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A New Standard Arises Regarding Discriminatory Enforcement of Employer No-Solicitiation Rules: Restaurant Corporation of America v. NLRB

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A NEW STANDARD ARISES REGARDING DISCRIMINATORY ENFORCEMENT OF EMPLOYER NO-SOLICITATION RULES: *RESTAURANT CORPORATION OF AMERICA v. NLRB*

In an attempt to improve labor-management relations and promote the free flow of commerce, Congress enacted the National Labor Relations Act of 1935 ("NLRA" or "the Act").[1] Section 7 of the Act gives employees the right to associate freely, organize, and bargain collectively,[2] while section 8 subjects employers to sanc-

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[1] The National Labor Relations (Wagner) Act of 1935, Pub. L. No. 74-198, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151-169 (1982)) [hereinafter "NLRA" or "Act"]. The preamble of the Act states:

> It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce . . . by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing.

29 U.S.C. § 151 (1982).

In order to effectuate the policy of the Act, Congress created the National Labor Relations Board ("NLRB" or "Board"), *id.* §§ 153-56, which has both rule making, *id.* § 156, and adjudicatory power, *id.* § 160(a). The Board consists of five members appointed by the President, subject to Senate confirmation, for a five year term. *Id.* § 153(a). Although the Board originally had the power to investigate, prosecute, and adjudicate violations, the Act was later amended to vest the Board's investigatory and prosecutory powers in a separate General Counsel appointed by the President and confirmed by the Senate. *See* R. GORMAN, BASIC TEXT ON LABOR LAW UNIONIZATION AND COLLECTIVE BARGAINING 5, 7 (1976). For a discussion of the origin and development of the NLRB and the policy behind enactment of the NLRA, see generally A. COX, LAW AND THE NATIONAL LABOR POLICY 8-19 (1960); Morris, *The Developing Labor Law*, 1 A.B.A. SEC. LAB. & EMPLOYMENT 3-48 (2d ed. 1983).

[2] *See* 29 U.S.C. § 157 (1982). Section 7 provides that: "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." *Id.* Courts have held that the protections of section 7 apply equally to both union and non-union employees. *See* Vic Tanny Int'l, Inc. v. NLRB, 622 F.2d 237, 241 (6th Cir. 1980) (unorganized employee walkout protesting work-related grievances protected since "Congress . . . clearly intended to protect not only concerted activity under the sanction of a labor union, but also concerted activity of the same nature engaged in by unorganized employees.").

Some employee rights under section 7 have been held so essential that they may not be waived even in a collective bargaining agreement. *See* NLRB v. Magnavox Co., 415 U.S. 322, 324-25 (1974) (right to solicit union support at plant during non-working hours could not be waived); Note, *Property Rights and Job Security: Workplace Solicitation by Nonemployee*

tions for improper abridgment of these rights.[3] Courts have recognized, however, that employers may limit section 7 employee rights to preserve production and maintain workplace discipline.[4] Conse-

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Union Organizers, 94 YALE L.J. 374, 374-75 (1985) (Act protects employees' workplace solicitation rights to ensure informed choice regarding self-organization).

[3] *See* 29 U.S.C. § 158(a) (1982). Section 8(a) of the NLRA provides:

> It shall be an unfair labor practice for an employer —
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> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
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> . . . .
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> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

Id.

In Radio Officer's Union v. NLRB, 347 U.S. 17 (1954), the Supreme Court explained the purpose of section 8(a)(3): "The policy of the Act is to insulate employees' jobs from their organizational rights. Thus [section] 8(a)(3) . . . [is] designed to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood." *Id.* at 40 (footnote omitted). Section 10(c) provides that if unfair labor practices are found after an administrative hearing, then the Board is expressly authorized to "issue . . . an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of [the Act]." 29 U.S.C. § 160(c) (1982). The most common order is reinstatement of a discriminatorily discharged employee with back pay. *See* R. GORMAN, *supra* note 1, at 138 (asserting that upon finding of discriminatory discharge ordinary order is reinstatement with back pay); D. MCDOWELL & K. HUHN, NLRB REMEDIES FOR UNFAIR LABOR PRACTICES 104 (1976) ("[r]einstatement rights . . . are usually automatic"). To be valid, an offer for reinstatement must be unconditional and extend for a reasonable time. *Id.* at 104. Courts have accorded great deference to remedies formulated by the Board pursuant to section 10(c). *See, e.g.*, NLRB v. Gissel Packing Co., 395 U.S. 575, 612 n.32 (1969) (Board's expertise entitles its choice of remedy special deference); Gerry's Cash Mkts., Inc. v. NLRB, 602 F.2d 1021, 1025 (1st Cir. 1979) (Board's choice of remedy enforced absent irrational application of Act).

[4] *See* Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945). In *Republic Aviation*, the Court noted:

> [The Board must provide an adjustment] between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments. Like so many others, these rights are not unlimited in the sense that they can be exercised without regard to any duty which the existence of rights in others may place upon employer or employee. Opportunity to organize and proper discipline are both essential elements in a balanced society.

