THE UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ROUNDY'S, INC.

and Case 30-ca-17185

MILWAUKEE BUILDING AND
CONSTRUCTION TRADES COUNCIL, AFL-CIO

BRIEF OF INTERNATIONAL COMMISSION FOR LABOR RIGHTS AS *AMICUS CURIAE*

Respectfully submitted by:

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTRODUCTION

The Board has invited amicus participation requesting briefs to address the proper "discrimination" standard to be applied in cases where union handbillers have been denied access to the employer's premises. The Board has asked *Amici* to address, in cases alleging unlawful employer discrimination in non employee access, whether the Board should continue to apply the Board majority decision *in Sandusky Mall Co*., and if not, what standard should the Board adopt to define discrimination in this context. The Board has also requested *Amici* to address what if any bearing the decision in *Register Guard* may have on the Board's standard for finding unlawful discrimination. The International Commission for Labor Rights submits this Amicus Brief in support of the Union's right to access to the employer's property.

INTEREST OF *AMICUS CURIAE*

The International Commission for Labor Rights (ICLR) is a non-profit, non-governmental organization based in New York City, which coordinates the pro bono work of a global network of lawyers and jurists who specialize in labor and human rights law. The ICLR has an interest in the outcome of this case given its primary purpose of ensuring that the fundamental freedoms of working people are effectively realized. ICLR seeks to ensure that domestic labor law conforms to international norms as articulated in the International Labor Organization's (ILO) Conventions. Bringing the jurisprudence of the Committee on Freedom of Association (CFA) of the ILO to the attention of the Board on the question of access to employer workplaces will be of assistance to the Board in deciding this case.

SUMMARY OF THE ARGUMENT

The CFA is charged with interpreting ILO Conventions 87 and 98, which are the Conventions most analogous to Sections 1, 7 & 8 of the National Labor Relations Act. The CFA decisions approach the issue of non employee access to employer workplaces from the

perspective that the right of access is essential to the right of freedom of association. The jurisprudence does not adopt a "discrimination" paradigm but rather assumes non employee union access to employees for the purpose of advising them on the benefits of unionization is critical to the core values of promoting freedom of association and collective bargaining.

This brief will consist of two sections. The first is a summary of the ILO's CFA jurisprudence on this question. The second will be ICLR's view of the Board's responsibility to adopt the approach of the CFA to address access issues.

I. CFA JURISPRUDENCE ON THE ISSUE OF ACCESS TO EMPLOYER WORKPLACES

A. BACKGROUND- History and Role of the CFA

In the late 1940s the ILO passed Conventions 87 and 98. These conventions protect freedom of association and the right to collective bargaining.[1] Convention 98 also provides protection to employees against interference with their rights to freedom of association and to form trade unions. These conventions have been ratified by most countries, although the United States has not ratified them.[2] Shortly after the adoption of Conventions 87 and 98, the ILO determined that it needed a supervisory procedure to ensure compliance with these conventions

[1].After World War I, longtime AFL president Samuel Gompers and other labor leaders pressed U.S. president Woodrow Wilson to endorse the creation of the International Labor Organization in the belief that "universal and lasting peace can be established only if it is based upon social justice" (ILO Constitution preamble). Wilson and the other negotiators at the Paris Peace Conference agreed that labor peace was central to world peace, and they accepted the proposal to establish an international institution to help mitigate the poor working conditions that gave rise to social unrest. The ILO adopted a structure that included representatives of government, business, and labor, allowing it to adopt international standards that would be accepted by everyone. Initial conventions of the ILO endorsed the eight-hour day and the 48-hour week as the norm and called for the abolition of child labor (under age 14), the institution of maternity leave (six weeks), and the establishment in every country of a national employment service. The right of free association itself, although included generally in the ILO Constitution's preamble, was not part of the organization's fundamental principles until 1944, when it adopted the Declaration of Philadelphia. In 1948, the ILO adopted Convention No. 87 on freedom of association, followed in 1949 by Convention No. 98 on the right to bargain collectively. Freedom of association and trade union rights were also recognized in the United Nations' Universal Declaration of Human Rights. ILO Conventions 87 and 98 have been adopted by 148 and 158 countries.

