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Employer Freedom of Speech in Labor Relations

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Conclusions

Specifically in the light of the present status of the international negotiations and agreements, our position as lawyers should, I suggest, therefore, be:

(1) We endorse heartily Chapter VII of the Dumbarton Oaks Proposals and the plan to incorporate with the Constitutional structure of the organization itself a supreme international judicial tribunal;

(2) In the judicial statute to be prepared, we recommend—as have already the five leading nation-wide associations of lawyers—the creation of a complete judicial system, with obligatory jurisdiction.

(3) We would not permit any nation to sit in judgment of its own cause, whether the issue is being determined by a court or by a council.

(4) We question the wisdom of expecting a political body to take up and attempt to settle each delicate controversy which may arise between individual nations. This does not mean that we do not favor both deliberative and executive international bodies, but the function of such bodies should be to lay down and modify from time to time general principles of international law, and to see that such principles are not violated by breaches of the peace.

(5) We question the wisdom of including in the proposed final Charter—which is designed to govern the peacetime relations of united, friendly, and peace loving states—any bristling wordy threats of force. The emphasis should be upon procedures to assure justice and right rather than to compel submission to the will of the strong.

EMPLOYER FREEDOM OF SPEECH IN LABOR RELATIONS

"Congress shall make no law . . . abridging the freedom of speech, or of the press."—First Amendment to the Constitution of the United States.¹

The recent decision of the United States Supreme Court in *Thomas v. Collins*,² invalidating the Texas statute which attempted to regulate the activities of labor union organizers, is almost as notable for the statements made by the majority members of the Court in reference to an employer's right to speak freely in labor matters as it is for the actual determination by the Court. It is significant that, although no question of employer freedom of speech was involved in the case, Mr. Justice Rutledge, who delivered the opinion of the Court, and Mr. Justice Douglas, who concurred in a separate opinion, deemed it necessary to square the Court's decision upholding labor's right of free expression with the attitude previously expressed by the Court in cases involving the same right of employers. Mr. Justice Jackson, who also concurred in a separate opinion, went so far as frankly to admit that, by its decision in the Texas case, the majority of the Court was applying "a rule the

1. U. S. CONST. AMEND. I.

2. — U. S. —, 65 Sup. Ct. 315 (1945).

benefit of which in all its breadth and vigor this Court denies to employers in National Labor Relation Board cases."³

The opinions of the majority of the Court in *Thomas v. Collins* makes opportune a review of the cases decided by the Supreme Court and other Federal Courts on the issue of employer freedom of speech, especially in view of the frequency with which employers have asserted this Constitutional right.

A number of fairly recent cases,⁴ decided in the United States Circuit Courts of Appeal, have involved the question whether, and under what circumstances, an employer is free to express his opinions regarding labor unions and the unionization of his employees without committing an unfair labor practice in violation of the National Labor Relations Act.⁵ At least on the surface these decisions disclose some conflict on the question as to what words constitute an unfair labor practice lying outside the protection of the Constitutional guaranty. To a great extent each of the decided cases rests upon its own facts. The reason for this is very well stated by Judge Learned Hand:

"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, of which the relation between the speaker and the hearer is perhaps the most important part."⁶

It is the purpose of this paper to attempt an examination of the criteria which have generally been utilized by the courts to determine whether employer utterances fall within or without the permissible area of free expression. An inquiry of equal importance is the extent of the right of judicial review which the courts possess to determine whether words are or are not within the protection of the Constitutional guaranty. Another specific problem which will be discussed is that of the legality of prior judicial restraint of employer utterances.

The problem of the extent of the employer's right to speak freely on labor union matters has arisen in connection with the enforcement by the National Labor Relations Board of Section 8, subsection 1, of the Wagner Act⁷ which provides that it shall be an unfair labor practice for an employer "to interfere

3. *Id.* at 330.

4. *Edward G. Budd Mfg. Co. v. N. L. R. B.*, 142 F. (2d) 922 (C. C. A. 3d, 1944); *Elastic Stop Nut Corp. v. N. L. R. B.*, 142 F. (2d) 371 (C. C. A. 8th, 1944), *cert. denied*, — U. S. —, 65 Sup. Ct. 55 (1944); *N. L. R. B. v. M. E. Blatt Co.*, 143 F. (2d) 268 (C. C. A. 3d, 1944), *cert. denied*, — U. S. —, 65 Sup. Ct. 135 (1944); *Reliance Mfg. Co. v. N. L. R. B.*, 143 F. (2d) 761 (C. C. A. 7th, 1944); *Peter J. Schweitzer, Inc., v. N. L. R. B.*, 144 F. (2d) 520 (App. D. C., 1944); *N. L. R. B. v. Brown-Brockmeyer Co.*, 143 F. (2d) 537 (C. C. A. 6th, 1944).

5. 49 STAT. 449 (1935), 29 U. S. C. §§ 151-166 (1940 ed.).

6. *N. L. R. B. v. Federbush Co., Inc.*, 121 F. (2d) 954, 957 (C. C. A. 2d, 1941). *See also Towne v. Eisner*, 245 U. S. 418, 425, 38 Sup. Ct. 158, 159 (1918), in which Mr. Justice Holmes stated, "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."

7. NATIONAL LABOR RELATIONS ACT, 49 STAT. 449 (1935), 29 U. S. C. § 158(1) (1940 ed.).

with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7." Section 7 defines these rights as follows:

"Employees 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 concerted activities, for the purpose of collective bargaining or other mutual aid or protection."⁸

The Board appears to have adopted an extreme policy with regard to employer utterances. It has been held by the Board that the formation and administration of employee unions are of no concern to employers⁹ and that any employer utterances which might influence the employees in any way in the exercise of their rights under the Act, no matter how truthful or how fairly stated, are necessarily coercive or constitute interference within the meaning of the Act¹⁰ because of the nature of the employer-employee relationship.¹¹ Employers, of course, have often invoked the guaranty of free speech embodied in the First Amendment to the Constitution as a defense to charges of unfair labor practices predicated on their utterances and the issue has been frequently fought in the courts. But despite the great number of cases in which the issue has arisen, the courts have not considered themselves called upon to define the controlling principles on this question except in the most general terms. Other grounds have usually been present to affect their decision, and the line between free speech and an unfair labor utterance has yet to be definitively drawn.

The Board's View

The position of the National Labor Relations Board on the free speech question has been rather anomalous. On the one hand, a former Chairman of the Board, speaking for the Board, has stated that employers are most certainly protected under the Wagner Act by their constitutional right of freedom of speech and that nothing in the Act, or in any decision of the Board, forbids expression of opinion by employers which does not interfere with, restrain, or coerce employees in their rights to self-organization.¹² On the other hand, in its actual enforcement of the Act, the Board has taken the view that the slightest suggestions, or activities, which would be innocuous and without significance between other individuals, become enormously significant and "heighten to proportions of coercion when engaged in by the employer in his relationship with his employees."¹³ The Board has gone so far as to hold that the expression of unfavorable opinions regarding labor unions is *per se* an unfair labor practice.¹⁴

8. *Ibid.*, 29 U. S. C. § 157 (1940 ed.).

9. *In re Hill Bus Company, Inc.*, 2 N. L. R. B. 781, 789 (1937).

10. 2 TELLER, LABOR DISPUTES AND COLLECTIVE BARGAINING (1940) 708; *In re Rockford Mitten & Hosiery Company*, 16 N. L. R. B. 501, 506 (1939).

11. *N. L. R. B. v. The Falk Corporation*, 102 F. (2d) 383, 389 (C. C. A. 7th, 1939).

12. Statement of J. Warren Madden, *Hearings Before Committee on Education and Labor, United States Senate*, 76th Cong., 1st Sess. (April-May 1939) 153.

13. THIRD ANNUAL REPORT OF NATIONAL LABOR RELATIONS BOARD (1938) p. 125.

14. *N. L. R. B. v. Citizen-News Co.*, 134 F. (2d) 970, 971 (C. C. A. 9th, 1943).

