EMPLOYER FREE SPEECH UNDER THE NATIONAL LABOR RELATIONS BOARD

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INTRODUCTION

Since the creation by Congress, in 1935, of the National Labor Relations Board (NLRB), it has been subject to constant criticism by various groups, for various reasons.[1] The protagonists of a dispute claim that Board decisions are under-researched. The Board answers that it is overworked and under-staffed. One group deplores creeping legalism and the spread of bureaucracy. Another decries the haphazard manner in which the public welfare is protected; and on and on. One of the most vitriolic controversies is the so-called "free speech" issue, which arises primarily from the Board's function of certifying a union as collective bargaining agent for the employees within an appropriate unit. The issue's importance is underlined by the following comment of the executive secretary of the NLRB, Ogden W. Fields:

> There is no category of cases, in my opinion, more difficult and time consuming to the Board and the regions than those involving or raising issues of free speech. And may I add, nothing the Board does is as significant in carrying out its Congressional mandate.[2]

The importance of the free speech issue is further emphasized by Fields in the following statement, ". . . the national policy of the United States is to promote and encourage the practice of collective bar-

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[1]For a good discussion of the validity of these criticisms see for example, Herbert R. Northrup and Gordon F. Bloom, Government and Labor (Homewood, Illinois: Richard D. Irwin, Inc., 1963), pp. 129-39.

[2]Ogden W. Fields, "Pre-Election Conduct and Free Speech," Labor Law Journal, XIV (December 1963), p. 969.

gaining where the majority of employees within any appropriate unit want it."[3] The Board is empowered to hold elections to determine whether or not there is a majority. If pre-election conduct (including what is said as well as what is done) causes workers to reject a union they otherwise might have welcomed, public policy has been undermined. The employer is, after all, the central figure in employer-employee or union-management relations, and he does exercise a considerable amount of economic influence over the activities of his employees.

4/ "The National Labor Relations Board had as its first duty to protect employees from interference by employers with their rights under the Act."[4] The possibilities present for conducting such interference through the spoken or printed word are enormous. Given freedom to say what he will, an employer can effectively make a mockery of employee free choice.)

The overall importance of the "free speech" issue is indisputable, and much time and effort has been expended in writing and speaking about the subject. Still, it is hard to find a study relating the stated purposes and objectives of the Board to its actual conduct. This is so because Board decisions are a compilation of union, employer, Congressional, public and statutory pressures which often conflict. Changes in Board conduct have occurred through amendment, Supreme Court decisions, and evolution of the trial and error variety. Shifts have been especially evident when new appointees replaced older members.

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[3]Fields, op. cit., p. 968.

[4]Harry A. Millis and Emily Clark Brown, From the Wagner Act to Taft-Hartley (Chicago: The University of Chicago Press, 1950), p. 20.

Despite this, one consistent theme runs through the entire 30 years; it has been Board policy to ensure employee free choice in the matter of selecting (or not selecting) a collective bargaining agent. The Board has changed its mind from time to time on what employer conduct is consistent with this objective. In trying to inform employers what conduct will be considered permissible and what will not, it has attempted to set up some guideposts, many of which have added to the confusion. For in a state of flux, old reference points pass away and new ones appear. But, if Board conduct has vacillated, the Board has kept its eyes rather firmly planted on the goal set for it by Congress, so that Board policy has remained unchanged.

THE NLRB UNDER THE WAGNER ACT

Background of the Wagner Act

The first amendment to the Constitution of the United States provides that "Congress shall make no law . . . abridging the freedom of speech . . . ." It has long been recognized that this freedom, as all freedoms are, is relative. Thus, no one can shout "Fire" in a crowded theater, nor does anyone have the right to incite others to riot. Certainly no one would have heard of libel and slander if freedom of speech were universal. Despite all this, prior to the National Labor Relations Act (Wagner Act)[5] no one would have dreamed of denying an employer the right to speak his mind on union organizing activities.

An abrupt about-face in public policy occurred when Congress legislated limits on the right of employer free speech. Section 8(1) of the Wagner Act made it an unfair employer labor practice to interfere, restrain or coerce employees in pursuit of their rights to organize and join unions and to bargain collectively.[6]

It must be remembered that the National Labor Relations Act was essentially a piece of depression legislation designed to help this nation bootstrap itself out of the most chaotic financial collapse the

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[5]In common usage the National Labor Relations Act refers both to the Wagner Act by itself or to the Wagner Act plus its 1947 and 1959 amendments, i.e., the Taft-Hartley and Landrum-Griffin Acts.

[6]Stephen J. Mueller and A. Howard Myers, Labor Law and Legislation (3rd ed., Cincinnati: South-Western Publishing Co., 1962), p. 623.

capitalist system had yet experienced. It was a product of social unrest and dissatisfaction. Unemployment reached an estimated 16 million in 1933, and it became a fairly common belief that an increase in purchasing power must precede any movement toward full employment.[7] With these things in mind, in 1935, Congress passed the Wagner Act by a large majority. Section I made Congressional intent unmistakably clear:

> 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, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions and by restoring equality of bargaining power between employers and employees.

Businessmen often complained that the Board was "pro-union". The charge was true, the Board was pro-union--it was meant to be.[9]

> The function of the Board, it must always be remembered, was to protect the right of workers to be free of interference or coercion in connection with their right to organize and bargain collectively. Protection of the basic

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[7]Millis and Brown, op. cit., p. 20.

[8]Reginald Parker, A Guide to Labor Law (New York: Frederick A. Praeger, Inc., 1961), p. 71.