[2] The United States has consistently taken the position that it accepts the principles contained in these Conventions and has raised other concerns not relevant to this brief as to why the Conventions have not been ratified.

even in countries which had not ratified them. The Committee on Freedom of Association (CFA) was established in 1951 for the purpose of receiving complaints and interpreting the duties under Conventions 98 and 87. The CFA is composed of an independent Chairperson and three representatives from workers, governments and employers. When a case is accepted the CFA establishes the facts in dialogue with the government concerned. Where a violation of Conventions 87 and/or 98 has been found, the CFA issues a report through the ILO's Governing Body and makes recommendations on how the violation should be remedied. In its 60 year history of handling cases the CFA has developed a rich jurisprudence. The principles articulated in these decisions give substance to Conventions and are important precedent.

B. CFA Decisions on Access to Workplaces

CFA jurisprudence in the 2006 decennial digest of decisions sets forth the principles regarding access of union representatives to employer workplaces in paragraphs 1102 to 1109 as follows:

1102. The Committee has drawn the attention of governments to the principal that workers' representatives should enjoy such facilities as may be necessary for the proper exercise of their functions, including access to workplaces.[3]

1103. Governments should guarantee the access of trade union representatives to workplaces, with due respect for the rights of property and management, so that trade unions can communicate with workers in order to apprise them of the potential advantages of unionization.[4]

[3] See the 1996 *Digest*, para. 957; 304th Report, Case No. 1852, para. 493; 333rd Report, Case No. 2255, para. 131; and 334th Report, Case No. 2316, para. 505.

[4] See the 1996 Digest, para. 954; 309th Report, Case No. 1852, para. 338; 327th Report, Case No. 1948/1955, para. 358; 330th Report, Case No. 2208, para. 604; 332nd Report, Case No. 2046, para. 446; 333rd Report, Case No. 2255, para. 131; 334th Report, Case No. 2316, para. 505; 335th Report, Case No. 2317, para. 1087; and 336th Report, Case No. 2316, para. 58, and Case No. 2255, para. 112.

1104. Workers' representatives should be granted access to all workplaces in the undertaking where such access is necessary to enable them to carry out their representation function.[5]

1105. Trade union representatives who are not employed in the undertaking but whose trade union has members employed therein should be granted access to the undertaking. The granting of such facilities should not impair the efficient operation of the undertaking concerned.[6]

1106. For the right to organize to be meaningful, the relevant workers' organizations should be able to further and defend the interests of their members, by enjoying such facilities as may be necessary for the proper exercise of their functions as workers' representatives, including access to the workplace of trade union members[7].

1107. The denial of access by trade union leaders to the premises of enterprises on the grounds that a list of dispute grievances had been presented constitutes a serious violation of the right of organizations to carry out their activities freely, which includes the presentation of grievances even by a trade union other than that which concluded the collective agreement in force.[8]

1108. The necessary measures should be taken to ensure that access is granted freely to farmworkers, domestic workers and workers in the mining industry by trade unions and their officials for the purpose of carrying out normal union activities although on the premises of employers.[9]

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[5] See 318th Report, Case No. 2012, para. 426.

[6] See 334th Report, Case No. 2316, para. 505.

[7] See 334th Report, Case No. 2222, para. 220.

[8] See the 1996 *Digest*, para. 955.

[9] See the 1996 *Digest*, para. 956.

1109. Access to the workplace should not of course be exercised to the detriment of the efficient functioning of the administration or public institutions concerned. Therefore, the workers' organizations concerned and the employer should strive to reach agreements so that access to workplaces, during and outside working hours, should be granted to workers' organizations without impairing the efficient functioning of the administration or the public institution concerned.[10]

As can be seen, these principles presume that in order for union representatives to be able to apprise workers of the potential benefits of unionization or to carry out other functions of union representatives, **access is a must**. While "due respect" is to be accorded to the rights of property and management, governments must guarantee access of trade union representatives to employers' property without reference to questions of discrimination. That is, under CFA jurisprudence even if an employer bars all solicitors from a workplace, union representatives must have access, on terms that are respectful of employer's property and management, so as to ensure that workers can be apprised of the potential advantages of unionization. Without access to employees the policies favoring freedom of association and collective bargaining are compromised.

Similarly in cases where trade unions represent workers in a workplace they are to be allowed unfettered access to the workplace as long as the access does not undermine efficient operation of the undertaking.