Id. at 797-98. *See also* Eastex, Inc. v. NLRB, 437 U.S. 556, 570-74 (1978) (exercise of employees' § 7 rights must be balanced against employers' management interests); Beth Israel Hosp. v. NLRB, 437 U.S. 483, 504-07 (1978) (Board must strike "appropriate *balance* between organizational and employer rights"); Montgomery Ward & Co., Inc. v. NLRB, 692 F.2d 1115, 1120 (7th Cir. 1982) (right to communicate at jobsite limited by employer right to direct work force and control access), *cert. denied*, 461 U.S. 914 (1983).

Employees' section 7 rights have also been balanced against other employer rights and managerial concerns. *See, e.g.*, Hudgens v. NLRB, 424 U.S. 507, 521 (1976) (Board must resolve conflicts between employees' section 7 rights and employers' private property

quently, courts have allowed employers to issue rules prohibiting employees from soliciting others to join labor organizations during "working time" in work areas.[5] Nevertheless, an employer may not enforce even a facially valid no-solicitation rule against union organizational activity when equally intrusive nonunion solicitations have occurred with the employer's knowledge.[6] Recently, however,

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rights); *Gissel*, 395 U.S. at 617 (employees' rights to associate freely balanced against employer's speech rights); NLRB v. Stowe Spinning Co., 336 U.S. 226, 230-33 (1949) (employees' right of access to company-owned meeting hall balanced against employer's property interest).

[5] *See Republic Aviation*, 324 U.S. at 803 n.10. In *Republic Aviation*, the Court, after reviewing Board precedent, endorsed presumptions regarding rules against solicitation that were adopted by the Board in a prior hearing. *See id.* at 803-04. The Court stated that:

> The Act . . . does not prevent an employer from making and enforcing reasonable rules covering the conduct of employees on company time. . . . It is therefore within the province of an employer to promulgate and enforce a rule prohibiting union solicitation during working hours. Such a rule must be presumed to be valid in the absence of evidence that it was adopted for a discriminatory purpose. It is no less true that time outside working hours, whether before or after work, or during luncheon or rest periods, is an employee's time to use as he wishes without unreasonable restraint. . . . [A] rule prohibiting union solicitation by an employee outside of working hours, although on company property . . . must be presumed to be an unreasonable impediment to self-organization and therefore discriminatory in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline.

Id. at 803-04 n.10 (quoting Peyton Packing Co., 49 N.L.R.B. 828, 843-44 (1943)).

The Board distinguishes employer rules that prohibit solicitation during "working hours" from those which limit solicitation during "working time." *See* Our Way, Inc., 268 N.L.R.B. 394, 394-95 (1983). Employer rules prohibiting solicitation during "working time" are deemed presumptively valid, while those prohibiting such conduct during "working hours" are deemed presumptively invalid. *Id.* The effect of such a distinction is that a party attempting to invalidate a presumptively valid "working time" rule has the burden of showing the rule was communicated or applied to prohibit solicitation when employees are not actually performing job duties. *See id.* at 395. A "working hours" rule requires the employer to clearly convey an intent to permit solicitation during non-working time. *See id.* at 396; *see also* Essex Int'l, Inc., 211 N.L.R.B. 749, 750 (1974) (rule forbidding solicitation during "working time" held facially valid).

[6] *See, e.g.*, Midwest Regional Joint Bd. v. NLRB, 564 F.2d 434, 446 (D.C. Cir. 1977) (enforcement against employee distributing pro-union literature improper if employer allows distribution of anti-union literature); William L. Bonnell Co. v. NLRB, 405 F.2d 593, 595 (5th Cir. 1969) (enforcement against union solicitation prohibited if employer allows solicitation for raffles and civic drives).

The Board, by examining each case based on its individual facts, determines whether or not an employer has treated union solicitation in a disparate manner. *See* Hammary Mfg. Corp., 265 N.L.R.B. 57, 57 n.4 (1982). *See also* Saint Vincent's Hosp., 265 N.L.R.B. 38, 38-41 (1982) (Board analyzed the totality of the circumstances to discern discriminatory enforcement), *enforcement granted in part, denied in part*, 729 F.2d 730 (11th Cir. 1984); Serv-Air Inc., 175 N.L.R.B. 801, 802 n.3 (1969) (disparate treatment established by quantum of incidents). Any condoned exception to the no-solicitation rule is a factor to be weighed towards a finding of disparate enforcement against union activity. *Hammary*, 265 N.L.R.B.

in *Restaurant Corporation of America v. National Labor Relations Board*,[7] the Court of Appeals for the District of Columbia Circuit held that an employer might enforce a facially valid no-solicitation rule against union organizational activity while knowingly allowing employees to solicit contributions from other employees for social purposes.[8]

The Restaurant Corporation of America ("RCA"), which operated several food service facilities in Washington, D.C.,[9] terminated two employees for violation, during working hours, of its facially valid no-solicitation rule.[10] The record indicated that prior

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at 57 n.4; *see* Ridgewood Management Co. v. NLRB, 410 F.2d 738, 740 (5th Cir.), *cert. denied*, 396 U.S. 832 (1969); *see also Bonnell Co.*, 405 F.2d at 595 (discriminatory enforcement against union activity found where widespread exceptions and nearly complete lack of enforcement existed otherwise); NLRB v. Electro Plastic Fabrics, Inc., 381 F.2d 374, 376 (4th Cir. 1967) (discriminatory discharge found where employer allowed anti-union and "other kinds" of solicitation despite posting and enforcing no-solicitation rule).

