whether it was incumbent upon the employer to show a clear reason for enforcing its rule against union organizers. In Tomlinson of High Point, Inc., a rule forbidding employees from soliciting funds for any organization on company time or company premises was struck down in regard to its enforcement against unions. Part of the reason for the Board's action was the "absence of any explanation" for the rule. If the enforcement of a rule against union organizers, although the rule is not discriminatorily enforced, does in fact handicap organizational activities, is there a burden upon the employer to produce evidence (as distinguished from a burden of persuasion) as to why it is necessary, as against the union, to enforce its

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2Cf. Gregory and Katz, note in Labor Law: Cases, Materials, and Comments (1948) 628 et seq., and Labor Board decisions there cited. Numerous instances of circumstances from which an anti-union purpose may be inferred are collected.

38 N.L.R.B. 88, 91 (1952).

48 N.L.R.B. 982 (1944).

58 N.L.R.B. 982, 986 (1944).
Certainly a rule which has the effect of restricting union activity must be for a reasonable, non-anti-union purpose. Is it sufficient that the general need for such a rule be shown, or should a need for its complete enforcement against everyone, including unions, be shown? There is no general rule against discriminating in favor of unions, unless the employer's action rises to the dubious standards of "unlawful assistance." The mere failure to enforce, against unions, a general rule against everybody could hardly fall within the category of assistance forbidden by the Labor Act. It might well be true that an employer's policy underlying a particular rule would not be compromised if the rule were relaxed where unions are concerned.

The facts of the *Marshall Field* case seem to fall within the analysis of the last paragraph. It is self-evident why an employer does not open a special employees' cafeteria to outsiders generally. A company could not be expected to sell food to non-employees at the drastically reduced prices which prevail there. Also, if members of the public were allowed to enter and solicit for innumerable causes, only confusion would result. However, the union involved in the *Marshall Field* case made no contention that their non-employee organizers should be allowed to purchase food in the employee-only cafeteria. It is also clear that the Labor Board in its decision recognized the rights of the employer to place reasonable restrictions upon the appearance of non-employee organizers in its employee-only restaurants. Footnote 23 to the Board's opinion is, in part, as follows:

"Respondent may lawfully require that only a limited number of organizers compatible with the size of the cafeterias and the number of employees using them be admitted, and is under no obligation to allow purchases to be made by these organizers in such facilities."48

Since Marshall Field & Co. could forbid all other types of outside solicitation in its cafeterias and could limit the number of outside union solicitors, it would seem that the efficient operation of its cafeterias would not be compromised by decorous solicitation by non-employee union organizers. Thus, a conclusion might logically have been reached that the enforcement of its no solicitation rule against union organizers manifests an anti-union motive unless the employer can justify the application of its rule to union organizers by showing some other legitimate purpose. It must be inferred that such is not the law.

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47 Cf. Montgomery Ward & Co. v. N.L.R.B., 107 F. (2d) 555 (C. C. A. 7th, 1939), suggesting that such a burden may sometimes exist.
The law of the Marshall Field case would seem to be that anti-union bias in the enforcement of a general rule is to be inferred principally from discriminatory enforcement—i.e., enforcement of the rule against unions and their organizers but not against other members of the public. In the absence of discrimination, as in the Marshall Field case, other affirmative evidence of anti-union motive must be shown. It appears that there is no burden on the employer to justify its non-discriminatory enforcement, against union organizers, of its non-discriminatory rule. Such an assumption seems to underlie even the Board decision. No attempt was made by the Board to base its decision upon an anti-union motive. In fact, the Board rejects an argument by the General Counsel which might have been aimed in that direction. The theory underlying the Labor Board's decision was that, under the circumstances of this case, the enforcement of the employer's rule against solicitation was per se an unfair labor practice.