CFA jurisprudence represents a different paradigm than the Board and the Court's in the United States have used to address union organizer access to potential members. In United States case law, specifically in *Lechmere Inc, v NLRB, 502 U.S. 527 (1992)* the Supreme Court

[10] See 334th Report, Case No. 2222, para. 220.

described the conflicting rights at issue as the rights of non employees to access an employers' property versus the rights of employers to control their own property. The Court failed to put access by union organizers to work places in the context of national legislative policies supporting unionization and collective bargaining which exist in both the Philadelphia Declaration by the ILO [11] and section one of the of the NLRA[12]. Despite the fact that Lechmere invited the public into its store, the Court elevated Lechmere's property rights over the strong NLRA "rights of employees to make common cause with one another, to engage in mutual aid and protection, to select representatives of their own choosing, to improve their purchasing power, and to stabilize wages and working conditions within and between

[11]Declaration of Philadelphia:

§1: The Conference reaffirms the fundamental principles on which the Organization is based and, in particular, that:

(b)freedom of expression and of association are essential to sustained progress;

(d) the war against want requires to be carried on with unrelenting vigour within each nation, and by continuous and concerted international effort in which the representatives of workers and employers, enjoying equal status with those of governments, join with them in free discussion and democratic decision with a view to the promotion of the common welfare.

[12] The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries…

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury... by removing certain recognized sources of industrial strife ... and by restoring equality of bargaining power between employers and employees....

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 and to mitigate and eliminate these obstructions when they have occurred 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, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection. 29 U.S.C. § 151

industries".[13] Although case law since *NLRB v Babcock & Wilcox, 351 U.S. 105 (1956)* has recognized 8(a)(1) is violated if an employer discriminates against a union in terms of solicitation, the Court in *Lechmere* determined access issues could only be addressed using the "discrimination" paradigm. This paradigm is embodied in the majority opinion in *Sandusky Mall*. This discrimination paradigm is rejected in the CFA cases, which presume the union organizers have the right of access to workplaces limited only by due respect to managerial rights to property and efficiency.

II. WHAT IS THE DUTY OF THE BOARD TO INTERPRET THIS CASE PURSUANT TO ILO CFA JURISPRUDENCE?

A. ILO Conventions 87 and 98 are Customary International Law

In addition to treaty obligation, nations are bound by customary international law. Customary international law is law which represents the global consensus regarding fundamental non-derogable norms and is enforceable. It is the position of the ICLR that Conventions 87 and 98 have attained that status of customary international law and are binding on the United States regardless of ratification. At least one United Stated Court has ruled that ILO Conventions 98 and 87 have attained the status of customary international law. See, *Estate of Rodriguez v Drummond Co., 256 F. Supp 2d 1250 (N.D. Ala. 2003)* [14] The ILO Committee on Freedom of Association, in a leading case applying ILO Convention No. 87 to a state party even though that

[13] See "Taking Back the Workers' Law" by Ellen Dannin, (ILR Press 2005), p 106. Contrast the Court's holding in *Lechmere* with the Court's holding in *Republic Aviation v NLRB. 324 U.S. 793 (1945*). In this case, the Court addressed the rights of employees to wear a union button while on employer premises as part of a unionizing drive. In that case the Supreme Court found that the employee right involved was a core NLRA right to organize workers without employer interference. The right ascribed to the employer was not a property right but a managerial right. While the employees in *Republic Aviation* were employed by that, this should not matter as section 2(3) defines employees as employees who have the rights of employees regardless of who their employer is.

[14] This case involve a claim under the *Alien Tort Statute 28 USC §1350* where the plaintiffs claimed that the murder of trade union leaders, allegedly by Drummond in complicity with the country of Columbia violated the associational rights of the workers under Conventions 87 and 98. In order to qualify as a claim under the Alien Tort Statute the right involved had to violate the "laws of nations". Laws of nations are known to be those laws which have attained the status of customary international law.

state had not ratified the Convention, stated that "freedom of association has become a customary rule above the Conventions.[15]

Additionally, the most important judicial authority concerning workers' fundamental freedoms and the role of international law in defining the scope of those freedoms, *Demir and Baykara v. Turkey*, No. 34503/97 was issued by the European Court of Human Rights on November 12, 2008. This decision, in which all eighteen judges of the Court's Grand Chamber concurred, is binding upon all states that are parties to the European Convention on Human Rights and Fundamental Freedoms. This Convention, which governs 800 million people, provides in Article 11 that "everyone has the right to freedom of peaceful assembly and to freedom of association," including the right to form and join trade unions for the protection of the interests of workers. Particularly significant in the European Court's decision are the following findings:

1. In determining the meaning of freedom of association, the Court must take into account "relevant rules and principles of international law" (para. 67), "relevant international treaties" (para. 69), "the interpretation of such elements by competent organs" (para. 85),"the consensus emerging from specialized international instruments and from the practice of contracting states" (para. 85);

2. "It is not necessary that a state had ratified the entire collection of applicable instruments; it is sufficient if relevant international instruments denote evolution in the norms and principles applied in international law" (para. 86);

3. The object of a guarantee of freedom of association is "to protect the individual against arbitrary interference by public authorities with the exercise of the rights protected" (para. 110);

[15] ILO Committee on Freedom of Association, Fact-Finding and Conciliation Commission Report, Chile, May 8,1975.