[9]Northrup and Bloom, op. cit., p. 66.

constitutional right of free speech, on the other hand, was in the hands of the courts.[10]

After a 12 year experience with the Wagner Act, it was widely felt that some adjustments were necessary. The scope and application of these proposed changes were debated on the floor of Congress. The Labor Management Relations Act, amending the National Labor Relations Act, was passed in 1947 over loud union protests and President Truman's veto.[11]

Where the Wagner Act had sought to restrin employers from "unfair" practices, Taft-Hartley extended similar constraints to union activities. Congress was seeking primarily to protect the public interest. To achieve this result, it was felt that the scales needed to be tipped away from the pro-union rationale of the NLRB.

Finally, the Labor Management Disclosure Reporting Amendment (Landrum-Griffin Act) was passed in 1959 to curb certain "internal" abuses of union power, which were further alienating public opinion.

Specific Violations

The wording of the Wagner Act left little doubt that any threat of economic reprisal or physical violence for supporting union activity would be considered an unfair labor practice, as would promises of benefit and rewards for "loyalty". Still there remained large areas of policy and dispute about which the Act said nothing. It has been suggested that Con-

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[10] Millis and Brown, op. cit., p. 175.

[11] The House approved 320 to 79; 217 Republicans and 103 Democrats voted for passage, while 66 Democrats, 15 Republicans and 1 American Labor Party member opposed. The Senate approved 54-17. There were 37 Republicans and 7 Democrats for, and 15 Democrats and 2 Republicans against, passage.

gress left the wording of the Act vague so that the Board would have greater freedom to react to any given situation.[12] How were statements of opinion to be handled? Could an employer express a hostile opinion toward a union? What exactly would constitute coercion? The answers which the Board gave to these questions greatly strengthened the position of organized labor.

Coercion Per Se

"For approximately the first six years under the Wagner Act, the NLRB tended to find that any statement by an employer against unionism was coercive per se."[13] "During this early period, the Board's theory was that the Act required the employer to maintain strict neutrality . . . ."[14] The Board felt that the best way to ensure employer neutrality was to force him to maintain complete silence. Thus, such statements as, "We don't want no outside union to come in and run our business for us," and "the union principles are fine, but we don't want no union in our plant" were regarded by the Board as "patently intimidatory or coercive."[15]

Although the courts in this early period tended to be more conservative than the Board, in the main they went along with the Board's decisions. For example, the 7th Circuit Court in 1939 upheld a Board order with the

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[12]Gordon F. Bloom and Herbert R. Northrup, Economics of Labor Relations (Homewood, Illinois: Richard D. Irwin, Inc., 1965), p. 783.

[13]Benjamin Aaron, "Employer Free Speech, The Search for a Policy," Public Policy and Collective Bargaining, ed. Joseph Shister, Benjamin Aaron, and Clyde W. Summers (New York: Harper & Row, 1962), p. 29.

[14]Millis and Brown, op. cit., p. 173.

[15]Aaron, op. cit., p. 29.

following statement:

> . . . the position of the employer is a most delicate one. Surely, he has the right to his views. And, the right to entertain views is rather valueless if it be not accompanied by the right to express them . . . . And yet, the voice of authority may, by tone inflection, as well as by the substance of the words uttered, provoke fear and awe quite as readily as it may bespeak fatherly advice. The position of the employer . . . carries such weight and influence that his words may be coercive when they would not be so if the relation of master and servant did not exist.[16]

This was a legal attitude with which the Supreme Court itself concurred in International Association of Machinists v. NLRB, a case in which the employer had expressed preference for one of two rival unions. "Slight suggestions as to the employer's choice between unions," thought the Court, "may have telling effect among men who know the consequences of incurring that employer's strong displeasure."[17] "But the Board made clear that such statements were found coercive only when . . . associated with and an integral part of extensive acts of interference and coercion. 'The time and the place and the circumstance, these are the controlling factors at all times,' explained Chairman Madden."[18]

That judiciary support of the Board's decisions was not complete however, was revealed by the Ford Motor Co. case in 1939. Against a background of violent anti-union activity, including threats, intimidation and beatings, the Board ordered Ford, among other things, to "cease and desist" distributing anti-union literature. The court of appeals refused to uphold that part of the order, saying, "The right to form opinion is of little

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[16] NLRB v. Falk Corp. 102 Fed. (2d) 383,389 (C.C.A. 7, 1940).

[17] 311 U.S. 72, 78 (1940).

[18] Millis and Brown, op. cit., p. 175.

value if such opinion may not be expressed, and the right to express it is of little value if it may not be communicated to those immediately concerned."[19]

During this period, many Board decisions were appealed to the circuit courts which were divided as to the method of handling them. Since the Supreme Court had not yet squarely faced the free speech issue, the Board was left to pursue its own course.

Course of Conduct

Finally in 1941, in the Virginia Electric and Power Company case,[20] the Supreme Court laid down what became known as the "course of conduct" doctrine. The Court held that,

> If the total activities of an employer restrain or coerce his employees in their free choice, then those employees are entitled to the protection of the Act. And in determining whether a course of conduct amounts to restraint or coercion, pressure exerted vocally by the employer may no more be disregarded than pressure exerted in other ways. . . . the Board has a right to look at what the company has said as well as what it has done.[21]

> In other words, employers had a right to express their views on labor matters to their employees, but they were not free to coerce by words any more than by acts. And the fact of whether words were coercive was to be reasonably determined in the light of the entire context.[22]

The courts of appeals, using this case as a guideline, upheld or

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[19]Ford Motor Co. 14 NLRB 346 (1939), enforced with the omission of the order on distributing propaganda 114 Fed. (2d) 905 (C.C.A. 6, 1940).