The final issue then presented again involves a balancing of the rights guaranteed to employees by Section 7 of the Labor Act against the so-called property right of the employer. Under the circumstances of the Marshall Field case, is it an unfair labor practice, as a matter of law and irrespective of motive, for an employer to forbid non-employee union organizers from soliciting union membership of employees, during their non-working hours but on the employer's premises? Must the employer make its premises available to union solicitors for such a purpose? It has already been seen that, barring special situations such as the selling floor of a mercantile establishment, an employer cannot forbid union solicitation on company premises by its employees provided both the soliciting employee and the solicited employee are off duty at the time. Is there any significant difference between the two types of solicitors?

The problem here has been faced in but few court decisions prior to the decision in the Marshall Field case and never as pointedly as in that case. The few cases, however, have been quite consistent in allowing an employer to exclude non-employee organizers from its premises, when special circumstances, to be considered later, are absent. In National Labor Relations Board v. Cities Service Oil Co. union representatives were permitted to go on shipboard for the

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518 N.L.R.B. 88, 97-98, esp. n. 21 (1952).
52122 F. (2d) 149 (C. C. A. 2d, 1941).
purpose of aiding in the processing of grievances by employees already represented by the union. However, the court made the following important qualification:

"There can, however, be no reason for giving the representatives of the union passes in order that it may solicit new members or collect dues..."53

Of like import is National Labor Relations Board v. J. L. Brandies & Sons.54 That case, like the Marshall Field case, involved a retail department store. One of the questions presented was whether the employer’s surveillance of non-employee union organizers, when on the employer’s premises, constituted an unfair labor practice. The court held that it did not, as follows:

"Respondent could have prohibited proselyting on its premises during business hours. That it did less, certainly can not subject it to just criticism."55

The United States Supreme Court decision in Republic Aviation Corp. v. National Labor Relations Board,56 has already been noted.57 It was there held that an employer could not forbid employee organizers from soliciting upon company premises during their non-working hours. In that case the Supreme Court affirmed the Circuit Court of Appeals. The latter court, in its opinion by Judge Learned Hand,58 in order to distinguish its own holding in the Cities Service Oil Co. case,59 expressly recognized the distinction between employee union organizers and non-employee union organizers, as follows:

"The representatives who sought the passes [in the Cities Service Oil Co. case] were not members of the crews, and had no right to be on the ships by virtue of their employment, as Stone had a right to be in the factory in the case at bar. Whether a union representative shall be allowed to board a vessel, or enter a plant, merely to electioneer or to collect dues, is one thing: whether an employee, already lawfully in the plant, shall be forbidden during his lunch hour to try to persuade his fellows to join the union, is another...."60

53142 F. (2d) 149, 152 (C. C. A. 2d, 1941).
5622 F. (2d) 149 (C. C. A. 2d, 1941).
57Notes 4 and 23, supra.
58142 F. (2d) 193 (C. C. A. 2d, 1944).
59142 F. (2d) 149 (C. C. A. 2d, 1941).
60142 F. (2d) 193, 195 (C. C. A. 2d, 1944) [italics supplied].
It seems evident, therefore, that the Marshall Field decision is in line with prior judicial announcements.

The Labor Board's decision in the Marshall Field case\(^6\) does not squarely join issue with the judicial precedents cited above. Instead, it seeks to base its holding upon special circumstances. It is clear that there are unusual circumstances under which an employer may be required to allow non-employee union organizers to enter its premises. These circumstances seem to be found in cases involving lumber camps and coal mining towns.\(^6\) In such cases employees are usually so isolated from the outside world that it is impossible for them to avail themselves of the assistance of non-employee organizers unless

\(^{6\text{a}}\) N.L.R.B. 88, 95 et seq. (1952).