An employer may, however, enact a no-solicitation rule that totally prohibits non-employee union organizers access to company premises, "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 employer's notice or order does not discriminate against the union by allowing other distribution." NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 112 (1956). Unlike employees, non-employee union organizers have the burden of proving: (1) employer denial of access unreasonably limits effective communication and (2) the ineffectiveness of alternate means of communication. *See* Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180, 205 (1978); Hutzler Bros. Co. v. NLRB, 630 F.2d 1012, 1016-17 (4th Cir. 1980); *see also* Hanley, *Union Organization on Company Property — A Discussion of Property Rights*, 47 GEO. L.J. 266, 298 (1958) (not unreasonable to require non-employee union organizer to resort to alternate means).

[7] 801 F.2d 1390 (D.C. Cir. 1986).

[8] *Id.* at 1394.

[9] *Id.* at 1392.

[10] *Id.* The rule mandates:

> SOLICITATION OF ANY KIND, INCLUDING SOLICITATION FOR CLUBS, ORGANIZATIONS, POLITICAL PARTIES, CHARITIES, ETC. IS *NOT* PERMITTED ON WORKING TIME OR IN CUSTOMER AREAS. DISTRIBUTION OF LITERATURE OF ANY KIND IS *NOT* PERMITTED ON WORKING TIME OR IN WORKING AREAS. OFF-SHIFT EMPLOYEES ARE *NOT* ALLOWED ON THE PREMISES.

Id. (emphasis in original). Since application of the rule was limited to "working hours" the rule was presumptively valid on its face. *See id.* at 1391; *see also infra* note 5 and accompanying text (rule presumptively valid unless adopted for discriminatory purpose).

A Restaurant Corporation employee, Herbekian, attempted to persuade co-workers to join the Hotel and Restaurant Employees Union, Local 25, AFL-CIO. *Restaurant Corp.*, 801 F.2d at 1392. In work areas during working hours, on ten separate occasions, Herbekian discussed, with employees, the possibility of unionization. *Id.* Her solicitations "involved an explanation [to employees] of the comparative merits of the union's dental, hospitalization, and legal plans." *Id.* at 1401 (MacKinnon, J., dissenting in part and concurring in part).

Herbekian approached Dameron, a fellow employee, who subsequently agreed to help in the organizing effort. *Id.* at 1392. The record indicated that Dameron solicited five employ-

to the employee terminations, RCA had allowed six instances of nonunion solicitation during working time.[11] Both RCA employees and supervisors participated in these nonunion solicitations, which consisted of collections for employees.[12] General Counsel of the National Labor Relations Board ("NLRB" or the "Board") issued a complaint alleging RCA's actions constituted an unfair labor practice in violation of section 8(a)(1) and (3) of the NLRA, which prohibits discriminatory conduct motivated by an anti-union animus.[13] After conducting a hearing, the Administrative Law Judge found RCA in violation of section 8(a)(1) and (3).[14] The Board subsequently adopted this finding and issued its final order which mandated, *inter alia*, that RCA cease and desist from disparate enforcement of its no-solicitation rule.[15]

On appeal, the District of Columbia Circuit denied enforcement of the Board's order.[16] Writing for the court, Judge Bork rejected the Board's conclusions as not supported by substantial evi-

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ees on non-working time and two others during working time. *Id.* The two working time solicitations lasted less than five minutes at a time when the employees were not actually working. *Id.* at 1397 (MacKinnon, J., dissenting in part and concurring in part).

Upon learning of the activities of Herbekian and Dameron, the General Manager suspended the two employees pending further investigation of their activities. *Id.* at 1392. When the employees later inquired about their job status, both were told they had been fired. *Id.*

[11] *Id.* at 1393. The solicitations included: (1) an employee taking up a collection on behalf of another employee who was leaving the company; (2) a supervisor organizing a collection among the employees to purchase a gift for a departing supervisor; (3) a supervisor collecting from employees on behalf of an employee expecting the birth of a child; (4) an employee collecting to purchase a birthday cake for another employee; (5) an employee and a supervisor collecting for a going away present for another employee; and (6) an employee collecting for a birthday cake for a fellow employee. *Id.*

[12] *See id.* at 1393.

[13] *See supra* note 3 and accompanying text.