The Board attempts to justify this position by advancing arguments of the relative economic helplessness of employees in the face of actual or inferred employer opposition to unionization. The Board has taken the position that in considering the effect of the employer's conduct upon the self-organization of employees, there must be borne in mind the control wielded by the employer over his employees, a control which results from the employees' complete dependence upon their jobs, generally their only means of livelihood and economic existence and which makes employees alertly responsive to the slightest suggestion of the employer.¹⁵

A few courts have not only supported, but also amplified, this view. In one case it was stated that an employer is as free as anyone else to broadcast any arguments he chooses against trade unions, and that while such arguments are legitimate enough as such, and to that extent protected by freedom of speech, so far as they disclose his wishes to his employees, as they generally do, they have a force independent of persuasion. "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."¹⁶ In another case the court said that "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."¹⁷ Other courts have used the following reasons for holding employer utterances coercive: "the employee is sensitive and responsive to even the most subtle expression on the part of his employer;"¹⁸ employer opinions "may have telling effect among men who know the consequences of incurring that employer's strong displeasure,"¹⁹ and that utterances, otherwise apparently harmless, "may be altered by inponderable subtleties at work."²⁰

One seeming defect in this paternalistic view, as applied to present-day labor conditions, is that it fails to give adequate recognition to the fact that the National Labor Relations Act specifically provides protection to employees against the consequences of incurring an employer's strong displeasure. An employer is prohibited from discriminating in regard to hire or tenure of employment, or any term or condition of employment in order to encourage or discourage membership in any labor organization;²¹ he may not discharge or otherwise discriminate against an employee who seeks protection for his rights under the Act;²² and he may not refuse to bargain collectively with

15. See note 13, *supra*.

16. *N. L. R. B. v. Federbush Co., Inc.*, 121 F. (2d) 954, 957 (C. C. A. 2d, 1941).

17. *N. L. R. B. v. Falk Corp.*, 102 F. (2d) 383, 389 (C. C. A. 7th, 1939).

18. *N. L. R. B. v. New Era Die Co.*, 118 F. (2d) 500, 503 (C. C. A. 3d, 1941).

19. *International Association of Machinists v. N. L. R. B.*, 311 U. S. 72, 78, 61 Sup. Ct. 83, 88 (1940).

20. *N. L. R. B. v. Virginia Electric and Power Co.*, 314 U. S. 469, 479, 62 Sup. Ct. 344, 349 (1941).

21. NATIONAL LABOR RELATIONS ACT, 49 STAT. 449 (1935), 29 U. S. C. § 158(3) (1940 ed.).

22. *Ibid.*, 29 U. S. C. § 158(4) (1940).

the representatives of his employees.²³ What, then, are the consequences which employees (at least those who are informed of the protection afforded by the Act) might reasonably fear as a result of exercising their guaranteed rights in the face of adverse employer opinion? Neither the Board nor the courts have supplied an answer. It might be said that the Board feels called upon to insulate employees from their own unwarranted fears or inferences, even at the cost of partially depriving employers of a civil liberty enjoyed prior to the passage of the Wagner Act. The extremity of the Board's view has been recognized by certain courts. The Circuit Court of Appeals, Sixth Circuit, has observed that the view that an employer's opinion of labor organizations and organizers must, because of the authority of master over servant, nearly always prove coercive, holds the employer forever suspect, and in practical application must necessarily silence him whose opinion may be the best informed, no matter how honestly his views may be entertained, or how truthful may be his observations.²⁴ And again, the Fourth Circuit Court of Appeals has said of the Board's position that it is predicated upon the unsupported assumption that labor, as a group, is today docile and uninformed, even though, before the Wagner Act, labor's aggressive spirit may have been dormant.

"The still picture of a sheep-like body of laboring men led by a dominating employer, is not representative of the true situation. Since the passage of the Act, the picture has been quite effectively streamlined. We see today a mobile labor force, strengthened by statutory safeguards, working on comparatively even terms with the employer, who may often owe his particular strength to a superior economic, educational and social position. Under this view of the modern industrial situation, we surely cannot indulge in any assumption of weakness on the part of the employee."²⁵

Before we attempt to analyze the most recent decisions of the courts, let us examine briefly a few examples of the principal types of employer utterances which, either by themselves or in conjunction with other conduct, have been held by the Labor Board to constitute interference, restraint or coercion within the meaning of the National Labor Relations Act.

*Employer Utterances Condemned by the Labor Board*²⁶

(a) Threats coercive on their face.

For the evident purpose of avoiding, impeding or destroying the unionization of their employees, some employers have resorted to extreme intimidatory

23. *Ibid.*, 29 U. S. C. § 158(5) (1940).

24. *N. L. R. B. v. Ford Motor Co.*, 114 F. (2d) 905, 914 (C. C. A. 6th, 1940); *cert. denied*, 312 U. S. 689, 61 Sup. Ct. 621 (1941).

25. *E. I. du Pont de Nemours & Co. v. N. L. R. B.*, 116 F. (2d) 388, 398 (C. C. A. 4th, 1940), *cert. denied*, 313 U. S. 571, 61 Sup. Ct. 958 (1941).

26. Because of space limitations, these examples do not purport to represent the full range of expressions which have been involved in the various categories of employer utterances mentioned in this discussion. Also, no distinction is made between utterances

threats. Typical of such conduct are threats of discharge or demotion,²⁷ to shut down the plant,²⁸ to remove the plant,²⁹ or to contract out the work,³⁰ in the event of unionization, and threats to evict from company-owned houses because of union membership.³¹ Striking workers have been threatened with loss of employment if they did not return to work.³² There have also been instances of inciting employees to violence against union leaders, organizers and members,³³ and of eliciting renunciations of union affiliations from employees under coercive circumstances.³⁴ In all such cases of patently coercive utterances which have been appealed to the courts, the latter have upheld the Board's assertion that they constituted unfair labor practices and the employers have not been successful in using the free speech privilege as a defense. No fault can be found with these holdings. As pointed out later, the Constitution was never intended to protect "words that may have all the effect of force."³⁵

(b) Derogatory utterances against unions and union members.

Some employers have also shown an aptitude for name-calling and other

of employers and those made by others for which the employer is held responsible. It should be noted, however, that the National Labor Relations Board holds employers responsible for acts of third parties "even though the acts . . . were not expressly authorized or might not be attributable to him on strict application of the rules of *respondeat superior*." *International Association of Machinists v. N. L. R. B.*, 311 U. S. 72, 80, 61 Sup. Ct. 83, 88 (1940), *rehearing denied*, 311 U. S. 729, 61 Sup. Ct. 314 (1940). Thus, employers have been held responsible for statements made by anyone on the employer's property during working hours, *In re Corinth Hosiery Mills, Inc.*, 16 N. L. R. B. 414, 425 (1939); and by local civic organizations or town officials even though the utterances did not occur on company time or property, *In re Lenox Shoe Company, Inc.*, 4 N. L. R. B. 372, 377 (1937), *In re Brown Shoe Company, Inc.*, 1 N. L. R. B. 803, 817-826 (1936). For collection of cases involving unfair labor practices predicated upon statements or acts of employees not expressly authorized by the employer, see Notes (1943) 146 A. L. R. 1062. Also, see Killingsworth, *Employer Freedom of Speech and the N. L. R. B.* (1941) 16 Wts. L. Rev. 211.

27. *N. L. R. B. v. Friedman-Harry Marks Clothing Co.*, 301 U. S. 58, 57 Sup. Ct. 645 (1937); *N. L. R. B. v. Auburn Foundry, Inc.*, 119 F. (2d) 331 (C. C. A. 7th, 1941); *Triplex Screw Co. v. N. L. R. B.*, 117 F. (2d) 858 (C. C. A. 6th, 1941).

28. *N. L. R. B. v. Jahn & Ollier Engraving Co.*, 123 F. (2d) 589, 592 (C. C. A. 7th, 1941); *N. L. R. B. v. New Era Die Co.*, 118 F. (2d) 500, 503 (C. C. A. 3d, 1941).

29. *In re Stackpole Carbon Co.*, 6 N. L. R. B. 171, 182 (1938).

30. *N. L. R. B. v. Pacific Gas and Electric Co.*, 118 F. (2d) 780, 788 (C. C. A. 9th, 1941).

31. *In re Good Coal Co.*, 12 N. L. R. B. 136, 140 (1939); *In re Carlisle Lumber Co.*, 2 N. L. R. B. 248, 265 (1936).

32. *Stewart Die Casting Corp. v. N. L. R. B.*, 114 F. (2d) 849, 851 (C. C. A. 7th, 1940).