[20]314 U.S. 469,477 (1941).

[21]Ibid.

[22]Millis and Brown, op. cit., p. 177.

overturned Board decisions in the next several years on a basis of "totality of conduct". Thus, in the American Tube Bending case,[23] letters from the president of the company to the employees were held privileged since nothing in the record but the letters and a speech indicated employer hostility. At the same time, the third circuit court upheld the Board's order in the Trojan Powder Co. case,[24] since evidence was presented substantiating a history of employer interference. The Supreme Court refused to review either of these cases, and in fact remained silent on the issue until 1945, when it considered a case involving not the issue of employer free speech, but a union organizer's right to make a speech without a permit.

Texas had a statute which required that anyone engaged in union organization be issued a permit to be kept in possession at all times or forfeit the right to so organize. Mr. R. J. Thomas, President of the United Auto Workers went to Texas specifically to test the law. The Supreme Court held that his speech was privileged, although the Texas statute was legal when applied to such organizational activities as collecting dues. Although this case held no specific reference to employer speech, the Court chose to apply the case generally. It hold,

> No one may be required to obtain a license in order to speak. But once he uses the economic power he has over other men and their jobs to influence their action, he is doing more than exercising the freedom of speech, protected by the First Amendment. That is true whether he be an employer or an employee.[25]

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[23] 44 NLRB 121 (1942) set aside in 134 Fed. (2d) 993 (C.C.A. 8, 1942).

[24] 41 NLRB 1308 (1942) enforced in 135 Fed. (2d) 337 (C.C.A. 3, 1943).

[25] Thomas v. Collins, 323 U.S. 516 (1945).

With these two cases[26] as guidelines, the circuit courts began overturning Board decisions when they found that expressing opinions was being considered a violation per se. In one case, the court felt that speech was privileged "so long as the reasoning power of the employee and not his fear is appealed to . . . . Certainly, effectiveness of statement is not a test of its constitutionality; neither is accuracy."[27]

Thus, we can see that there were no easily understandable rules as to what was privileged speech and what was coercive and violative of the Act. The Supreme Court had made known its dislike of the per se violation findings of the Board. In examining the "course of conduct" doctrine we see that each case came to be judged on its own merits.

Separability

In the Thomas v. Collins case, Mr. Justice Jackson, in a separate concurrence, had suggested that where either violence or intimidation were associated with employer speech, "the constitutional remedy would be to stop the evil, but permit the speech, if the two are separable; and only rarely and when they are inseparable to stop or punish speech or publication."[28]

In the same year, in a minority dissent, Mr. Reilly of the Board, had argued that a letter addressed to the employees was separable from other unfair labor practices.[29] By the end of 1946 this had become a

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[26]Virginia Electric and Power, and Thomas v. Collins.

[27]J. L. Brandeis & Sons, 145 Fed. (2d) 556,566 (C.C.A. 8, 1944).

[28]Thomas v. Collins, op. cit.

[29]Republic Aviation Corp. 61 NLRB 397 (1945).

popular attitude with a majority on the Board, and in the Fisher Governor Company case, an unfair speech practice charge was dismissed despite two discriminatory firings 10 days earlier. The Board held that the discrimination could be prevented, which would then leave the employees free "to listen to their employer and weigh for themselves the merits of his opinions in an atmosphere free from fear."[30] This position was reiterated in the Bausch and Lamb Optical Company,[31] LaSalle Steel Company[32] and United Welding Company[33] cases in 1947.

Perhaps these decisions were influenced by the general outcry over the free speech issue as well as Congressional attempts to amend the National Labor Relations Act to provide the same checks upon union power as had been imposed on employers. At any rate, the Board seems to have gone full circle. It started with the early period contention that neutrality through silence was necessary. This doctrine was then modified to consider the totality of employer activity. By 1947, the Board was saying that speech could be interpreted apart from the overall context in which it was uttered. Employers welcomed this switch in Board policy, and were quick to take advantage of it. ". . . 'American Tube Bending' letters and speeches tended to become more numerous and more vigorous."[34]

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[30] 71 NLRB 1291, 1295 (1946).

[31] 72 NLRB 132 (1947).

[32] 72 NLRB 411 (1947).

[33] 72 NLRB 954 (1947).

[34] Emily Clark Brown, "The NLRB-Wagner Act Through Taft-Hartley Law," Labor in Postwar America, ed. Colston E. Warne (New York: Remsen Press, 1949), p. 188.

Captive Audience

The above material has been concerned primarily with what could be said by the employer. The Board also addressed itself to the question of when employer speeches could be made. The first attempt by the NLRB to make it an unfair practice for an employer to force his employees to listen to him deliver an anti-union speech on paid time was overturned by the courts. In the American Tube Bending case all work was stopped on the day before an election, and employees were required to listen to an anti-union speech on company time. The Board claimed that this constituted "tactical advantages which the unions could not possibly match"[35] and was thus an unfair practice. The Court refused to consider this issue and reversed the Board saying this case did not differ from the Virginia Electric and Power Company case. In a Montgomery Ward and Company case[36] the Court explicity held that "employees were not inconvenienced by being required to attend, the employer had as much right to speak at one time as another, and freedom of speech was not to be limited by subtleties . . . ."[37]

The Board kept trying, however, and in the Clark Brothers Co.[38] decision it achieved partial success when the circuit court ruled that if an employer wished to force his employees to listen to an anti-union diatribe he must give the union an opportunity to reply on company time. This was the rule which prevailed when the Taft-Hartley Act became law.

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[35]American Tube Bending Co., op. cit.