[14] *Restaurant Corp.*, 801 F.2d at 1393. The Administrative Law Judge ("ALJ") noted that several of the nonunion work time solicitations were initiated and participated in by supervisory personnel. *See Restaurant Corp.*, 271 N.L.R.B. at 1087. In the context of the case, the ALJ held that the condoned employee and supervisory solicitations were sufficiently numerous to support a finding of discriminatory enforcement against Herbekian and Dameron. *Id.* The ALJ also found that RCA had violated section 8(a)(1) of the Act by coercively interrogating some of its other employees regarding their alleged union activity. *Id.* at 1086.

[15] *Restaurant Corp.*, 27 N.L.R.B. 1081. The Board ordered that both Herbekian and Dameron be reinstated to their former positions with back pay. *Id.* The Board also ordered RCA to cease and desist from coercively interrogating employees concerning union activities. *Id.* RCA did not challenge this part of the Board's decision, but the court neither enforced nor denied this part of the order. *See Restaurant Corp.*, 801 F.2d at 1404 (MacKinnon, J., dissenting in part and concurring in part).

[16] *Restaurant Corp.*, 801 F.2d at 1396.

dence in the record.[17] The court found the Board had not produced sufficient evidence to show that the permitted solicitations "had a potential for interference with work substantially equivalent to that of union solicitations."[18] The court noted that the nonunion solicitations in the instant case "could seldom, if ever, support such a finding of equivalent [potential for disruption of work]."[19] Moreover, the court reasoned that the disruptive effect of the nonunion solicitations in cases such as this "is counterbalanced by an accompanying increase in employee morale and cohesion."[20]

In dissent, Judge MacKinnon noted that no-solicitation rules are presumptively valid only when directed towards, and actually preventing interference with, workplace production and discipline.[21] Judge MacKinnon argued that since employee solicitations to join labor unions were made pursuant to a statutory right, the Board had a duty to ensure that no-solicitation rules were enforced without regard to the content of the solicitations.[22] Therefore, Judge MacKinnon concluded, the underlying policy of allowing no-solicitation rules, to avoid actual disruption in the workplace, requires the courts to compare the challenged instances of union solicitation with the condoned instances of nonunion solicitations.[23]

In *Restaurant Corporation*, the circuit court, comparing the

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[17] *See id.* at 1393.

[18] *Id.* at 1394 (quoting Central Freight Lines v. NLRB, 653 F.2d 1023, 1026 (5th Cir. 1981)).

[19] *Restaurant Corp.*, 801 F.2d at 1394 (emphasis omitted).

[20] *Id.*

[21] *See id.* at 1400 (MacKinnon, J., dissenting in part and concurring in part).

[22] *See id.* at 1402 n.2 (MacKinnon, J., dissenting in part and concurring in part). Judge MacKinnon noted that disparate enforcement of no-solicitation rules occurs where an employer treats basically similar conduct differently. *See id.* at 1401 (MacKinnon, J., dissenting in part and concurring in part). Therefore, Judge MacKinnon reasoned, the Board must engage in a fact-based inquiry and proceed on a case-by-case basis. *Id.* (MacKinnon, J., dissenting in part and concurring in part).

[23] *Id.* (MacKinnon, J., dissenting in part and concurring in part). Judge MacKinnon criticized, as being a pure policy statement, the majority's attempt to distinguish beneficent solicitations, and the supposed positive effects on employee morale from other types of solicitation. *Id.* at 1403 (MacKinnon, J., dissenting in part and concurring in part).

Although Judge MacKinnon agreed with the court that Herbekian's numerous and systematic violations of the no-solicitation rule had a comparatively greater actual detrimental effect on workplace production and discipline than did the social solicitations condoned by the employer, *see id.* at 1401 (MacKinnon, J., dissenting in part and concurring in part), he asserted that Dameron's work time solicitations had a disruptive effect similar to that of the condoned nonunion solicitations. Thus, he argued that the Board's order with respect to Dameron should be upheld. *See id.* at 1402 (MacKinnon, J., dissenting in part and concurring in part).

respective potential for interference with workplace production and discipline of union and nonunion solicitation, concluded union solicitation was inherently more disruptive than social solicitation. In so doing, the court effectively adopted a new standard to test whether a no-solicitation rule has been enforced discriminatorily.[24] It is submitted that, in direct contradiction to the intent and purposes of section 7, this standard discriminates against union organizing. It is suggested that the court has unduly ventured into the area of labor policy making, an area in which the Board, with its long recognized expertise in the formation and refinement of national labor policy pursuant to the NLRA, properly resides. This Comment will examine the developing case law on both the judicial and administrative levels and will suggest that the District of Columbia Circuit deviated from consistent policy and precedent in the area of no-solicitation rules. Furthermore, it is asserted that adoption of an "actual disruption" standard would allow the Board and the courts to determine more accurately and consistently whether or not an employee was improperly terminated because of his protected participation in union organizational activity.

