Signaling it may be ready to establish a broad right of union access to employer property for handbilling directed against retail employers and their contractors, the National Labor Relations Board has invited “all interested parties” to submit briefs addressing when an employer may lawfully deny access to a union that does not represent the retailer’s employees. This action came in a decision in which the Board reserved judgment on whether an employer violated the National Labor Relations Act by removing non-employee union handbillers from its private property, although it had permitted other groups and elected officials to solicit frequently inside and outside its retail premises over several years. *Roundy’s Inc. and Milwaukee Bldg. & Constr. Trades Council, AFL-CIO, 356 NLRB No. 27* (Nov. 12, 2010). A formal notice and invitation for briefing followed. The decision on this question will likely have wide-ranging implications for both union and non-unionized employers.

**Facts of the Case**

*Roundy’s Inc.* operates grocery stores throughout southeastern Wisconsin and leases retail space at all but one of its locations. At its leased locations, the company reserved the right to select contractors to remodel or renovate their stores. It often selected contractors by price. Not surprisingly, it selected non-union firms.

The Milwaukee Building & Construction Trades Council, a body of construction-industry local unions in the metropolitan area, began handbilling at the company’s stores to advise consumers that Roundy’s used non-union contractors and to urge a boycott of the retailer. The company expelled the handbillers from all 26 locations and contacted law enforcement for assistance.

The MBCTC filed unfair labor practice charges with the NLRB based on the company’s interference with its activity. An administrative complaint was issued.

**Decision of Administrative Law Judge**

While the Board’s administrative law judge concluded the company lacked the property rights to expel the handbillers at most locations, at two, he concluded this was not an issue. There, however, he found that the company had discriminated unlawfully in its treatment of union handbillers as compared to other groups and individuals who had been allowed to use company property for their solicitations.

The company’s tolerance of widespread, on-site solicitations and distributions led the ALJ to rule against Roundy’s. According to the ALJ, the company had a history of permitting repeated solicitation and
distribution of literature on its property, both inside and outside its stores, for at least three years. The company had permitted solicitation by the Salvation Army, Boy Scouts, Girl Scouts, the Veterans of Foreign Wars and Shriners, as well as for various other civic, political or charitable solicitations. These solicitations included appeals for financial support and fundraising efforts. The company also allowed members of the public to use company-maintained in-store bulletin boards to solicit items for sale or to advertise community or organizational events. It allowed an arguably controversial environmental group to solicit support and contributions, permitted a judicial candidate to hand out campaign literature outside the stores, and raised no objection to a state senator setting up a table inside one store to distribute campaign material and meet potential voters.

**Sandusky Mall**

The ALJ relied heavily on the Board’s 3-2 decision in *Sandusky Mall Co.*, 329 NLRB 318, which he found was indistinguishable from *Roundy’s*, to hold the company’s prohibition unlawful. The Board majority in that 1999 case, he noted, stated that a mall owner’s policy of permitting some solicitations, but not the union’s, amounted to prohibited discrimination under the Act. As did the Board in *Sandusky Mall*, the ALJ in *Roundy’s* rejected an employer argument that permitting these charitable and other third-party solicitations differed from allowing the union’s handbilling that urged a boycott of the very retailer on whose property the activity was taking place. In the *Sandusky Mall* majority’s view, the distinction was based on nothing more than the likes and dislikes of the retailer or property owner. Two Board members dissented. They thought the employer in *Sandusky Mall* was right. The union’s boycott appeal, they said, was detrimental to the mall and its tenants’ business and therefore was not of the same type or character as the other solicitations. They noted the mall would have forbidden all such boycott activity, irrespective of the identity of the boycotter. Based on one of its earlier decision, the U.S. Court of Appeals in Cincinnati agreed with the dissenters and denied enforcement of the Board’s order in relevant part. 242 F.3d 682 (6th Cir. 2001).

**Register-Guard**

Nine months after the ALJ in *Roundy’s* issued his decision, and while the case was pending before the Board, the agency issued its widely discussed decision in *Register-Guard*, 351 NLRB 1110 (2007), *enf. denied in part*, 571 F.3d 43 (D.C. Cir. 2009), a case involving employees’ right to use employer e-mail systems for union solicitations. A majority of the Board narrowed the class of solicitation cases to which its disparate treatment analysis would apply to “communications of a similar character.” It indicated that an employer might legitimately draw a line between “business-related use” and “non-business-related use” of its e-mail system, among other similar distinctions (e.g., charitable solicitations and non-charitable solicitations).

**Revisiting Standards**

A differently constituted Board in *Roundy’s* is now ready to revisit the solicitation discrimination issue and has called for “friends of the court” briefs. It asks whether the agency should continue to apply the standard articulated in *Sandusky Mall*, or “[i]f not, what standard should it adopt to define discrimination in this context?” It also has inquired what bearing, if any, *Register-Guard* has on the Board’s standard for finding unlawful discrimination in non-employee access cases.

Broadly speaking, *Roundy’s* presents the question whether a retail property owner may discriminate lawfully against non-employee solicitors handbilling on its premises because of the content of the
message they seek to communicate – or whether tolerating solicitation on private property for any purpose (except perhaps for the rare charitable request) deprives the employer of the right to bar it for all purposes, including union-encouraged consumer boycotts.

Board members and courts have disagreed on an answer. Most retailers would favor allowing employers to make content-based decision on access. With a pro-union Board firmly in the driver’s seat, however, it would startle no one if the agency sought to maximize opportunities for organized labor at the expense of employer property rights and economically conducted business operations.

The Board still can surprise us, but a refurbished Sandusky Mall may soon be “open for business.”