[36]157 Fed. (2d) 486,500 (C.C.A. 8, 1946).

[37]Millis and Brown, op. cit., p. 180.

[38]70 NLRB 802 (1946).

THE PRESENT STATUS OF THE LAW

Background of the Taft-Hartley Act

In 1947, 12 years after Congress had overwhelmingly shown its support of union activity and collective bargaining, it voted the necessary two-thirds majority to override President Truman's veto of what was generally conceded to be an anti-union amendment. The factors leading to this abrupt change in the attitude of Congress were many and complex.

> The Taft-Hartley Act was for many years a subject of controversy between representatives of labor and management. Union leaders called it a "slave labor law" and the "Lawyers Full-Employment Act". Industry spokesmen hailed it as a Magna Charta of employees' rights and complained that it did not go far enough in outlawing various undesirable union practices.[38]

Although the labor leaders and other sympathetic to labor deprecated the importance of the forces which called the Taft-Hartley Act into being, the alarm with which most people viewed organized labor was not entirely unfounded. From 1932 to 1947, organized labor had added 12 million members.[40] In addition, "Unions powerful in terms of members and financial resources could in time of stress conduct huge strikes with paralyzing effects upon large sections of the economy and drastic repercussions in the press and upon attitudes of much of the public."[41]

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[38] Northrup and Bloom, op. cit., p. 69.

[40] Millis and Brown, op. cit., p. 271.

[41] Ibid., p. 272.

Wartime strikes were another factor which contributed to the bad public image that unions picked up prior to 1947. Although the wartime record of organized labor as a whole was quite good, a number of wildcat work stoppages occurred. Most of these were of short duration and quickly disavowed by union officials. Nevertheless, news media coverage was disproportionate and resentment by the public was natural.

Following V-J Day in August 1945, most unions and employees felt that the no-strike pledges they had made were no longer binding. They began demanding wage increases which they felt were long overdue. The table below sums up the resulting wave of work-stoppages.

The monthly figures of man-days lost in strikes were as follows, in thousands:[a]

Month	1945	1946	1947
January	199	19,700	1,340
February	388	22,900	1,230
March	775	13,800	1,100
April	1,470	14,300	8,540
May	2,220	13,700	6,730
June	1,890	4,580	3,960
July	1,770	3,970	3,970
August	1,710	3,900	2,520
September	4,340	4,380	1,970
October	8,610	6,220	1,780
November	6,930	4,980	829
December	7,720	3,130	590

[a]Harry A. Millis and Emily Clark Brown, From the Wagner Act to Taft-Hartley (Chicago: The University of Chicago Press, 1950), p. 301.

These figures represent the greatest wave of strikes this nation has experienced, but they do not begin to reflect the effect on the economy

or on public opinion. The fact that many of these strikes were jurisdictional in nature, that they subjected many employers to losses which they had done nothing to incur, and which they were powerless to do anything about, further alienated public and Congressional attitudes. While these and other factors were bringing pressure to bear on Congress to pass legislation which would modify the pro-union rationale of the Wagner Act, the National Association of Manufacturers led the way in demanding "equalizing" amendments.

The 12 year experience of the Wagner Act had, then demonstrated a need to provide some checks on union activity. The shift in Congressional attitude can be demonstrated by the fact that 17 separate bills dealing with labor policy were offered to the House of Representatives when the Eightieth Congress convened.[42]

Of course, some of the most vigorous criticisms received by the Wagner Act and the NLRB concerned the treatment by the latter of the free speech issue. Typical of Congressional attitude is this statement made during the Taft-Hartley hearings, "The first amendment to the Constitution of the United States of America guarantees the right of free speech to all Americans. Yet the National Labor Relations Board, over a period of 7 years, denied that right to an American who happened to be an employer.[43] The Taft-Hartley Act officially expressed Congressional disapproval of the Board's treatment of employer speech.

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[42] Millis and Brown, op. cit., p. 363.

[43] U.S., National Labor Relations Board, Legislative History of the Labor Management Relations Act of 1947 (2 vols., Washington, D.C.: U.S. Government Printing Office, 1948), p. 658.

Section 8(c) said,

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.[44]

In view of the wording of the Act and Congressional intent, it seemed that the treatment of representation cases by the "course of conduct" doctrine was over. However, the power of interpretation and application of the statute was still in the hands of the Board, under the watchful eye of the Court. "The exercise of that power has, of course, always depended to no little degree on the personalities of the Board . . . ."[45] It must be remembered that the primary purpose of Congress in setting up the Board was to provide protection for the right of the individual employee to self-organization. The Board has seemingly felt that it can best accomplish this objective with a case by case approach, and not by persistent adherence to any general rule that ignores the facts of the individual situation.

> The Board's determination to consider the total situation, the employer-employee relationship and what has been said and when it was said in all the circumstances is the touchstone of its policy. It rejects an analysis of words in isolation and a narrow legalistic approach. Its intent is to protect employee freedom of choice.[46]

The General Shoe Doctrine

Shortly after the 1947 amendment, employer satisfaction with

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[44]Mueller and Myers, op. cit., p. 825.

[45]M. R. Lefkoe, "The NLRB's New, Rough Line," Labor Readings on Major Issues, ed. Richard A. Lester (New York: Random House, 1965), p. 497.

[46]Fields, op. cit., p. 971.