NATIONAL LABOR POLICY FORMATION SHOULD BE LEFT TO THE NLRB

The court's holding in *Restaurant Corporation* effectively disregards many of the Board's previous basic policy considerations.[25] Previous cases, relied upon by the majority, in which the Board has upheld enforcement of no-solicitation rules, rested on a factual determination of at least some disruptive effect caused by the employee's union activities.[26] The *Restaurant Corporation* court,

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[24] *See id.* at 1404 (MacKinnon, J., dissenting in part and concurring in part); *infra* notes 40-45 and accompanying text.

[25] *See Restaurant Corp.*, 801 F.2d at 1403 (MacKinnon, J., dissenting in part and concurring in part).

[26] *Id.* at 1394 (citing The Seng Co., 210 N.L.R.B. 936, 936 (1974)). In *Seng*, three employee organizers were fired for solicitation during work time. *See Seng*, 210 N.L.R.B. at 936. In each of these situations, the evidence indicated multiple instances of solicitation during work time, as well as evidence that employees had been solicited while at work. *See id.* at 940 n.5. The Board, on the other hand, noted that there was no evidence that the charitable solicitations had interfered with production. *Id.*

In Atkins Pickle Co., 181 N.L.R.B. 935 (1970), the Board found that union solicitation and organizational activity during working hours was detrimental to production, causing workers to leave their job posts and gather in small groups. *See id.* at 935. Evidence did not indicate that the few non-union solicitations allowed on company time resulted in interference with production. *Id.*

however, focused on the fact that the condoned solicitations were limited to beneficent acts whose disruptive effects were "counterbalanced by an increase in employee morale."[27] The court also based its decision on the fact that outside organizations had never been allowed to solicit on company property and, that none of the company solicitations were for personal profit.[28] By including these grounds, the court, instead of reviewing the Board's policy, engaged in policy making of its own.[29] Congress, in an attempt to promote better labor-management relations, established the NLRB to balance the competing interests of the employer and the employee.[30] The power and special competence of the Board to create national labor policies has long been recognized by the courts.[31]

In Serv-Air, Inc., 161 N.L.R.B. 382 (1966), *rev'd*, 395 F.2d 557 (10th Cir.), *cert denied*, 393 U.S. 840 (1968), the terminated employee organizer had solicited eight others on company time, including employees working at an assembly line. *Id.* at 392. On remand, the Board held that three charitable solicitations of short duration did not rise to the level of disparate enforcement, but noted that:

> [w]e do not understand the court of appeals' decision as meaning that a finding of discriminatory application would not be justified even if numerous solicitations for various and sundry social and charitable purposes were allowed, but only as concluding that disparate treatment was not established by the quantum of such incidents shown in the record before it.

Serv-Air, Inc., 175 N.L.R.B. 801, 802 n.3 (1969).

In United Aircraft Corp. v. NLRB, 440 F.2d 85 (2d Cir. 1971), the court held that isolated instances of charity and gift solicitation did not prohibit an employer from enforcing a no-solicitation rule against union activists. *See id.* at 97. This rule, however, was promulgated pursuant to a collective bargaining agreement; the court was reluctant to overturn the rule because it had played an important part in management-labor negotiations. *Id.* at 96.

It is asserted that in the above cases, the evidence suggested the actual disruptive effect of the union solicitation was greater than of the non-union solicitation; therefore, the rule was properly enforced. Consequently, it is submitted that the *Restaurant Corporation* Court's concern with vitiating the efficacy of no-solicitation rules is unfounded.

[27] *See Restaurant Corp.*, 801 F.2d at 1394.

[28] *See id.* at 1394.

[29] *See id.* at 1403 (MacKinnon, J., dissenting in part and concurring in part). The court cited no case in which the Board has considered personal profit as a factor in determining whether a rule has been improperly enforced. *See id.* at 1395. The Board has not held that solicitation based upon charitable motivation is exempt from consideration as to whether or not an employer disparately enforced a no-solicitation rule. *See* Saint Vincent's Hosp., 265 N.L.R.B. 38, 40 (1982). The Board, however, has held that employer toleration of intra-employee social solicitations despite a broad no-solicitation rule may constitute disparate enforcement. *See* Idaho Potato Processors Inc., 137 N.L.R.B. 910, 911 (1962).

[30] *See supra* notes 1-4 and accompanying text.

[31] *See, e.g.*, NLRB v. Hendricks County Rural Elec. Membership Corp., 454 U.S. 170, 177 (1981) (citing Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1967)) ("the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong"). In Beth Israel Hospital v. NLRB, 437 U.S. 483, 501 (1978), the Court noted that in labor cases "[t]he ultimate problem is the balancing of

Consequently, courts have traditionally accorded Board decisions great deference even when the court itself would have reached a different result had it heard the case *de novo*.[32]

It is submitted that the *Restaurant Corporation* court erred in substituting its own views of effective labor policy in place of established Board policy, absent a showing that the Board had departed from established precedent. Such substitution impedes the development of a consistent Board policy to ameliorate management-employee relations and directly contradicts the Board's mandate under the NLRA.