\(^{6\text{b}}\) Most of the decisions have been in Labor Board cases. Illustrative of those cases are: Weyerhaeuser Timber Company, 31 N.L.R.B. 258 (1941); West Kentucky Coal Co., 10 N.L.R.B. 88 (1938); Harlan Fuel Company, 8 N.L.R.B. 88 (1938). In its decision in the Marshall Field case, 98 N.L.R.B. 88, 95 (1952) the Labor Board states:

"... in certain instances, notably those concerning lumber camp, maritime, and company town situations, the Board has held that nonemployee union representatives must be granted entry to company property where the physical limitations of the employment locale prevent employees from gaining access to outside contacts for long periods of time or except at the cost of considerable effort..."

The only cases cited in support of that statement are found in the Board's footnote 16, which is as follows:


Although there is authority to support the Board's proposition (as cited above), its choice of authority is singularly inept. Not one of the cases cited is in point. The Cities Service Oil Co. case is commented upon in this article (see note 52, supra). It held just the opposite of the proposition for which the Board cited it. So far from holding that the employer had to permit non-employee organizers on its premises, that case held that the employer was not required to admit them. The Weyerhaeuser Timber Company case cited by the Board does not deal with this problem at all, but with a factual issue as to whether the employer's discharge of two employees was motivated by anti-union bias. Apparently the Board has confused the decision of the Ninth Circuit with a case of its own by the same name (cited supra). The two cases seem to be unconnected except for the fact that the same employer was involved in both. The Stowe Spinning Co. case is discussed at length in this article (see notes 27, 38 and 39). Clearly that decision was based upon discrimination. It did not hold that the employer would have had to admit union organizers had it not discriminated against them. The Phillips Petroleum Co. case is factually the same as the Stowe Spinning Co. case and involves the same legal proposition. The Board's opinion in the Phillips Petroleum Co. case consists principally of a reliance upon the United States Supreme Court decision in the Stowe Spinning Co. case.
said organizers are allowed access to the employer's premises. The only court decision found along that line is *National Labor Relations Board v. Lake Superior Lumber Corp.* That case involved an isolated lumber camp 18 miles from the nearest habitation. There was a rapid turnover of employees and during their tenure of employment the employees rarely left the camp. The company's rules permitted one union organizer to meet the men one evening a week in the recreation hall. The court held that the Board properly ordered the employer to permit solicitation in the bunk houses subject to the company's "lights out" rule.

In the *Marshall Field* case the Labor Board did not attempt to assimilate a department store to a lumber camp. It did recognize that the location of the store and the nature of the employment situation created special obstacles to organization. However, the Board found that "such limiting circumstances...could and do exist in whole or in part in other types of establishments without unduly impeding self-organization and concerted activity..." Therefore, the Board did not regard those circumstances as alone sufficient to compel the employer to allow non-employee organizers to enter restricted areas. The circumstance which seems to tip the balance against the employer is a rule in the employer's favor. It is noted above that a department store proprietor may forbid all union solicitation on the selling floor. In such a place it may even forbid employee organizers who are off duty from soliciting other employees who are also off duty. This additional handicap to self-organization, together with the fact of staggered relief hours, persuaded the Board that the accomplishment of the

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63167 F. (2d) 147 (C. C. A. 6th, 1948).
64The Board uses the following language, 98 N.L.R.B. 88, 96 (1952):
"At the hearing in this case it was credibly testified by a witness for the charging union that without access by nonemployee organizers to such areas, organization of the employees would be a practical impossibility. This conclusion was based upon the lack of access to employees at other times because of the physical location of the store on the busiest streets of a large metropolis, the multitude of entrances and exits, the impossibility of distinguishing between customers and employees at points of access, and the variety of hours and compensation of employees...."

The compensation difficulty indicated is found in the fact that the company employed a highly competitive system of incentive pay, thus making organization by employee organizers difficult because of the reluctance of employees to trust and follow their fellow employees.
6598 N.L.R.B. 88, 95 (1952).
66Note 28, *supra*.
67Actually Marshall Field & Company was extremely generous in its allowance of rest periods. Every employee was entitled to one and a half hours off during the
purposes of the Labor Act required that non-employee organizers be admitted to the employer's restricted areas.