33. *In re Clover Fork Coal Co.*, 4 N. L. R. B. 202, 212 (1937). The general superintendent of a mine told employees, "If one of my men will pick up a stick and whip hell out of one of them organizers, I will . . . see he don't put in a day in jail and I will pay the fine."

34. *In re Greensboro Lumber Co.*, 1 N. L. R. B. 629, 632 (1936). *In re Maryland Distillery, Inc.*, 3 N. L. R. B. 176 (1937).

35. See *infra*, p. 84.

anti-union utterances of a wide range of color and import. Of the more extreme type are the following: Union members are "racketeers" and "rats,"³⁶ union organizers are "communists," "professional bums" and "outright scabs;"³⁷ the C.I.O. are all "scums,"³⁸ the C.I.O. is composed of "murderers" and "gangsters,"³⁹ and an employee-organizer is a "communist" and an "agitator."⁴⁰ Slightly more temperate are the following: A union member was called a "sucker" for paying union dues;⁴¹ "A good worker doesn't need a union;"⁴² "You see that fellow out there—he is just leading those fellows to their ruin;"⁴³ "The C.I.O. had sold out;"⁴⁴ the "Union wasn't worth one dime to anybody,"⁴⁵ unions are "reds and communists and I don't know what all;"⁴⁶ "Are you helping yourselves, your wives and your families, or are you with your hard-earned dollars helping a selfish group of so-called labor leaders to gain power?"⁴⁷ The National Labor Relations Board has even charged the following moderate, and seemingly harmless, expressions as being interference, restraint, coercion: "I don't believe either you or I ever felt it necessary to call in outsiders to help us settle our family affairs;"⁴⁸ a plant manager's manner of greeting employees with expressions such as, "Hello, John L.," and "Hello, C.I.O.;"⁴⁹ asking an employee where his union initiation fee went and reminding him of the fine residence of a union organizer;⁵⁰ an employer's expression of unrestrained joy in commenting to employees upon an election which rejected the union.⁵¹

It is important to note that in none of the above-cited instances has the Board found it necessary to seek judicial aid in the enforcement of its cease and desist orders. The employers apparently complied with the Board's orders. Therefore, in none of these cases, have we the benefit of judicial opinion as to whether the derogatory remarks were coercive in fact and, hence, outside the sphere of Constitutional protection. However, in at least one case a Circuit Court of Appeals has ruled that derogatory remarks were not necessarily coercive and that, therefore, their utterance was protected by the Constitutional guaranty.⁵²

36. *In re* Sterling Corset Co., Inc., 9 N. L. R. B. 858, 862 (1938).

37. *In re* Reed and Prince Mfg. Co., 12 N. L. R. B. 944, 956 (1939).

38. *In re* Moltrup Steel Products Co., 19 N. L. R. B. 471, 480 (1940).

39. *In re* Missouri-Arkansas Coach Lines, Inc., 7 N. L. R. B. 186, 190 (1938).

40. *In re* California Cotton Oil Corp., 20 N. L. R. B. 540, 549 (1940).

41. *In re* New Era Die Co., 19 N. L. R. B. 227, 235 (1940).

42. *In re* Block-Friedman Co., Inc., 20 N. L. R. B. 625, 629 (1940).

43. *In re* Kuehne Mfg. Co., 7 N. L. R. B. 304, 312 (1938).

44. *In re* Ingram Mfg. Co., 5 N. L. R. B. 908, 915 (1938).

45. *In re* Mexia Textile Mills, 11 N. L. R. B. 1167, 1170 (1939).

46. *In re* Borden Mills, Inc., 13 N. L. R. B. 459, 468 (1939).

47. *In re* Stewart Die Casting Corp., 14 N. L. R. B. 872, 882 (1939).

48. *In re* General Shoe Corp., 5 N. L. R. B. 1005, 1008 (1938).

49. *In re* Commonwealth Telephone Co., 13 N. L. R. B. 317, 323 (1939).

50. *In re* The Maryland Bolt and Nut Co., 14 N. L. R. B. 707, 714 (1939).

51. *In re* Lennox Furnace Co., Inc., 20 N. L. R. B. 962, 978 (1940).

52. N. L. R. B. v. Ford Motor Company, 114 F. (2d) 905 (C. C. A. 6th, 1940); *cert. denied*, Ford Motor Company v. N. L. R. B., 312 U. S. 689, 61 Sup. Ct. 621 (1941).

(c) Expressions of preference between unions.

It is the established policy of the Labor Board to hold practically any expression of preference by an employer for a particular union or for particular union candidates to be an unfair labor practice.⁵³ Preferences between unions or for particular union candidates may be expressed in a variety of ways, of which the following are representative:

1. The employer told a union shop committee that he would not deal with an "outside" union without proof that it represented a majority of the workers but that he would negotiate directly with the committee if no "outsider" was present. The Board held this an expression of preference for an "inside organization, hence interference, restraint and coercion."⁵⁴

2. A company official called several employees into his office and made known to them his ideas as to who should be elected as their union officials and suggested they go out and campaign a bit. This was held to be interference, restraint and coercion in the exercise of the employees' right to select representatives of their own choosing.⁵⁵

3. A company official called representatives from various departments to his office and stated: "You are at perfect liberty to join any labor organization, or if you want to form your own, I can't see why you can't do it." He then pointed out that dues in an outside labor organization would be higher than those of an inside organization and that the employees knew more about their problems than did outsiders. An independent union was subsequently formed. The Board found these utterances constituted interference, restraint and coercion.⁵⁶

In one case where the question of an employer's preference arose, the Fifth Circuit Court of Appeals upheld the Labor Board's cease and desist order.⁵⁷ The court found that there was some evidence to support the Board's finding that the employer did have a preference for an independent union and interfered with the employee's freedom of choice of union. Nevertheless the court made the following statement regarding expressions of preference:

"The employer has the right to have and to express a preference for one union over another so long as that expression is the mere expression of opinion in the exercise of free speech and is not the use of economic power to coerce, compel or buy the support of the employees for or against a particular labor organization."⁵⁸

53. Language of the Supreme Court in two cases, considered outside the context, lends some support to the Labor Board's view: "Slight suggestions as to the employer's choice between unions may have telling effect among men who know the consequences of incurring that employer's strong displeasure." *International Association of Machinists v. N. L. R. B.*, 311 U. S. 72, 78, 61 Sup. Ct. 83, 88 (1940). "Intimations of an employer's preference, though subtle, may be as potent as outright threats of discharge." *N. L. R. B. v. Link-Belt Co.*, 311 U. S. 584, 600, 61 Sup. Ct. 358, 366 (1941).

54. *In re Air Associates, Incorporated*, 20 N. L. R. B. 356, 361-362 (1940).

55. *In re Shell Petroleum Corp.*, 10 N. L. R. B. 719, 730 (1938).

56. *In re The Maryland Bolt and Nut Co.*, 14 N. L. R. B. 707, 712 (1939).

57. *Continental Box Co. v. N. L. R. B.*, 113 F. (2d) 93 (C. C. A. 5th, 1940).

58. *Id.* at 97.

But we are left with the difficulty of determining just what precisely is the allowable area of free speech and what constitutes coercion within the meaning of the Wagner Act.

(d) Advice or opinions regarding labor unions generally.

Considerable controversy has arisen in cases where employers have given advice to employees, either voluntarily or upon solicitation by employees, and where they have issued statements of policy regarding labor unions. The Labor Board has taken the position that the employer must remain aloof and impartial under all circumstances and that even if employees request the advice of their employers, such advice, if given, necessarily restrains or coerces.⁵⁹ The Board has stated:

"Such 'advice' is not the advice of a person on an equal plane and having an unprejudiced mind. It is the 'advice' of an employer who has the right to discharge the employee to whom the 'advice' is given—to control to a large extent his economic position and thus his welfare."⁶⁰

As to the distribution of leaflets setting forth opinions of company policy, the Board has held that such distribution constitutes an attempt to circumvent the Act by interfering with employee rights, unprejudiced by the employer, to make up their own minds regarding self-organization.⁶¹ Recognizing the employer's dilemma when asked for advice, the Circuit Court of Appeals remarked as follows:

"The position of the employer, where, as here, there is present genuine and sincere respect and regard, 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."⁶²

In other words, as one commentator has remarked: "This is as much as to say that the better employee relations, the less right employer and employee have to discuss their mutual relations with frankness and honesty of purpose."⁶³

The following are examples of employer advice and statements of policy which the Labor Board has found to be unfair labor practices:

1. "There has been circulated false information to the effect that you must join the Union in order to keep your job. This is a false statement. It is not necessary to have a Union Card to work here. It is the policy of this firm not to encourage or discourage membership in Labor Unions. This is entirely for you to decide. However, do not let anybody tell you that your job here depends upon membership in any Union." The Labor Board found that this advice was given gratuitously and was in effect an ultimatum which was intended to discourage union organization by warning employees that any possible advantage to be derived from such membership and from collective bargaining was beyond their reach.⁶⁴

59. *In re* Crossett Lumber Co., 8 N. L. R. B. 440, 451 (1938).