DISCRIMINATORY ENFORCEMENT OF NO-SOLICITATION RULES: "ACTUAL DISRUPTION" — THE PROPER STANDARD

The decision by the NLRB to forego using its rule-making authority[33] has led to the formulation of policy on a case-by-case basis,[34] often obscuring fundamental Board policy.[35] Similarly, to

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the conflicting legitimate interests. The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review." *Id.* at 501 (quoting NLRB v. Truck Drivers, 353 U.S. 87, 96 (1957)). *See also* Republic Aviation Corp. v. NLRB, 324 U.S. 793, 798 (1945) (Congress used broad language in NLRA to give Board flexibility to achieve legislative purpose).

[32] *See, e.g.*, NLRB v. J. Weingarten, Inc., 420 U.S. 251, 266-67 (1975) (Board decision subject to limited judicial review); Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951) (labor relations requires application of specialized knowledge not possessed by courts). *See generally* Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393, 404 (1981) (courts take limited meaning of rationality in deference to administrative policy judgments).

[33] *See* NLRB v. Wyman-Gordon Co., 394 U.S. 759, 779 n.2 (1969) (Douglas, J., dissenting) (NLRB used adjudication instead of rule-making to announce new policies); Bell Aerospace Co. v. NLRB, 475 F.2d 485, 495 n.14 (2d Cir. 1973), *rev'd*, 416 U.S. 267 (1974) (NLRB used substantive rule-making only once since its inception). *See generally* Peck, *The Atrophied Rule-Making Powers of the National Labor Relations Board*, 70 YALE L.J. 729, 730-32 (1961) (NLRB considers itself a quasi-judicial body).

[34] *See* NLRB v. Bell Aerospace Co., 416 U.S. 267, 295 (1974) (rule-making/adjudication decision up to Board's informed discretion); B. SCHWARTZ, ADMINISTRATIVE LAW § 4.16 (1984). *See also* Bernstein, *The NLRB's Adjudication-Rule Making Dilemma Under the Administrative Procedure Act*, 79 YALE L.J. 571, 574-82 (1970) (lack of adequate fact-finding machinery inhibits NLRB rule-making).

[35] *See, e.g.*, NLRB v. Majestic Weaving Co., 355 F.2d 854, 860-61 (2d Cir. 1966) (retroactive application of new principles by adjudication may have negative effects on parties relying on old rule in affected industry); Our Way, Inc., 268 N.L.R.B. 394, 395 (1983) (unnecessary departure from precedent resulted in confusion and unproductive litigation). One commentator suggested that since the Board's decision is limited to the facts before it, the members may not fully articulate the policy grounds for their decisions. *See* Bernstein, *supra* note 34, at 576. The Board faces the dilemma of balancing the dangers of premature

formulate and refine Board policy regarding discriminatory enforcement of no-solicitation rules, the Board hears individual cases and engages in a fact-based inquiry on a case-by-case basis.[36] However, a recurrent theme throughout the cases has been Board consideration of the level and nature of the permitted employer solicitation to determine whether the employer has treated basically similar conduct differently.[37]

The *Restaurant Corporation* court found that if an employee's

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generalization and excessive particularization when announcing or modifying policy in the context of a particular case. *See id.* at 588. As a result, litigants are often unaware of the larger issues of policy formation when they appear before the Board and this results in changes in Board policy in a seemingly haphazard and inconsistent fashion. *See id.* at 588-89.

[36] *See, e.g., Restaurant Corp.*, 801 F.2d at 1401 (Board determines what constitutes discriminatory application case-by-case); Montgomery Ward & Co. v. NLRB, 692 F.2d 1115, 1121 (7th Cir. 1982) (same).

[37] *See* Midwest Stock Exch. v. NLRB, 635 F.2d 1255, 1270 (7th Cir. 1980) (disparate enforcement where charity solicitations permitted but union solicitations prohibited); Midwest Regional Joint Bd. v. NLRB, 564 F.2d 434, 446-47 (D.C. Cir. 1977) (permitted company literature but not union information). *See also* Mission Valley Mills, 225 N.L.R.B. 442, 447 (1976) (anti-union solicitation invalidates application of rule against union activity); Alberts, Inc., 213 N.L.R.B. 686, 692 (1974) (not infrequent exceptions for birthday and anniversary gift solicitation invalidates rule applied against union activities).

The *Restaurant Corporation* court compared the "nature" of social solicitation with that of union solicitation and concluded that an employer might choose to punish only union solicitation of the same nature and frequency, since union activity was potentially more disruptive. *Restaurant Corp.*, 801 F.2d at 1394. It is suggested that according social solicitation preferential status because of its "superior nature" is unjustified considering that an employer may enact a rule completely prohibiting social solicitation on the premises, yet such a rule directed against union solicitation would be invalid on its face. *See* Gerry's Cash Mkts., Inc. v. NLRB, 602 F.2d 1021, 1022 (1st Cir. 1979); United Steelworkers of America v. NLRB, 393 F.2d 661, 663 (D.C. Cir. 1968). Finding union solicitation of a less beneficial nature than social solicitation allows employers to tolerate the disruptive effects of solicitations on the workplace while denying employees and the public at large the beneficial effects of collective bargaining sought to be achieved by the Act. *See supra* notes 1-3 and accompanying text.