In the essential features above outlined, the Board was reversed by the United States Court of Appeals. The court's approach to the case is both legal and factual. The court realized that it was being presented a question of first instance. It also pointed out that, in fact, there was no element of isolation, and that employees were readily accessible to outside contacts, without the necessity of non-employee organizers entering restricted areas of the employer's premises. The significant paragraph in which the court summarized its holding is as follows:

"The order of the Board directing the company to permit non-employee organizers to carry on organizational activities in the employees' restaurants and cafeterias cannot be sustained unless the employees are 'uniquely handicapped in matter of self-organization and concerted activity.' We hold that the facts established in the instant case do not present unique handicaps of self-organization. The liberal time off policy of the company affords even greater opportunities for self-organization during working hours than is the case in many business and industrial establishments. The employees are not so isolated from outside contacts as to justify non-employee organizers having access to the cafeterias which are set aside for employees only. We conclude that the company rule denying access to employees' restaurants and cafeterias by non-employee union organizers was not in violation of Sec. 8 (a) (1) of the act." (footnotes omitted).

As a matter of law the court holds "unique handicaps" to self-organization necessary before an employer can be required to allow non-employee organizers on his premises. The Board probably agrees with

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footnotes:

6200 F. (2d) 375 (C. A. 7th, 1952).
6"The court states, 200 F. (2d) 375, 379 (C. A. 7th, 1952):
   "Apparently this is the first case in which the Board has required an employer to permit non-employee union organizers to solicit in employees' cafeterias or public waiting rooms or washrooms, absent discrimination, illegal motive, or other special circumstances which the Board did not find to exist here...."
7200 F. (2d) 375, 379 (C. A. 7th, 1952).
7200 F. (2d) 375, 381 (C. A. 7th, 1952).
this. Where the court and the Board differ is as to whether such "unique handicaps" existed in the Marshall Field case.

In effect the Court of Appeals seems to restrict the doctrine of "unique handicaps" to cases of isolation such as the lumber camp cases. Such a restriction ties in with the court's decision in Cities Service Oil Co. In that case the handicaps to organization were greater than in the Marshall Field case. Ships were in port but a few days, and members of the crews, when not on board, dispersed rapidly to various recreation spots. Such a showing was not sufficient to permit non-employee organizers on board for purposes of solicitation.

The conclusion which seems to follow from the authorities is that rules are not absolute regarding the rights of either employee or non-employee organizers to use the employer's premises for the purpose of soliciting union membership. The difference between the two types of organizers seems to relate to the burden of showing special circumstances. It may be reliably said that, prima facie, employee organizers may solicit union membership upon the employer's premises at any time that both the soliciting employee and the solicited employee are not required to be working. If special circumstances make rules against such solicitation legitimate (such as the rule against solicitation on the selling floor of a mercantile establishment) the burden is upon the employer to show them. On the other hand, normally the employer may forbid solicitation on its premises by non-employee union organizers. If "unique handicaps" to self-organization by the employees exists so as to indicate the necessity of allowing non-employees to enter the employer's premises, such handicaps must be shown by the union. Is this difference in treatment between the two types of organizers sound in principle?

Judge Learned Hand suggests that the difference between employee and non-employee organizers is explained by the fact that employee organizers are already legitimately upon the employer's premises whereas non-employees have no privilege to be there unless a special right is created by virtue of their organizational objectives. This basis of differentiation is subject to some technical difficulty. A licensee or invitee upon premises becomes a trespasser if he goes beyond the purpose of his license or invitation. Therefore, under strict property