60. *In re* Pennsylvania Greyhound Lines, Inc., 1 N. L. R. B. 1, 22-23 (1935).

61. *In re* Brashear Freight Lines, Inc., 13 N. L. R. B. 191, 194 (1939).

62. *N. L. R. B. v. Falk Corp.*, 102 F. (2d) 383, 389 (C. C. A. 7th, 1939).

63. *BUFFORD, THE WAGNER ACT* (1941) 285.

64. *In re* Roberti Bros., Inc., 8 N. L. R. B. 925, 928 (1938).

2. "In the interest of sound industrial relations between employer and employe, this factory will observe and operate upon the broad principles of Industrial Freedom, which gives the right to every man to work—and assures to the Employer the privilege of employing his labor without coercion from any source." The Board inferred that the employer had a closed mind on the possibility of a closed shop.⁶⁵

3. "I have read the Wagner Act, and while I don't pose as any authority on it, I can say that you have a perfect right to organize in any way you see fit a union in our plant. . . . There are three forms of union that I know of . . . and any of those are acceptable to me. However, personally, since I am going to conduct the negotiations probably with the representatives of whatever union is formed, naturally I would like to talk and deal with a man or men who know our business in our plant, understand our peculiar working conditions and can talk intelligently about them." The Board found that these remarks, taken together with promised wage increases and vacations, would inevitably be construed by the employees as requiring adherence to the expressed wishes of the employer.⁶⁶

(e) Non-coercive utterances with background of anti-union conduct.

There have been a relatively large number of cases in which the Labor Board has admitted that the employer utterances in question, if taken by themselves, did not interfere with or coerce the employees but, when "examined in the context of surrounding circumstances in its relation to the entire factual background," the intimidatory or coercive nature and effect of the statement made or used appears.⁶⁷ In other words, the Board has held that a background of anti-union conduct of an employer so colors an otherwise harmless utterance in regard to labor matters as to render it intimidatory or coercive. For purposes of the special problem considered in this paper, this category of employer statements presents the most controversial type of utterance. The problem is whether, and under what circumstances, an employer is permitted by virtue of the First Amendment to comment upon union activities. It would appear that in this type of case the question of freedom of speech is today most often involved. It seems safe to say that, after almost ten years of experience with the Wagner Act, employers for the most part have learned to refrain from conduct which is unequivocally anti-union. Within recent years, as is indicated by decisions of the Circuit Courts of Appeals which will later be discussed in detail, the alleged interference or coercion has frequently taken the form of statements made by employers, which, on their face, do not appear to be coercive, but which the Labor Board has condemned in view of a prior, or present, background of anti-union activity.

The effect of this position of the Board is best understood if one bears in mind the powers given to the Board for enforcement of the Act. The Board is empowered to prevent any person from engaging in any unfair labor practice,

65. *Id.* at 929.

66. *In re Diamond T. Motor Car Co.*, 18 N. L. R. B. 204, 208 (1939).

67. THIRD ANNUAL REPORT OF NATIONAL LABOR RELATIONS BOARD (1938) 59.

affecting commerce, specifically listed in Section 8 of the Act.⁶⁸ If the Board finds, in the manner prescribed in the Act,⁶⁹ that any person named in a complaint has engaged in, or is engaging in, any such unfair labor practice, it is required to issue an order requiring the person to cease and desist from such unfair labor practice, and to take such affirmative action as will effectuate the policies of the Act.⁷⁰ While no penalty is provided by the Act for the commission of an unfair labor practice, if the Board's order is ignored, the Board may petition a circuit court of appeals, for the enforcement of the order.⁷¹ Thus, if the Board is successful in showing that the employer has had a record of anti-union conduct, the Board often attempts to secure a decree of the court requiring not only that the employer cease his unfriendly acts but also enjoining him from making any future utterances regarding labor matters which, though in themselves non-coercive, the Board contends may acquire the stature of coercion by relation to past anti-union conduct.

A few examples will illustrate the divergence of approach of the courts on this type of utterance, namely one not coercive on its face, but which is made against a background of anti-union conduct. The National Labor Relations Board has found that while attempts were being made to organize workers of a Ford Motor Company plant, the company distributed anti-union literature to its employees. Express denials were made in the pamphlets of any design on the part of the company to prevent the employees from joining a union, but the union was referred to in an uncomplimentary manner, the integrity of its leaders was questioned and the employees were advised not to join the union. The Board also found that before and after the distribution of the literature, twenty-four out of the eighty thousand employees of Ford were discharged for union activity.⁷² The Board held that under these circumstances the distribution of the literature interfered with, restrained and coerced the employees in the exercise of their rights of self-organization and petitioned the Circuit Court for enforcement of its cease and desist order. The court set aside and denied enforcement of the provision in the order forbidding the future dissemination of propaganda by the company among its employees, as it was in violation of the Constitutional guaranty of freedom of speech set forth in the First Amendment. The court found that the alleged discriminatory discharges were too small in number to furnish a sufficient background of coercion which would condemn the publication. "Basic Constitutional rights are not thus lightly to be whittled away."⁷³

68. NATIONAL LABOR RELATIONS ACT, 49 STAT. 449 (1935), 29 U. S. C. § 160(a) (1940 ed.).

69. *Ibid.*, 29 U. S. C. § 160(b) (1940 ed.).

70. *Ibid.*, 29 U. S. C. § 160(c) (1940 ed.).

71. *Ibid.*, 29 U. S. C. § 160(e) (1940 ed.).

72. Three employees were discharged before the distribution of the literature and twenty-one after. The Board also found that shortly after the distribution some union organizers were attacked in a riot for which the company was responsible but the court did not rely on this fact in arriving at its decision.

73. *N. L. R. B. v. Ford Motor Company*, 114 F. (2d) 905, 915 (C. C. A. 6th, 1940), *cert. denied*, 312 U. S. 689, 61 Sup. Ct. 621 (1941).

In an earlier case the Labor Board found that during the existence of an open shop contract with a union the officials of a bus company made certain statements which the Board held to be anti-union⁷⁴ and at the expiration of the contract certain employees were discharged for union activities. The Board also found the company guilty of other unfair labor practices. Upon application for enforcement of a cease and desist order, the court set aside the provision forbidding expression of opinions by the employer on labor matters as being in violation of the First Amendment to the Constitution, without considering the alleged background of anti-union conduct.⁷⁵

In *National Labor Relations Board v. Luxway, Inc.*,⁷⁶ the Board found that when the union began to organize the company's employees, the president gave reasons why they should not join the union and advised them against it. The Board also found that the company discharged an employee for alleged union activities. The president of the corporate employer admitted this to be the fact. Upon petition for enforcement of the order to cease and desist from making anti-union statements, etc., the court held that the company's right to freedom of speech "does not extend to interested appeals by an employer to induce his men not to exercise the right of collective bargaining and not to become members of a labor union."⁷⁷

Virginia Electric and American Tube Bending Decisions

The first case to bring the issue of employer free speech in labor relations before the Supreme Court of the United States was *National Labor Relations Board v. Virginia Electric & Power Co.*⁷⁸ In this case the Board found that for a number of years the company had been hostile to labor organizations. Shortly after a union organizer appeared in 1937, the company posted a bulletin which explicitly recognized the employee's right to join any union they wished but pointed out that it was "not at all necessary" that they join any labor organization and that there was no law which required or was intended to compel them to pay dues to or join any organization. The notice also appealed to the employees to bargain with the company directly, as "It is reasonable to believe that our interests are mutual and can best be promoted through confidence and cooperation."⁷⁹ A short time later company officials stressed to employee representatives at company-called meetings the desirability of forming a bargaining agency and encouraged the formation of an independent

74. Examples of statements held to be anti-union: (1) One official informed employees that steps had been taken toward securing a pay increase, but the union had nothing to do with it. He also stated that employees had no need of a union in order to safeguard their rights, and that they were not obliged to pay tribute. (2) Another official told an employee that if he had a son he would not let him join the union.