Section 8(c) suffered a sharp setback. The Board declared in the General Shoe case that it did not consider representation cases to be affected equally with unfair practice cases and would not apply the same criteria to each. Thus, the Board held that 8(c) did not apply to representation cases. It set forth the General Shoe doctrine as follows:

> In election proceedings it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees. It is our duty to establish those conditions; it is also our duty to determine whether they have been fulfilled. When . . . the standard drops too low, . . . the experiment must be conducted over again.[47]

In effect, the Board was saying that conduct which interferes with a free choice will be grounds for overturning an election, even though that conduct may not be an unfair labor practice. The Board defended its interpretation of the statute by pointing out that Congress only applied Section 8(c) to unfair labor practices. It will be necessary to keep in mind the General Shoe doctrine. We shall see that, excepting brief sojourns, the Board has clung very close to this guideline. Indeed, it is now one of the prime considerations in representation cases.

Threats or Predictions?

In its search for a consistent method of treating representation cases, and one that is still realistic, the Board hit upon a distinction in ". . . semantics whereby a statement was protected by use of the magic words, 'I predict'."[48]

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[47]General Shoe Corporation, 77 NLRB 124 (1948).

[48]Gerald A. Brown, Freedom of Choice and the National Labor Policy, Address before the Labor Law Section, State Bar of Texas, San Antonio, Texas, July 5, 1962, p. 9.

Thus, for a time, the Board looked solely at the form of the statement and not to its content or impact. During this period, an employer, if he couched his speech in predictions, statements of legal position, or expressions of opinion, could effectively convey his meaning to an audience that stood in awe of his economic power. In 1962, this superficial rule was laid to rest when the Board said such an approach,

> . . . is too mechanical, fails to consider all the surrounding circumstances, and is inconsistent with the duty of the Board to enforce and advance the statutory policy of encouraging the practice and procedure of collective bargaining by protecting the full freedom of employees to select representatives of their own choosing. Rather, we shall look to the economic realities of the employer-employee relationship and shall set aside an election where we find that the employer's conduct has resulted in substantial interference with the election, regardless of the form in which the statement was made.[49]

The rules, or rather non-rules, set out above in the General Shoe and Dal-Tex decisions, provide the clearest statement available as to what the Board regards as protected speech and what it will not tolerate. We shall next examine the application of these concepts to specific issues.

Captive Audience Revisited

Critics of the Board, and there were many, were heartened by its decision in the Babcock & Wilcox Co. case in 1949. This was the first test of the "captive audience" issue after the Taft-Hartley Amendment. The Board agreed with Congress and in effect struck down the Clark Bros. rule. For the next several years, employers took advantage of the situation until 1951 when in Bonwit-Teller the Board set up a new doctrine.

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[49] Dal-Tex Optical Co. 137 NLRB 1782 (1962).

Under the Bonwit-Teller rule, employers who used company time and property for making anti-union speeches before elections were required to give the union an equal opportunity to reply. If the union requested and was denied such an opportunity, it was to be considered an unfair employer labor practice and the election could be set aside.

There were numerous qualifications attached to the ruling, ". . . qualifications which suggested that it would have only limited application to other situations."[50] These restrictions can be summed up by pointing out that in the Clark Brothers case the Board had tried to protect employees from hearing information they did not want to hear. In Bonwit-Teller, however, the Board attempted to make sure that the employee heard all available information. The Bonwit-Teller doctrine was applied by the Board much to the distress of management. In 1953 however, two Eisenhower appointees replaced the chairman and another member of the NLRB. A few months later, ". . . the reconstituted Board repudiated the Bonwit-Teller case, its ancestors, and its progeny . . . ."[51]

In the Livingston Shirt case, the Board held that the employer deliverance of a non-coercive anti-union speech on company time, coupled with a subsequent refusal to grant the union similar opportunity for rebuttal, did not constitute an unfair labor practice. The Board felt that the Bonwit-Teller doctrine erred by burdening the privilege of free speech with "conditions which are tantamount to negation."[52] They also felt that an employer's premises are his "natural forum" and his refusal to share that forum does not

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[50] Haron, op. cit., p. 37.

[51] Ibid., p. 40.

[52] 107 NLRB 400 (1953).

hinder organization activity.

In the future, an employer would not be found guilty of an unfair labor practice for making a pre-election speech on company time and property when simultaneously denying the union's request for an opportunity to reply, provided:

(1) that he did not have an unlawful rule prohibiting union access to company premises on nonworking time,[53] or

(2) he had a non-solicitation rule which was broad but lawful because of the character of the business.[54]

In a companion case,[55] the opinion on which the Court handed down on the same day, a third restriction was added:

(3) the speech must not have been delivered within the 24-hour period preceding the election.

Third Party Pressure

An issue that occurs less frequently but is nevertheless important raises this question: Will third party pressure ever be judged violative of the laboratory conditions the Board desires for election conduct?

The Board answered this question in the affirmative in the James

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[53] In Peyton Packing Co., 49 NLRB 828 (1943) the Board had said that union solicitation during lunch and coffee breaks should not be restrained but "working time is for work".

[54] In May Department Store, 59 NLRB 976 (1944) the Board granted certain types of retail establishments the right to prohibit solicitation on the selling floor at all times.

[55] Peerless Plywood, 107 NLRB 427 (1953).

Leas & Sons Co.[56] case. During the midst of an organization drive by union officials, pressure was exerted in the following ways:

(1) Community leaders urged employees to vote against the union.

(2) A front-page newspaper editorial proclaimed that if the union was certified the employer would move his business.

(3) City Councilmen visited employees' homes and repeated this claim.

(4) The local bank deferred all loan applications until after the election so that it could better tell if the potential borrower faced unemployment when the mill moved.

The Board decided that such conduct created a general atmosphere which invalidated election proceedings.