4. It is a violation of freedom of association to refuse to recognize the legal personality of a union (paras. 113 and 116);

5. Any restrictions that affect the essential elements of trade union freedom, without which that freedom would become devoid of substance, are unacceptable (para. 144); and

6. "Limitations to human rights must be construed constructively, in a manner which gives practical and effective protection to human rights" (para. 146).

One of the key instruments referred to by the European Court of Human Rights is ILO Convention No. 87 and the guarantee of freedom of association as has been interpreted by the ILO Committee on Freedom of Association. Thus, in construing international labor law instruments, it is necessary to examine and apply the interpretations of competent bodies established under those instruments. This was an essential finding of the European Court of Human Rights, and represents a global consensus on how international law should be applied.

To the same effect is a recent decision of the Supreme Court of Canada, which applied ILO Convention No. 87, and the rulings of the ILO Committee on Freedom of Association, in determining the scope of the guarantee of freedom of association in Article 2(d) of the Canadian Charter of Rights and Freedoms, part of Canada's Constitution. In that case, *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC [2007] 2 S.C. R. 391, decided in June 2007, the Court stated that "the Charter should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified. "In this regard, the Supreme Court of Canada noted that "Convention No. 87 has been the subject of numerous interpretations by the ILO's Committee on Freedom of Association, Committee of Experts and Commissions of Inquiry. These interpretations have been

described as the 'cornerstone of the international law on trade union freedom and collective bargaining'…" [2007] 2 S.C.R. 391.

B. As Customary International Law the Board Must Interpret the NLRA Consistently with CFA Rulings on the Issue of Union Access to Workplaces

As customary international law Conventions 87 and 98 impose obligations on the United States to interpret domestic law consistently with international law. The principle interpreting domestic law consistent with international law has been recognized since the founding of this country. In *Ware v Hylton, 3 U.S. (3 Dall) 199 (1796)* the Supreme Court stated the principle that statutes should not be interpreted to violate international legal obligations. Again, in the case of *Murray v Schooner Charming Betsy, 6 U.S. (Cranch) 64 (1804)*, the Supreme Court held that even when a treaty is not self executing, courts must strive not to interpret statutes to conflict with international obligations expressed in such treaty. (An act of Congress ought never to be construed to violate the laws of nations, if any other possible construction remains). This is especially true where the domestic law does not actually conflict with international obligations. In the case of employee access, the NLRA itself, although it defines employees to include all employees, and not necessarily employees of a specific employer, is silent on the specific question of access of union organizers to employer workplaces. The law on this subject has been Board and judicially created. As customary law, the ICLR submits the Board and the Courts must, as the European Court of Human Rights and the Canadian Supreme Court did, begin to interpret the NLRA consistently with CFA precedent. This would mean finding that regardless of discrimination, union organizers must have access to employer workplaces consistent with CFA principles of "due respect" to property and "management efficiency".

ICLR believes that even if the Board finds CFA jurisprudence is not binding, the Board must try to decide this case with deference to CFA decisional law and try to harmonize CFA

principles with the current case law. That is, if the Board wants to uphold the principles of the majority in *Sandusky Mall,* it may do so, even using the discrimination paradigm but articulating that this paradigm is being used because of the presumptive right of access which is inherent in the CFA principles. [16]

CONCLUSION

The ICLR respectfully requests the Board to consider the arguments contained in this Amicus brief in its decision.

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[16] While the Board has asked for references to *Register-Guard*, ICLR believes that the same analysis of the right to communicate, even using employer equipment is an essential part of the freedom of association and the right to collective bargaining. The majority in *Register Guard* wrongfully claim *Republic Aviation* did not apply and would support the reasoning of the dissent.

[17]Jeanne Mirer, in addition to being President of the Board of ICLR is a partner in the firm of Eisner & Mirer P.C. ICLR has its offices in the same building as the law firm.