75. *N. L. R. B. v. Union Pacific Stages, Inc.*, 99 F. (2d) 153 (C. C. A. 9th, 1938).

76. 123 F. (2d) 106 (C. C. A. 2d, 1941).

77. *Id.* at 108.

78. 314 U. S. 469, 62 Sup. Ct. 344 (1941).

79. For text of notice, see marginal note 5, *N. L. R. B. v. Virginia Electric & Power Co.*, 314 U. S. 469, 471, 62 Sup. Ct. 344, 345 (1941).

union.⁸⁰ Thereafter an independent union was formed with which the company entered into a closed shop contract. The Board found that the bulletin and speeches coerced the company's employees in the exercise of their rights and ordered the company to cease and desist in such utterances and to disestablish the independent union. The company and the independent union petitioned the Circuit Court to review and set aside the order and were successful.⁸¹ Upon appeal to the Supreme Court, the decision of the Circuit Court was reversed and the case remanded to the Board for redetermination of the issues. The company argued that the Board's finding that the bulletin and speeches "interfered with, restrained and coerced" the company's employees violated the First Amendment. Mr. Justice Murphy, speaking for the Court, remarked:

"Neither the Act nor the Board's order here enjoins the employer from expressing its view on labor policies or problems, nor is a penalty imposed upon it because of any utterances which it has made. The sanctions of the Act are imposed not in punishment of the employer but for the protection of the employees. The employer in this case is as free now as ever to take any side it may choose on this controversial issue. But, certainly, conduct, though evidenced in part by speech, may amount, in connection with other circumstances to coercion within the meaning 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."⁸²

The Court found that if the bulletin and speeches were to be considered separate from their background, it would be difficult to find them coercive, and that the Board had not "raised them to the stature of coercion by reliance on the surrounding circumstances."⁸³ The cause was, therefore, remanded to the Board for a redetermination in accordance with the opinion.⁸⁴

The issue of free speech was involved in the *Virginia Electric* case, to this extent: it brought forth from the Supreme Court a decision that the Wagner Act was never intended to deprive an employer of his Constitutional right to express an opinion on unionization, so long as the expression did not tend to intimidate the employee. With the Wagner Act thus properly construed, the Court's determination that the utterance of the employer, considered by itself, did not interfere with, restrain or coerce the employees, rendered unnecessary any further consideration of the Constitutional privilege. It is

80. For text of speeches, see marginal note 7, *id.* at 473, 62 Sup. Ct. 344, 346 (1941).

81. *Virginia Electric & Power Co. v. N. L. R. B.*, 115 F. (2d) 414 (C. C. A. 4th, 1940).

82. *N. L. R. B. v. Virginia Electric & Power Co.*, 314 U. S. 469, 477, 62 Sup. Ct. 344, 348 (1941).

83. *Id.* at 479, 62 Sup. Ct. 344, 349 (1941).

84. After remand of the case, the Labor Board reconsidered it upon the original record, made new and much more elaborate findings of fact and issued a new order. *In re Virginia Electric & Power Co.*, 44 N. L. R. B. 404 (1942). The Circuit Court upheld the order, *N. L. R. B. v. Virginia Electric & Power Co.*, 132 F. (2d) 390 (1942), and the Supreme Court affirmed, *Virginia Electric & Power Co. v. N. L. R. B.*, 319 U. S. 533, 63 Sup. Ct. 1214 (1943), on the ground that the Board's findings and conclusions were supported by substantial evidence, and therefore conclusive.

implicit in the Court's decision, however, that if the words spoken are not coercive, they are protected by the First Amendment. This assumption was made by the Second Circuit Court of Appeals in the later case of *National Labor Relations Board v. American Tube Bending Co.*⁸⁵ Judge Learned Hand in that case interpreted the decision in the *Virginia Electric* case as being a binding precedent on the question of privilege, since the employer had raised the issue. The facts in the *Tube Bending* case were as follows: A few days before an election by the company's employees to determine a bargaining representative the president of the company sent a letter to employees reminding them that the election was by secret ballot and that they should be sure to vote. It was pointed out that they could vote in any way they wished and that they should consider whether the leadership they were about to select was interested in the employee's welfare or not; whatever they should decide, the company would continue to play the game knowing that the interests of the employees and the company are the same.⁸⁶ On the eve of the election the president delivered a speech to the employees reiterating in general the matter set forth in the letter and stating in addition that the company favored an open shop and appealed to the employees to support the management's policies and therefore, by implication at least, for them to reject both unions on the ballot.⁸⁷ The court found that there was no intimation of reprisal against those who disagreed with the management and since the company's letter and speech were not materially different from those considered by the Supreme Court in the *Virginia Electric* case, the Board's order was set aside.⁸⁸ The Board's petition for writ of certiorari was denied by the Supreme Court.⁸⁹

The Supreme Court's denial of certiorari aroused considerable comment in the public press⁹⁰ to the effect that the right of employer freedom of speech in regard to labor matters had been definitely established. Two facts should be especially noted. First, in neither the *Virginia Electric* nor the *Tube Bending* decisions did the courts find it necessary to state, or elaborate upon, the test which controls in determining generally whether particular statements of employers, unrelated to other factors, tend to coerce. While it is recognized that the actual decision in neither case required any such elucidation, an opportunity was presented to add some clarification to the law. Second, the denial of certiorari by the Supreme Court is not technically the equivalent to an affirmance of a decision of a circuit court of appeals and certainly cannot

85. 134 F. (2d) 993 (C. C. A. 2d, 1943); *cert. denied*, 320 U. S. 768, 64 Sup. Ct. 84 (1943).

86. *Id.* at 995.

87. *Id.* at 996.

88. Judge Learned Hand observed that had it not been for the *Virginia Electric* case, the Court might have considered some of the Supreme Court's earlier decisions as requiring a contrary holding. *Id.* at 994.

89. See note 85, *supra*.

90. N. Y. Times, October 19, 1943, p. 20 col. 2; N. Y. Times, October 20, 1943, p. 22 col. 2; N. Y. Times, October 21, 1943, p. 26 col. 2.

be relied upon as approval of the statements of law enunciated by the lower court.⁹¹ The denial may merely mean that the Court was unwilling to accept the case as a test for an authoritative decision. In this connection it is worthy to note that on the same day the Supreme Court refused to hear the *Tube Bending* case, it also denied certiorari in the case of *Trojan Powder Company v. National Labor Relations Board*⁹² where the Third Circuit Court of Appeals had upheld the Board's cease and desist order, based upon a "barrage" of letters to the employees, which the Court admitted contained no explicit threat. Aside from these utterances, there had occurred, five years before, activity which might be deemed somewhat intimidatory, which the Board had relied upon as "background," although it was not a part of the complaint in the case. Although it must be conceded that no two cases involving utterances are alike, it would appear that the decision in the *Tube Bending* and the *Trojan Powder* cases are somewhat conflicting in principle.

Aftermath of the Tube Bending Case

Nevertheless, the *Tube Bending* decision appears to have been a "shot in the arm" to employers. In contrast to the comparative calm which had prevailed on the free speech front in the two years between the *Virginia Electric* and *Tube Bending* cases, a relatively large number of cases began to appear in the various circuit courts of appeal early in 1944 in which the employers relied on the *Tube Bending* decision to sustain their defense of free speech to charges of unfair labor practices predicated upon their utterances. Two cases decided by the Third Circuit Court are of particular interest because on the surface they appear to reach divergent results.