In many cases, however, the Board has felt that less weight should be accorded the effect of third-party conduct than that of employers' conduct, since in most cases community leaders do not hold much economic power over the workers. Lack of such power, coupled with lack of evidence that the interferring parties were acting at the instigation of the employer has not been regarded by the Board as grounds for ordering a new election. Here again, we can see the extension of the General Shoe and Dal-Tex doctrines.

Misrepresentation

In the Haynes Stellite Co.[57] case, the Board applied its laboratory doctrine to a case where an employer had repeatedly told his employees that if they voted for the union some of his best customers had informed him they would buy elsewhere. Investigating the union's appeal, the NLRB

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[56] 130 NLRB 290 (1961).

[57] 136 NLRB 3 (1962).

found that only one customer had so threatened. Feeling that this misrepresentation of the facts affected the outcome of the election, the Board ordered a new election to be held. In a later case, the Board said an election would be overturned

> . . . where there has been a misrepresentation or other similar campaign trickery, which involved a substantial departure from the truth, at a time which prevents the other party or parties from making an effective reply, so that the misrepresentation, whether deliberate or not, may reasonably be expected to have a significant impact on the election.[58]

Racial Propaganda

Another issue of primary concern to a civil rights conscious America is the use by employers of statements designed to arouse antagonism toward a union by appealing to employee racial prejudices. The Board faced this issue in a representation case in 1962, when it said appeals to racial prejudice

> . . . create conditions which make impossible a sober, informed exercise of the franchise. The Board does not intend to tolerate . . . arguments which . . . inflame the racial feelings of voters in the election.
>
> This is not to say that a relevant campaign statement is to be condemned because it may have racial overtones . . . . they must be tolerated because they are true and because they pertain to a subject concerning which employees are entitled to have knowledge . . .
>
> So long, therefore, as a party limits itself to TRUTHFULLY setting forth another party's position on matters of racial interest and does not deliberately seek to overstress and exacerbate racial feelings by irrelevant, inflammatory appeals, we shall not set aside an election on this ground.[59]

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[58] Hollywood Ceramics Co., Inc., 140 NLRB 221 (1962).

[59] Sewell Manufacturing Co., 138 NLRB 12 (1962).

The Board went on to say that the burden of proof would fall on the shoulders of the employer who introduced the race issue.

A prediction would be that the Board will move away from this permissive stance to a strict refusal to allow the injection of race as an issue. The Board seemed to leave the door open for further exploration of this avenue when it said: "We would be less than realistic if we did not recognize that such statements, even when moderate and truthful, do in fact cater to racial prejudice."[60] The Board is after all an agency of the Federal Government, which has recently indicated its vigorous attachment to the cause of racial equality.

Considered in the light of General Shoe and Dal-Tex, the above policy seems inconsistent with Board policy. Here, as in many areas where there is a conflict between "freedom of speech" and "freedom of choice", possibility exists for further erosion of the guarantee of the First Amendment.

Boulwarism

A contemporary issue which is being watched closely by all concerned rises from the dispute of the General Electric Corporation with the International Union of Electrical Radio and Machine Workers (IUE) over "Boulwarism". This practice takes its name from its originator, Lemuel R. Boulware, General Electric vice-president for employee and community relations. The "truth in bargaining" approach, as G. E. prefers to call it, is a relatively simple process. Management representatives arrive at the bargaining table armed with a complete package of well planned concessions beyond which they will not budge. As an important corrollary to this

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[60] Ibid.

tactic, they flood the workers with a veritable deluge of "leaflets, recordings run in the plant, plant newspapers, phone calls, radio messages, personal letters, and other means."[61] These provide the workers with a blow-by-blow account of the bargaining session, a complete analysis of why management has chosen its position, a reminder of their many benefits, and an inference that the union leaders are being unreasonable.

On October 2, 1960, following years of union frustration, IUE President, James Carey, called for a strike which proved disastrous. After settling the strike on company terms, Carey filed an unfair labor practice charge with the general counsel, who instructed the Board to look into the matter.

The trial examiner found "that the company's whole conduct at the bargaining table was a pretext merely to justify its communication activities, which were in effect a way of bargaining with individual employees."[62]

In a decision released December 16, 1964, the Board upheld the findings of the trial examiner and issued a cease and desist order to General Electric to stop refusing to bargain in good faith. The Board felt that "the employer's statutory obligation is to deal with the employees through the union, and not the union through the employees."[63] The net effect of General Electric's over-all conduct "devitalizes negotiations and collective bargaining and robs them of their commonly accepted meaning."[64]

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[61]Norbert R. Northrup, "The Case for Boulwarism," Labor Readings on Major Issues, ed. Richard A. Lester (New York: Random House, 1965), p. 419.

[62]Ibid.

[63]Ibid.

[64]Ibid.

This decision has been appealed to the Circuit Court and is still pending at this writing. The NLRB's critics claim that

> . . . what is at stake in the G.E. case is not only the right of a company to communicate; it is also the right of employees to evaluate the views of both management and union officials before making decisions which affect not only their livelihoods but also those of many others in the community.[65]

It is possible, however, that this view is missing the main point of the findings. In its decision, the Board pointed out that the total conduct of General Electric was evidence of a failure to bargain in good faith. Although this is not a representation case, as most cases which raise the free speech issue are, it does not seem unreasonable that the Board can justify the extension and application of the Dal-Tex doctrine to other areas.

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[65]The Wall Street Journal, December 17, 1964, p. 16.