The Board has recognized a difference in nature between solicitations engaged in by employees and solicitations participated in by supervisory personnel. *See* Saint Vincent's Hosp., 265 N.L.R.B. 38, 40-41 (1981). In *Saint Vincent's Hospital*, the Board noted that supervisor participation in solicitation for charitable and intra-employee social acts:

> constitute[d] substantial evidence that [the employer] discriminatorily enforced its rule . . . . We emphasize that this evidence assumes added significance in light of the active participation of supervisors in the conduct . . . . Such supervisory conduct further demonstrates that [the employer] had no interest in enforcing its rule, apart from its desire to inhibit its employees' union activities.

Id. at 40. The *Restaurant Corporation* court never considered the participation of supervisory personnel despite the Board's reliance on this fact in reaching its conclusion. *See Restaurant Corp.*, 271 N.L.R.B. 1080, 1087 (1981).

activities caused little actual disruption of the workplace[38]—no more than otherwise had been allowed by the employer[39]— an employer might still enforce a no-solicitation rule against union attempts to organize provided that the employer did not allow solicitation which "had a *potential* for interference with work substantially equivalent to that of union solicitations."[40] The court adopted this language from dictum asserted in a Fifth Circuit case which later was viewed skeptically in that same circuit.[41] Previously, the courts and the Board had held that an employer may neither promulgate nor enforce a no-solicitation rule based on the content of the activity.[42] It is asserted that the *Restaurant Corpo-*

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[38] *See Restaurant Corp.*, 801 F.2d at 1392. The actual length of time Dameron spent discussing union activity with others was disputed. *Compare id.* at 1392 (five to ten minutes) *with id.* at 1397 (MacKinnon, J., dissenting in part and concurring in part) (discussion lasted less than five minutes with others not actually working at time). Neither version, however, reveals any disruptive effect on the workplace. *See id.* at 1397 (MacKinnon, J., dissenting in part and concurring in part).

[39] *See id.* at 1402 (MacKinnon, J., dissenting in part and concurring in part).

[40] *See id.* at 1394 (quoting Central Freight Lines v. NLRB, 653 F.2d 1023, 1026 (5th Cir. 1981)) (emphasis added).

[41] *See id.* at 1403 (MacKinnon, J., dissenting in part and concurring in part). In dictum in Central Freight Lines v. NLRB, 653 F.2d 1023 (5th Cir. 1981), the court suggested that if the rule had been valid, it might have been disparately enforced because there was "no evidence" that sports betting, which was allowed by the employer on company time, would have a potential for interference substantially equivalent to union activity. *See id.* at 1026.

In NLRB v. Trailways, Inc., 729 F.2d 1013 (5th Cir. 1984), the court, while finding a no-solicitation rule was discriminatorily enforced, noted the dictum in *Central Freight Lines* and questioned the significance accorded it by the Special Master in his report. *See id.* at 1021. The *Trailways* court stated:

> Without commenting further on this dictum, we note that it involves a balance between the undisputed right of employees to self-organization and the equally undisputed right of employers to maintain discipline in their establishments . . . . [W]here a valid no-solicitation rule is discriminatorily applied only to union activity, the presumption arises that the rule does not serve the legitimate ends of plant order and production. In such a case, the employer would have to introduce evidence of special circumstances necessary to justify such discriminatory application.

Id. at 1021 n.16 (citations omitted).

It is asserted that the D.C. Circuit's ruling rests on tenuous authority at best, and is hardly persuasive justification for upholding Dameron's dismissal in light of the "actual interference" standard discussed *infra* notes 43-45 and accompanying text.

[42] *See Restaurant Corp.*, 801 F.2d at 1402 n.2 (MacKinnon, J., dissenting in part and concurring in part). In William L. Bonnell Co. v. NLRB, 405 F.2d 593 (5th Cir. 1969), the court noted that when other types of solicitation go unchallenged "the inference arises that the rules are not being used simply to serve the ends of plant order and production." *Id.* at 595. *See also* George Washington Univ. Hosp., 227 N.L.R.B. 1362, 1373-74 (1977) (discrimination against union activity implied if similarly disruptive solicitation allowed); Selwyn Shoe Mfg. Corp., 172 N.L.R.B. 674, 676 (1968) (anti-union activist's discharge improper

ration holding was contrary to the long-established precedent that no-solicitation rules are valid solely because they are designed to enhance and protect production while safeguarding workplace discipline.