In *Edward G. Budd Manufacturing Co. v. National Labor Relations Board*,⁹³ the Labor Board had found the company guilty of unfair labor practices and had obtained a decree from the Third Circuit Court enforcing the order.⁹⁴ One provision in the decree required the employer to post notices throughout its plant stating that it would comply in detail with the decree. The company affirmatively submitted to the decree but simultaneously with posting the notices, the president of the company mailed a letter to all employees containing an enclosure which set forth the facts underlying the controversy and impressed upon them the fact that they were free to form a union of their own, as well as to join an outside one, and to argue to them the advantages, as he saw them, to be derived by the employees of a union of their own. In general, the contents of the letter and enclosure were similar to utterances involved in the *Virginia Electric* and *Tube Bending* cases.⁹⁵ The Board sought

91. See *United States v. Carver*, 260 U. S. 482, 490, 43 Sup. Ct. 181, 182 (1923), in which Mr. Justice Holmes stated: "The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times."

92. 135 F. (2d) 337 (C. C. A. 3d, 1943), *cert. denied*, 320 U. S. 768, 64 Sup. Ct. 76 (1943), *petition for rehearing denied*, 320 U. S. 813, 64 Sup. Ct. 194 (1943).

93. 142 F. (2d) 922 (C. C. A. 3d, 1944).

94. *Edward G. Budd Mfg. Co. v. N. L. R. B.*, 138 F. (2d) 86 (C. C. A. 3d, 1943).

95. The texts of the letter and enclosure are appended to the opinion. *Edward G. Budd*

an order adjudging the company in contempt. The court held that the expressions contained in the letter and enclosure, standing alone as they did, were privileged and that the privilege was not lost through any prior threat or act of discrimination, coercion or intimidation by the company in violation of the employees' rights under the Act. The court said that "a court's decrees are no less effective merely because the court will not permit them to be construed so as to violate constitutional rights and, especially not, those guaranteed by the Bill of Rights."⁹⁶ The court qualified the privilege, however, as follows:

"... an employer's right to speak freely concerning labor matters does not automatically carry with it freedom from responsibility for the reasonably foreseeable consequences of his utterances. Thus an expression may be actionable because of its direct, intended and unmistakable wrongful import or it may take on evidentiary value as revealing of the improper intent, motive or purpose of other conduct which, alone, might be ambiguous or equivocal. . . . But that, in turn, does not mean that one's right to entertain opinions and to give them free expression may be preemptorily foreclosed for the future by either Board order or court decree."⁹⁷

The *Budd* case was interpreted by the press as establishing that the employer's right to express his preference for a particular union is unqualifiedly protected by the free-speech guaranty of the First Amendment.⁹⁸ But any such inference was soon dispelled by a subsequent decision of the same court in the case of *National Labor Relations Board v. M. E. Blatt Co.*⁹⁹ In the latter case the Labor Board had found the company guilty of unfair labor practices and it had ordered the company to cease and desist from such practices and to take certain affirmative action including posting of notice. The company complied with the order, but simultaneously with posting the required notice, it posted another notice which was practically identical with the notice involved in the *Virginia Electric* case.¹⁰⁰ Subsequently, during a membership drive by a union, the employer's supervisors discouraged membership and a second notice was posted calling the employees attention to the fact that "it is not necessary for any employee to join any organization or to pay dues to any organization to continue in our employ."¹⁰¹ The Board held that the first notice was plainly intended to counteract the force of the required notice and marked the company as a partisan candidate for the allegiance of the employees in opposition to the union and constituted a forceful effort to discourage membership in the union. Both notices were found to be unfair labor practices. The company took the position that even if it be assumed that both notices were intended to discourage membership in the

Mfg. Co. v. N. L. R. B., 142 F. (2d) 922, 930-931 (C. C. A. 3d, 1944).

96. *Id.* at 929.

97. *Id.* at 926.

98. N. Y. Times, May 14, 1944, p. 1, col. 2.

99. 143 F. (2d) 268 (C. C. A. 3d, 1944); *cert. denied*, — U. S. —, 65 Sup. Ct. 135 (1944).

100. For text of notice, see marginal note 4, *id.* at 270-271.

101. Marginal note 7, *id.* at 272.

union by express words, it none the less had the right so to address its employees in pursuit of its right of freedom of speech.¹⁰² The court held that the company could not successfully assert the privilege of freedom of speech in respect to the notices, when viewed in conjunction with "other facts completing the pattern of the respondent's conduct."¹⁰³ The court found the second notice, quoted above, "objectionable in itself," laying emphasis on the fact that it was phrased in the negative and did not refer to the fact that the employees might join a labor organization and still remain in respondent's employ. Nevertheless, a reading of the entire opinion compels the conclusion that the court deemed the notices to be coercive principally because they were conjoined with "other acts." These "other acts" were instances of domination of a company-sponsored union and discouragement of membership in an outside union, and these acts accompanied the posting of the notices.

If viewed superficially it might appear that the *Budd* and the *Blatt* decisions are contradictory. This is not so. The *Blatt* decision is essentially in accord with the ruling in the *Virginia Electric* and the *Tube Bending* cases.¹⁰⁴ In all of these cases the courts recognized that utterances, which considered by themselves are not intimidatory, may become such when considered in the pattern of acts which are coercive.

That the line which divides non-coercive from coercive speech may be narrow is indicated by two decisions recently handed down within two days of each other, *Peter J. Schweitzer, Inc. v. National Labor Relations Board*¹⁰⁵ and *Reliance Manufacturing Co. v. National Labor Relations Board*.¹⁰⁶ In the *Schweitzer* case the Labor Board had issued an order to the company to cease and desist from interfering with, or coercing, its employees in their attempt to unionize and to mail to the employees, and post, notices to the effect that the company would comply with the order. The practices complained of by the Board were as follows: the company used its policy of generous and liberal treatment of employees for the purpose of convincing them that there was no need for a union in the plant; the company distributed a letter to employees the day before an election listing the benefits voluntarily given

102. The Company relied on *N. L. R. B. v. Virginia Electric & Power Co.*, 314 U. S. 469, 62 Sup. Ct. 344 (1941), and *N. L. R. B. v. American Tube Bending Co.*, 134 F. (2d) 993 (C. C. A. 2d, 1943), *cert. denied*, 320 U. S. 768, 64 Sup. Ct. 84 (1943).

103. *N. L. R. B. v. M. E. Blatt Co.*, 143 F. (2d) 268, 275 (C. C. A. 3d, 1944), *cert. denied*, — U. S. —, 65 Sup. Ct. 135 (1944).

104. Judge Biggs, who wrote the opinion in the *Blatt* case, interpreted Judge Learned Hand's opinion in *N. L. R. B. v. American Tube Bending Co.*, 134 F. (2d) 993 (1943), *cert. denied*, 320 U. S. 768, 64 Sup. Ct. 84 (1943) as holding the employer's privilege of free speech to be "absolute." 143 F. (2d) 268, 274. This criticism does not appear to be justified. The court in the *Tube Bending* case refused to remand the cause to the Board, as was done in the *Virginia Electric* case, since the record contained nothing other than the utterance complained of. Besides, the Board indicated it did not wish to conduct further hearings.

105. 144 F. (2d) 520 (App. D. C., 1944).

106. 143 F. (2d) 761 (C. C. A. 7th, 1944).

them by the company and asking them to check up to see if their union friends in other plants were getting similar treatment;¹⁰⁷ in accordance with previous custom the company gave to an employee who was prominent in the union movement a special benefit because his wife was about to have a child and also granted to another employee active in union organization certain requests which the court found were not unusual. The Board found that the letter interpreted in connection with the other activities enumerated above went further than appealing to their loyalty on account of past favor and would justify the inference that if the union were formed the voluntary benefits might be withdrawn. The court unanimously sustained the order in so far as it required the company to assure its employees that if the union were formed the benefits would not be withdrawn. The majority of the court, however, disagreed with the Board's finding that an employer would be guilty of an unfair labor practice because he treated his employees well in order to forestall a union movement. "Such a principle would mean that it is the duty of an employer to refrain from benefiting his employees in order to make them more inclined to vote for a union."¹⁰⁸ The court also upheld the right of the company to comment on labor matters as embodied in the letter, citing the *Virginia Electric* decision as authority for the right.¹⁰⁹

In the *Reliance* case, the Labor Board had previously obtained a court decree¹¹⁰ enforcing its order finding the company guilty of unfair labor practices. An election was subsequently called to decide whether the employees wished to vote for a union in the company's plant. On the day before the election the company inserted full page advertisements in newspapers consisting solely of the legend "Rely on Reliance," which had been the company's advertising slogan for many years, and the company's name appeared at the bottom. On the day of the election certain of the company foremen wore copies of the advertisement pinned on their backs to which had been added in a few instances, "Vote No." On the night before the election the company let off with pay some employees who had worn anti-union signs. The company also bought drinks and lunch for night shift employees. After the union defeat the company invited the employees to a hotel to celebrate. The Labor Board petitioned to have the company adjudged in contempt for failure to comply with the decree. The company contended that the publication of the advertisements and the acts of the supervisory employees in wearing them were merely exercise of the privilege of free speech.¹¹¹ The court held that the

107. For text of letter, see *Peter J. Schweitzer, Inc., v. N. L. R. B.*, 144 F. (2d) 520, marginal note 1, p. 521.

108. *Id.*, marginal note 4, p. 524.

