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NLRB Overrules Board Precedent and Returns to Pure Supreme Court Test Regarding Union Solicitation

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On June 14, 2019, the National Labor Relations Board ("NLRB" or the "Board") issued a 3-1 decision overturning a 38-year precedent regarding non-employee union access to public spaces within an employer's property. *UPMC,* 368 NLRB No. 2 (June 14, 2019). The decision returns the NLRB to the standard outlined in *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), which only provided for two exceptions to an employer's ability to restrict non-employee union access to an employer's property. The NLRB overruled an additional exception created by the Board in *Ameron Automotive Centers*, 265 NLRB 511 (1982).

In *Babcock & Wilcox*, the Supreme Court stated that, although an employer could not restrict employees' right to discuss self-organization among themselves, "no such obligation is owed nonemployee organizers." The Supreme Court then outlined two, narrow exceptions to that general rule: inaccessibility, i.e., when a union has no other reasonable means of communicating its message to employees, the employer's property interest yields to the employees' Section 7 rights; and discrimination, i.e., preventing an employer from prohibiting nonemployee union access, but allowing other third parties to distribute literature or access employees in public spaces. The Supreme Court elaborated that the burden on the union to overcome these exceptions is a heavy one and subsequent court decisions rarely found in favor of trespassory organizational activity.

In 1982, the NLRB created a third exception that found an employer violated the National Labor Relations Act if it prevented a nonemployee union organizer from patronizing the public space as a general member of the public. *Ameron Automotive*, 265 NLRB 511. The Board in *UPMC* overruled this decision, stating that *Ameron Automotive* effectively eliminated the applicability of *Babcock & Wilcox's* rule limiting nonemployee access to the employer's private property and found discrimination simply because "nonemployee union organizers were excluded, without regard to whether the employer permitted any other nonemployees to engage in the same solicitation or promotional activities … in the public cafeteria area." The *UPMC* decision found that *Ameron Automotive* has been rejected by multiple Circuit Courts.

As a result, the *UPMC* decision returned the Board to the *Babcock & Wilcox* exceptions that permit an employer to prohibit nonemployee access to public spaces at its facility so long as the restriction (1) does not result in employee inaccessibility to the union or (2) is not implemented in a discriminatory fashion.

Applied to the facts in *UPMC*, the Board found that the inaccessibility exception was not in question. Regarding discrimination, the employer provided evidence that showed the employer had removed nonemployees from the cafeteria area for soliciting monetary contributions in 2011 and 2012, and

distributing religious literature for Falun Gong in 2013. The employer treated these solicitations consistently with the nonemployee union solicitation at issue in the present case and had the nonemployees removed from the property.

Furthermore, the Board rejected the General Counsel's position that the Board should consider nonemployee union representatives' presence in the cafeteria consistently with other nonemployees. Instead, the Board cited Fourth Circuit precedent to identify a difference between admitting friends or relatives of employees versus outside entities seeking money or memberships. Thus, the hospital employer's policy of allowing employees, patients, and friend and relatives of patients to use the cafeteria did not create a discriminatory application when nonemployee union members sought access to solicit.

As a result of *UPMC*, an employer can prohibit nonemployee access to public areas of its facility for the purpose of soliciting employees or distributing literature as long as the policy is applied consistently to all third party solicitations.

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