By rejecting a standard which measured disparate enforcement by contrasting the actual effects of permitted workplace solicitation against the actual disruptive effects of employee attempts to unionize, the *Restaurant Corporation* court unwisely ignored the previously established interpretation of section 7 of the NLRA.[43] It is asserted that the adoption of a similarity of actual disruption standard would allow courts to examine the real effects of variation from the no-solicitation rule. Courts then could more easily determine whether or not an employer, as required by section 8(a)(1) and (3) of the Act, would have terminated a given employee even in the absence of his union activities.[44] The current

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upon showing that solicitation activity, not abdication of duties, motivated employer's action). An employer, furthermore, may not promulgate a new no-solicitation rule in an attempt to impede union organizational activity. *See, e.g.*, NLRB v. Roney Plaza Apartments, 597 F.2d 1046, 1049 (5th Cir. 1979) (initial promulgation at commencement of organizational activity strong evidence of discriminatory intent); NLRB v. Electro Plastic Fabrics, Inc., 381 F.2d 374, 376 (4th Cir. 1967) (rule promulgated to impede organizational activity as other activities permitted after formulation).

[43] *See Restaurant Corp.*, 801 F.2d at 1403-04 (MacKinnon, J., dissenting in part and concurring in part). A review of Board precedent reveals that when considering whether or not a no-solicitation rule has been enforced disparately, the Board consistently has based its decisions on the actual disruptive effects of the respective union and nonunion solicitations. *See* George Washington Univ. Hosp., 227 N.L.R.B. 1362, 1373-74 (1977) (no solicitation rule disparately enforced because nonunion solicitation was "neither more essential to nor less disruptive of, the effective functioning of the hospital"); Hanes Hosiery, Inc., 219 N.L.R.B. 338, 350 (1975) (dismissal of union soliciting employee invalid where the solicitations were "not shown to have actually impeded work."); Daylin Inc., 198 N.L.R.B. 281, 281 (1972) ("only a substantial business justification, such as a *genuine interference* with the progress of the work, justifies any restriction on this right of solicitation") (emphasis added).

As Judge MacKinnon noted in dissent, "the social solicitations permitted by the Company were only nominally disruptive of the workplace, but the same is true of Dameron's solicitation." *Restaurant Corp.*, 801 F.2d at 1402 (MacKinnon, J., dissenting in part and concurring in part). It is asserted that since Dameron's solicitations lasted less than five minutes and involved only two employees, as opposed to the condoned "social solicitations" which involved approximately twelve employees, Judge MacKinnon correctly classified the actual effect on the workplace as *de minimus*. *See id.* (MacKinnon, J., dissenting in part and concurring in part). Such a finding, it is suggested, is inconsistent with the majority opinion finding that the Board's determination of disparate application of the no-solicitation rule was not supported by substantial evidence. *Id.* at 1394 n.2. (MacKinnon, J., dissenting in part and concurring in part).

[44] *See* Wright Line, 251 N.L.R.B. 1083, 1089 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 899 (1982). An employer violates section 8(a)(3) when he engages in discriminatory conduct motivated by an anti-union animus. *See, e.g.*, NLRB v.

"potential for disruption" standard effectively permits employers to select certain solicitations and their consequential negative effects on production and discipline, while simultaneously enforcing no-solicitation rules against union activities that have a similar or lesser detrimental effect on workplace production and discipline. By finding union solicitation inherently more "potentially disruptive" than other permitted and condoned solicitation of similar intensity, it is asserted that the court puts union activity in a less preferred, rather than in a more preferred, position, as is mandated by the Act.[45]

CONCLUSION

Section 7 of the NLRA gives employees the right to associate and organize with one another, limited only by management's legitimate concern over production and discipline. The standard adopted by the *Restaurant Corporation* court impedes organizational activity while, at the same time, allowing employers to permit similarly disruptive nonunion activity to affect workplace production and discipline. The court has deviated from established Board policy and, more fundamentally, has ventured into labor policy formulation, an area in which the court has little or no expertise. In future cases of alleged discriminatory enforcement of no-solicitation rules, the Board and courts should determine whether or not an employer tolerated similarly disruptive nonunion solicitations in the past. Adoption of a "similarity of actual disruption standard" will more accurately determine an employer's true motivation for discharging employees engaged in statutorily protected activity.

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Brown, 380 U.S. 278, 288 (1965) (anti-union motivation will convert an otherwise ordinary business act into an unfair labor practice). An employer may defend against such a charge only by asserting a legitimate business reason for the conduct. *See* NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 34 (1967). In *Wright Line*, the Board formulated a causation test which required an employer to show that the disciplinary action would have occurred regardless of the union activity. *See* Wright Line, 251 N.L.R.B. 1083, 1089 (1980). Prior to *Wright Line* there had been two inconsistent standards to determine whether or not a section 8(a)(3) violation had taken place. *See* Comment, *Labor Law — Employer Violates Section 8(a)(3) of NLRA If Employee Would Not Have Been Discharged But For Union Activity — Burden of Persuasion Remains with Employee*, 28 VILL. L. REV. 470, 475-80 (1982). It is submitted in light of the similarity of actual disruption caused by Dameron's solicitations and the "social" solicitations, Dameron would not have been terminated absent an anti-union motivation on the part of RCA.

[45] *See supra* note 37 (discussion of "union" solicitation as compared to "social" solicitation).