109. Edgerton, J., dissented on the ground that the *Virginia Electric* decision recognized that expression of opinion by employers "is not privileged when it is a part of a general effort at interference and restraint." 144 F. (2d) 520, 526.

110. *Reliance Mfg. Co. v. N. L. R. B.*, 125 F. (2d) 311 (C. C. A. 7th, 1941).

111. The company relied on *N. L. R. B. v. Virginia Electric & Power Co.*, 314 U. S. 469, 62 Sup. Ct. 344 (1941), *N. L. R. B. v. American Tube Bending Co.*, 134 F. (2d) 993 (C. C. A. 2d, 1943), *cert. denied*, 320 U. S. 768, 64 Sup. Ct. 84 (1943), *N. L. R. B. v.*

conduct complained of was an unjustifiable interference with the employees' rights to vote for a union of their own choosing. The court refused to decide whether the publications standing alone were contemptuous, but found that if they were considered in connection with the other circumstances which followed they were made in violation of the decree. The court stated that while the management may have a right under some circumstances to express an opinion regarding labor unions, the right does not extend to the point where the company becomes a participant in the contest.

Representing a different and relatively liberal interpretation of the free speech privilege is the Sixth Circuit Court's opinion in the case of *National Labor Relations Board v. Brown-Brockmeyer Co.*¹¹² Among the acts of the company found by the Board to constitute unfair labor practices were: (1) a letter stating that it was because of union opposition that the Ohio State Department of Industrial Relations had rescinded its permit for women to work more than eight hours in one day; and (2) certain derogatory remarks made by the company officers against the union growing out of the union's refusal to consent to employees working on holidays at time and a half rather than at double time as provided in the union contract. As to (1), the Board found that the company's letter was a "statement which the respondent knew was not in accord with the facts." The court held as to (1) that the statements were not unfair labor practices since they dealt with the facts of the controversy, and therefore fell "within the area of free discussion that is guaranteed by the Constitution."¹¹³ The court also stated, "The right of free speech does not depend upon the accuracy of the ideas expressed."¹¹⁴ As to (2), the court held that an employer has the right of freedom of speech and may express his hostility to a union and his views on labor problems or policy, provided he does not threaten or otherwise coerce his employees, citing among other decisions the *Virginia Electric* and *Ford Motor* cases. The Board's petition was denied in its entirety.

The foregoing review of recently decided cases indicates that the courts are in substantial agreement on at least one basic question: the Wagner Act is constitutional in that it was never intended to abridge employer's freedom of speech. Employer speech falls within the condemnation of the Act and outside the protection of the First Amendment when it tends to "interfere with, restrain or coerce employees in the exercise of the rights guaranteed" in the Act.¹¹⁵

Ford Motor Co., 114 F. (2d) 905 (C. C. A. 6th, 1940), *cert. denied*, 312 U. S. 689, 61 Sup. Ct. 621 (1941), and *Edward G. Budd Mfg. Co. v. N. L. R. B.*, 142 F. (2d) 922 (C. C. A. 3d, 1944), to support its assertion of the privilege of free speech.

112. 143 F. (2d) 537 (C. C. A. 6th, 1944).

113. *Thornhill v. Alabama*, 310 U. S. 88, 102, 60 Sup. Ct. 736, 744 (1940).

114. *N. L. R. B. v. Brown-Brockmeyer Co.*, 143 F. (2d) 537, 542 (C. C. A. 6th, 1944).

115. NATIONAL LABOR RELATIONS ACT, 49 STAT. 449 (1935), 29 U. S. C. § 158(1) (1940).

The Meaning of Interference, Restraint and Coercion

Chief Justice Stone, speaking for the Supreme Court in a recent case,¹¹⁶ stated that as between explicit statements of the meaning of statutory language made in Committee Reports and by members of the Committees on the floor of Congress and opinions rendered by other members of Congress in floor debates, the former are entitled to greater weight.¹¹⁷ Since there was no debate in Congress as to the meaning of interference, restraint and coercion as an unfair labor practice under the National Labor Relations Act the Committee Reports are practically conclusive on the question of the intent of Congress as to the meaning of these terms. It is, therefore, important to note that in the Committee Reports of both houses of Congress¹¹⁸ it is expressly stated that the unfair labor practices set forth in the Wagner Act are similar to those contained in previous legislation of Congress, including the National Industrial Recovery Act¹¹⁹ and the Railway Labor Act of 1926.¹²⁰ In fact, particular attention was called to the similarity in the language contained in the various statutes. No intention is indicated in the Committee Reports to give the language a meaning different from that established under the former legislation, and there is a presumption that, in the absence of anything to indicate a different intention, the legislature used the statutory terms in their judicially established meaning.¹²¹

Only five years prior to the passage of the National Labor Relations Act, the following provision in the Railway Labor Act of 1926 was construed by the Supreme Court:¹²²

"Representatives for the purposes of this Act, shall be designated by the respective parties . . . without interference, influence or coercion exercised by either party over the self-organization of representatives by the other."¹²³

The question was the meaning of the expression "interference, influence or coercion." We quote from the Court's opinion, delivered by Mr. Justice Hughes:

"The intent of Congress is clear with respect to the sort of conduct that is prohibited. 'Interference' with freedom of action and 'coercion' refer to well understood concepts of the law. The meaning of the word 'influence' in this clause may be gathered from the context. . . . 'Influence' in this context plainly means pressure, the use of the authority or power of either party to induce action by the other in

116. *United States v. Wrightwood Dairy Co.*, 315 U. S. 110, 62 Sup. Ct. 523 (1942).

117. *Id.* at 125, 62 Sup. Ct. at 529 (1942).

118. SEN. REP. No. 573, 74th Cong., 1st Sess. (1935) 9; H. R. REP. No. 1147, 74th Cong., 1st Sess. (1935) 15.

119. 48 STAT. 198 (1933), 15 U. S. C. § 707(a) (1933).

120. 44 STAT. 577 (1926), 45 U. S. C. § 152 (1940).

121. *Case v. Los Angeles Lumber Co.*, 308 U. S. 106, 115, 60 Sup. Ct. 1, 7 (1939). Cf. *Helvering v. Hallock*, 309 U. S. 106, 60 Sup. Ct. 444 (1940).

122. *Texas and New Orleans R.R. Co. v. Brotherhood of Railway and Steamship Clerks*, 281 U. S. 548, 50 Sup. Ct. 427 (1940).

123. *Railway Labor Act of 1926*, 44 Stat. 577 § 2(3) (1926).

derogation of what the statute calls 'self-organization.' The phrase covers the abuse of relation or opportunity so as to *corrupt or override the will. . .*'¹²⁴ Italics added.