CONCLUSION

The history of public policy in the United States was decidedly anti-union prior to the Great Depression, which ushered in the Norris-LaGuardia Anti-Injunction Act in 1932 and the Wagner Act in 1935. Exuberant labor leaders talked of labor's Magna Carta and the Golden Age of Labor. Union membership swelled and public sympathy with labor's plight seemed undivided.

The main feature of the Wagner Act and the one which caused the most excitement was Section 7 which provided that employees should have the right to select representatives of their own choosing to negotiate for better pay, shorter hours, and better working conditions. Congress also set up the National Labor Board, empowered to supervise representation elections and ensure employee freedom of choice. In pursuing its function of developing appropriate procedures, the Board quite often found itself the object of criticism from employers, the public, the courts, and even the Congress which created it.

It was inevitable that employee free choice provided by statute, and employer free speech, provided by the Constitution would conflict, since they are overlapping, rather than mutually exclusive concepts. In resolving those conflicts, the Board has found itself increasingly in organized labor's camp,[66] since it has attempted to balance these conflicting rights in relation to the statutory objectives.

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[66]Bloom and Northrup, op. cit., p. 736.

The importance of Board election standards takes on special significance in light of stated national policy to promote and encourage collective bargaining if a majority of employees so desire.

There seems to be a concensus of opinion that use of the term "free speech" is unfortunate, since it carries with it an emotional content which is bound to prejudice pre-conceptions. Much of the emotion-charged debate tends to obscure the pertinent issue, which is not whether Board policy infringes on free speech but whether it does so unduly. Thus, the same people who clamor for restrictions on speech regarding union picketing activity, somehow resent restrictions on employer speech which are equally necessary.

Under the influence of such arguments, Congress in 1947 amended the Act specifically to permit employer expression. But with the General Shoe decision a way was found for the Board effectively to circumvent Congressional intent. It simply held that Section 8(c) did not apply to representation cases. This principle was not applied consistently by the Board for the first dozen years under Taft-Hartley. Since the 1959 decision in the Del-Tex matter, Board policy seems to have crystallized around two major concepts. The first is that a representation election must be conducted as a controlled experiment, in an atmosphere of perfect laboratory conditions. The second is that employer speech must be analyzed in the light of total conduct. For sentences or phrases which, taken out of context, would appear sufficient to invalidate an election, often take on entirely different meanings when returned to context. It is equally true, and more germane to this paper, that statements which, by themselves, may not be coercive, take on an entirely different character when placed in a

background of economic intimidation. In attempting to strike a balance between freedom of speech and freedom of choice, the Board has never forgotten that a secret ballot is an integral part of the democratic process and should never be lightly set aside simply because the results do not conform with the bias of Board members. And yet, charged with a statutory duty for the protection of collective bargaining, the Board has refused to tolerate conduct designed to create an atmosphere of fear as a means of thwarting employee choice.

The guidelines the Board has set for itself in determining whether speech is privileged or coercive according to whether or not that speech, coupled with other activity, creates an atmosphere which interferes with employee choice, were not designed for ease of administration. The relationship of employer to employee is at best a nebulous thing, and one that defies treatment by some neat formula. Each case requires a long, careful perusal of background information, attitudes, conduct and a host of other pertinent details. It is safe to say that decision making in the realm of representation cases will not soon be computerized. Not only is the relationship between speaker and listener pertinent, but many other factors as well, factors such as geographical location, cultural background and many others. "Words which may only antagonize a hard-bitten truck driver in Detroit may seriously intimidate a rural textile hand in a company village where the mill owners dominate every aspect of life."[67]

Perhaps the reason for the special strictures given employer speech

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[67]Archibald Cox, Law and the National Labor Policy, quoted in Elihu Platt, op. cit., p. 21.

in pre-election conduct has never been better stated than by Judge Learned Hand in his famour "pebbles in juxtaposition" passage:

> Words are not pebbles in alien juxtaposition; they have only a communal existence, and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used, in which the relation between the speaker and the hearer is perhaps the most important part. What to an outsider will be no more than the vigorous presentation of a conviction, to an employee may be the manifestation of a determination which it is not safe to thwart.[68]

[68] Quoted in General Shoe decision, op. cit.

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BIBLIOGRAPHY

Books

Bloom, Gordon F. and Northrup, Herbert R. Economics of Labor Relations (Homewood, Illinois: Richard D. Irwin, Inc., 1965).

Millis, Harry A. and Brown, Emily Clark. From the Wagner Act to Taft-Hartley (Chicago: The University of Chicago Press, 1950).

Mueller, Stephen J. and Myers, A. Howard. Labor Law and Legislation (3rd ed., Cincinnati: South-Western Publishing Co., 1962).

Northrup, Herbert R. and Bloom, Gordon F. Government and Labor (Homewood, Illinois: Richard D. Irwin, Inc., 1963).

Parker, Reginald. A Guide to Labor Law (New York: Frederick A. Praeger, Inc., 1961).

U.S., National Labor Relations Board, Legislative History of the Labor Management Relations Act of 1947 (2 vols., Washington, D.C.: U.S. Government Printing Office, 1948).

Essays and Articles

Aaron, Benjamin. "Employer Free Speech, The Search for a Policy," Public Policy and Collective Bargaining, ed. Joseph Shister, Benjamin Aaron, and Clyde W. Summers (New York: Harper & Row, 1962).

Bloom, Max. "Freedom of Communication Under the Labor Relations Act," Proceedings of New York University Eighth Annual Conference on Labor, 1955.

Brown, Emily Clark. "The NLRB-Wagner Act Through Taft-Hartley Law," Labor in Postwar America, ed. Colston E. Warne (New York: Remsen Press, 1949).

Fields, Ogden W. "Pre-Election Conduct and Free Speech," Labor Law Journal, XIV (December 1963).