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72 122 F. (2d) 149 (C. C. A. 2d, 1941), discussed supra, see notes 52 and 59.
CONCEPTS, employees are invitees upon the employer's premises only for the purpose of work and recreational activities approved by the employer. When they make a use of the premises not contemplated by their invitation, they become trespassers. It is recognized that strict property law has been modified by the Labor Relations Act. To determine the extent of the modification in terms of traditional property concepts, however, begs the whole question. The line between the employer's "property rights" and the rights conferred upon employees by the Labor Act must be drawn by referring to considerations of public policy. Judge Learned Hand's suggestion, therefore, hardly furnishes the basis for an analytical distinction between the two types of union organizers. There is something about his distinction, however, which appeals to the intuition. It seems to be a proposition of self-evident justice that employees, who come upon an employer's premises at the employer's invitation and to further its purposes, should have superior prerogatives, as against the employer, to those of outsiders whose only motive for entry is to further a program adverse to the owner of the premises.

However attractive, and influential, Judge Learned Hand's suggestion may be, it is believed that the soundest basis for applying different rules to employee and non-employee union organizers is to be found by considering the underlying purpose of the Labor Act. The ultimate end of the Labor Act is to secure, to those who have nothing to offer but their services, an equitable portion of our entire social production.75 The method by which the Act aims to secure that end

75It is realized that the "declaration of policy" set forth in Section One of the National Labor Relations Act, 29 U. S. C. § 151 (1935) states the purpose of that Act differently. The emphasis there is upon protecting the free flow of commerce from industrial strife. Such a statement of purpose is necessitated by legalistic considerations arising out of our constitutional distribution of powers between the federal and the state governments. A consideration of the history of the act

is by vesting in employees the right to bargain as a unit. To secure that end, it is evident that unions are a necessary means. It is also evident that employees will not always be able to accomplish an effective organization without the assistance of professional, non-employee organizers. It must be borne in mind, however, that the Labor Act was not designed to further unions as such. Any prerogatives union leaders may have must be supported by showing their utility in enabling employees to bargain collectively; they cannot be supported merely by showing their necessity in furthering the development of unions, or any particular union, as an end in itself. History is replete with examples of institutions, established to accomplish particular purposes, becoming vested interests wholly apart from the purposes they were originally designed to promote.

The employees of any employer have the most real interest and the only immediate interest in their self-organization. It follows that the purposes of the Labor Act are well served by allowing them great latitude in their organizational activities. Professional, outside organizers, as such, have no rights in their own title. A justification of their exercise of power, in any particular situation, must be derived through the immediate interests of the employees. If the employees of a particular employer desire to organize, they are undoubtedly entitled to call upon outside help. It also may be properly assumed that the purpose of the Labor Act will be best served if professional, non-employee organizers are permitted to present to employees the benefits of organization. Absent considerations of "unique handicaps"—i.e., isolation of employees—the unions' educational activities can be performed without invading the employer's premises. But, when professional organizers insist upon entering an employer's premises, the question immediately arises as to whether their primary concern is in the employees or in increasing the power of their establishment.

Employees may or may not desire to exercise the rights conferred by the Labor Act. If they do not so desire, the Act imposes no duties upon them. If the employees are genuinely interested, unionization can be accomplished by indigenous organizers. Professional organizers can advise, and perform their legitimate activities wholly outside the

and the social influences leading to its enactment together with a thorough and discerning reading of Section One itself, leaves unimpaired the conclusion stated in this article. Section One of the Labor Management Relations Act of 1947 (the so-called "Taft-Hartley" Act) does not change the essential picture so far as legislative purposes are concerned. To a great extent it follows the wording of the original act verbatim. Where changes are found, it is clear that they are not aimed at changing the fundamental philosophy of the Act.
employer's premises. It is only necessary for them to contact the few key employees who will distribute their literature, obtain signatures upon union cards, and invite the other employees to organizational meetings to be held in union halls outside the employer's premises. Gigantic industries have been organized in that way. Thus, we leave this problem by the same door we entered. The title to this article is in the form of a question: are unions an end in themselves or a means to the end of employee self-organization? If regarded as only a means, the answer to the particular problem here considered becomes clear.