Grodsin, Joseph. "The Kennedy Labor Board," Labor Readings on Major Issues, ed. Richard A. Lester (New York: Random House, 1965).

Lefkoe, M. R. "The NLRB's New, Rough Line," Labor Readings on Major Issues, ed. Richard A. Lester (New York: Random House, 1965).

Northrup, Herbert R. "The Case for Boulwarism," Labor Readings on Major Issues, ed. Richard A. Lester (New York: Random House, 1965).

"Significant Decisions in Labor Cases," Monthly Labor Review, LXXXVIII (February 1965).

Stein, Emanuel. "The Supreme Court and Labor," Labor in Postwar America, ed. Colston E. Warne (New York: Remsen Press, 1949).

Wall Street Journal, The, Thursday, December 17, 1964.

Unpublished Materials

Brown, Gerald A. Freedom of Choice and the National Labor Policy, address before the Labor Relations Law Section, American Bar Association, San Francisco, August 7, 1962.

Day, Virgil B. Truth in Bargaining and Free Speech, address before the Cincinnati Personnel Association and Society for the Advancement of Management, Cincinnati, Ohio, February 4, 1965.

Fields, Ogden W. Then and Now, address before the Labor Relations Law Section, American Bar Association, San Francisco, August 7, 1962.

Platt, Elihu. Free Speech under the National Labor Relations Act, address before the Society for Advancement of Management Seminar, Asheville, North Carolina, March 19, 1964.

Cases

Ford Motor Co. 14 NLRB 346 (1939).

International Association of Machinists v. NLRB 311 U.S. 72,78 (1940).

NLRB v. Falk Corp. 102 Fed. (2d) 383,389 (1940).

Virginia Electric and Power Company v. NLRB 314 U.S. 469,477 (1941).

Trojan Powder Co. 41 NLRB 1308 (1942).

American Tube Bending Co. 44 NLRB 121 (1942).

Peyton Packing Co. 49 NLRB 828 (1943).

J. L. Brandeis and Sons 145 Fed. (2d) 556,586 (1944).

May Department Store 59 NLRB 976 (1944).

Thomas v. Collins 323 U.S. 516 (1945).

Republic Aviation Corp. 61 NLRB 397 (1945).

Clark Brothers Co. 70 NLRB 802 (1946).

Fisher Governor Co. 71 NLRB 1291 (1946).

Montgomery Ward & Co. v. NLRB 157 Fed. (2d) 486,500 (1946).

Bausch and Lamb Optical Co. 72 NLRB 132 (1947).

LaSalle Steel Co. 72 NLRB 411 (1947).

United Welding Co. 72 NLRB 954 (1947).

General Shoe Corporation 77 NLRB 124 (1948).

Bonwit-Teller 96 NLRB 608 (1951).

Livingston Shirt Co. 107 NLRB 400 (1953).

Peerless Plywood 107 NLRB 427 (1953).

Blue Flash Express Co. 109 NLRB 591 (1954).

U.S. Radium Corp., 122 NLRB 468 (1958).

Fisher Radio Corp. 123 NLRB 879 (1959).

James Lees and Sons Co. 130 NLRB 290 (1961).

The Great Atlantic and Pacific Tea Co., Inc., 140 NLRB 133 (1962).

Sewell Manufacturing Co. 138 NLRB 12 (1962).

Hollywood Ceramics Co., Inc., 140 NLRB 221 (1962).

Haynes Stellite Co. 136 NLRB 3 (1962).

Del-Tex Optical Co. 137 NLRB 1782 (1962).

EMPLOYER FREE SPEECH UNDER THE NATIONAL LABOR RELATIONS BOARD

by

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Since the National Labor Relations Board was created by Congress, in 1935, it has been subject to constant criticism for various reasons. One of the most important controversies is the "free speech" issue. These cases arise from the conflict between the freedom of speech on the part of the employer and the statutory right of employees to freely select a collective bargaining agent.

The Wagner Act of 1935 was an attempt to give unions sufficient power to balance employer power. The vague wording of the Act allowed the Board freedom of interpretation. From 1935 to 1941, the Board felt that the best way to ensure neutrality of an employer was to force him to maintain complete silence. In 1941 this policy was relaxed as the Board decided whether words were coercive, in the light of total conduct. Ultimately, the Board allowed employers greater latitude by saying that anti-union speeches could be analyzed separate from the background in which they were uttered.

The "captive audience" doctrine forbade the employer practice of delivering anti-union speeches on company time and property, and requiring attendance, unless the union was granted a like opportunity.)

Section 8(c) of the Taft-Hartley amendment officially expressed Congressional disapproval of the Board's treatment of employer speech. The Board decided, with Court approval, in the General Shoe case, that Section 8(c) did not apply to representation cases.

For a time the Board looked solely at the form of the employer statement and not to its content or impact. This rule and the "captive audience"

doctrine have since been discarded.

Another class of cases involving the free speech issue arises from application of outside pressure in elections. The Board has felt that less weight should be accorded the effect of third party conduct than employees conduct.

An employer is free to present his side of any issue but he must do so truthfully. Misrepresentation of the facts will void an election. The same rule has been applied to appeals to racial prejudice.

A contemporary issue is the use of a deluge of communications from the employer to the employee during collective bargaining sessions. In a recent decision, the Board held that such a practice undermines the collective bargaining concept.

Since 1960, Board policy seems to have crystallized around two major concepts. The first is that a representation election must be conducted in an atmosphere of perfect laboratory conditions; the second, that employer speech must be analyzed in the light of total conduct.