The Supreme Court has also laid down the rule that in adopting the language used in earlier legislation, Congress must be considered to have also adopted the construction given to such language by the Supreme Court and to have made it a part of the enactment.¹²⁵ It is true, of course, that the Wagner Act used the word "restrain" in place of the word "influence" used in the Railway Labor Act but it cannot be argued that the effect of this substitution was to broaden the meaning of the word "influence." If anything, the substitution would have the effect of narrowing the scope of an unfair labor practice under the Wagner Act.¹²⁶ It seems clear that if Congress had intended to bring within the prohibitions of the Wagner Act utterances of employers other than those which corrupt or override the will of employees, it would have at least indicated such intention to do so in view of the judicial construction accorded to similar wording in former legislation. It is of interest, moreover, that the Senate Committee Report pointed out particularly that the power given to the Labor Board was limited to enforcement of the particular unfair labor practices set forth in the Act,¹²⁷ in contrast to the general powers given to previous enforcement bodies by the former statutes, and that neither the Board nor the courts are given any blanket authority to prohibit any and all labor practices which in their judgment are unfair.¹²⁸

Significance of the Constitutional Privilege

It is obvious that Congress never intended to abridge employer freedom of speech, that the Labor Board, at least in theory, if not in practice, recognizes that intention, and that the courts have thus construed the Wagner Act. How then, does the question of Constitutional privilege arise in the practical enforcement of the Act? We have seen that, although the First Amendment was appealed to in the *Virginia Electric* and the *Tube Bending* cases (to mention only two), the courts' decisions were essentially based upon the interpretation of the Act. The real point of inquiry in these cases was whether the utterances in question fell within or without the condemnation of the Act, that is, whether in fact they were coercive or non-coercive. It is submitted

124. *Texas and New Orleans R.R. Co. v. Brotherhood of Railway and Steamship Clerks*, 281 U. S. 548, 568, 50 Sup. Ct. 427, 433 (1930); italics added.

125. *Hecht v. Malley*, 265 U. S. 144, 153, 44 Sup. Ct. 462, 465 (1924).

126. This conclusion is in accord with the views expressed by J. Warren Madden, former chairman of the Labor Board, in *Hearings before Committee on Education and Labor, United States Senate*, 76th Cong., 1st Sess. (April and May 1939) 146, as follows: "The Railway Labor Act, indeed, phrases the obligation of the employer in even stronger language." And again, "The Railway Labor Act goes beyond the National Labor Relations Act in that it not only forbids an employer to interfere with or coerce his employees, but it forbids him to influence them in self-organization." *Id.* at 159.

127. "The unfair labor practices under the purview of this bill are strictly limited to those enumerated in Section 8." SEN. REP. No. 573, 74th Cong., 1st Sess. (1935) 8.

128. SEN. REP. No. 573, 74th Cong., 1st Sess. (1935) 8.

that the question of Constitutional privilege was not directly involved in these cases and did not enter into the result for the reasons just stated. It would also appear from a reading of the decided cases that the First Amendment becomes important, not in the types of cases just mentioned, but in the following two situations: (1) when the courts are requested to review judicially the Board's finding that utterances are coercive; and (2) when the courts are requested to restrain such utterances in the future.

Courts' Power to Review

The Wagner Act provides that in the event the Board petitions a court for a decree enforcing its order, or if any person aggrieved by the order petitions the court to have the order set aside or modified, the findings of the Board as to the facts, if supported by evidence, shall be conclusive.¹²⁹ Some courts have adopted the view that they are bound by the findings of the Board that an employer's utterances are coercive.¹³⁰ In *National Labor Relations Board v. Trojan Powder Co.*,¹³¹ where there was involved little besides the interpretation of utterances found by the Board to have been intimidatory, the Court said:

"The evidence is capable of a conclusion either in favor of the respondent or against it. The Board has concluded against it. We have no authority to interfere with that finding."¹³²

A similar attitude was taken in a very recent case, *Peter J. Sweitzer, Inc. v. National Labor Relations Board*.¹³³ There the Board had found that the employer's letter was intended to give, and did give, to employees the impression that if they joined a union, certain benefits might be withdrawn. The court said:

"We cannot say that this conclusion is not supported by substantial evidence. It is true that a trier of fact might conclude to the contrary because the evidence is far from conclusive but we are not triers of fact in this case."¹³⁴

It may be that in adopting the above view, these courts have abdicated their proper function. While the question cannot be considered entirely settled,

129. NATIONAL LABOR RELATIONS ACT, 49 STAT. 449 (1935), 29 U. S. C. §§ 160(e), 160(f) (1940).

130. See *Elastic Stop Nut Corp. v. N. L. R. B.*, 142 F. (2d) 371 (C. C. A. 8th, 1944), in which the court stated at p. 378: "While an expression of opinion on labor matters may be protected when such utterances do not constitute coercion under the Act, speech amounting, in connection with other circumstances, to coercion within the meaning of the Act is not protected. . . . The determination of the category into which the remarks fell was a question of fact for the Board . . . and the Board's finding on the fact may not be disturbed." See also *Oughton v. N. L. R. B.*, 118 F. (2d) 486, 496 (C. C. A. 3d, 1941).

131. 135 F. (2d) 337 (C. C. A. 3d, 1943), *cert. denied*, 320 U. S. 768, 64 Sup. Ct. 76 (1943).

132. *Id.* at 339.

133. 144 F. (2d) 520 (App. D. C., 1944).

134. *Id.* at 522.

it is submitted that the employer is entitled to judicial review of the Board's finding that his utterances, as such, are coercive, and that the courts are not conclusively bound by the Board's findings in this respect. Even though there may be no decisions of the highest court in the land directly sustaining this view, there is strong language supporting its validity. In one case we find this pertinent statement as to administrative agencies:

"But to say that their findings of fact may be made conclusive where constitutional rights of liberty and property are involved, although the evidence clearly establishes that the findings are wrong and constitutional rights have been invaded, is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards."¹³⁵

Even more pertinent language is contained in another Supreme Court decision involving labor's right to free expression:

"Still it is of prime importance that no constitutional freedom, least of all the guarantees of the Bill of Rights, be defeated by insubstantial findings of fact screening reality. . . . And so the right of free speech cannot be denied by drawing from a trivial rough incident or a moment of animal exuberance the conclusion that otherwise peaceful picketing has the taint of force."¹³⁶

As a matter of fact the Supreme Court in upholding the constitutionality of the Wagner Act, in *National Labor Relations Board v. Jones & Laughlin Steel Corp.*,¹³⁷ said, specifically, in answer to the charge that in its procedural aspects the Act was unconstitutional, that, upon review of Board orders, "all questions of constitutional right, . . . are open to examination by the court."

Finally, we have the very recent expression of Mr. Justice Jackson's opinion in *Thomas v. Collins*:

"Speech of employers otherwise beyond reach of the Federal Government is brought within the Labor Board's power to suppress by associating it with 'coercion' or 'domination'. . . . Whether in a particular case the association or characterization is a proven and valid one often is difficult to resolve. If this Court may not or does not in proper cases inquire whether speech or publication is properly condemned by association, its claim to guardianship of free speech and press is but a hollow one."

The conclusion apparently reached by some courts that they are bound by the Board's finding that speech is coercive undoubtedly rests upon the premise that such a finding is one of *fact*. What has been recently written by one

135. *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 52, 56 Sup. Ct. 720, 726 (1936). See also *Baltimore & Ohio R.R. Co. v. United States*, 298 U. S. 349, 56 Sup. Ct. 797 (1936). *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U. S. 287, 40 Sup. Ct. 527 (1920); *Crowell v. Benson*, 285 U. S. 22, 52 Sup. Ct. 285 (1932). Cf. *United States v. Ju Toy*, 198 U. S. 253, 25 Sup. Ct. 644 (1905); Dickinson, *Judicial Review of Administrative Determinations* (1941) 25 MINN. L. REV. 588, 595-599; McGovney, *Administrative Decisions and Court Review* (1941) 29 CALIF. L. REV. 110.

136. *Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U. S. 287, 293; 61 Sup. Ct. 552, 555 (1941).

137. 301 U. S. 1, 47, 57 Sup. Ct. 615, 629 (1935); see also *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 49, 58 Sup. Ct. 459 (1938).

learned writer on the distinction between questions of law and questions of fact in administrative proceedings would lead one to conclude that the question of the factors which the administrative agency may consider in applying the statutory norm is a matter of law for the consideration of the courts.¹³⁸ Accordingly, even without recourse to the Constitutional argument, it may be urged that the employer is entitled to a judicial review of the question whether or not his words, as such, fall within the condemnation of the statute. Since a constitutional privilege is involved, *a fortiori* the employer is entitled to a judicial review.

In connection with the problem we are now considering, and also pertaining to the one next to be considered, an important distinction must be observed. Speech is merely one form of conduct, but it is also a species of conduct specifically protected by the First Amendment. Employer utterances may be involved in a charge of unfair labor practices in two respects. An utterance may be considered by the Board merely as circumstantial or cumulative evidence utilized to characterize other conduct—a “verbal act.”¹³⁹ Where the other conduct is the basis of the Board’s finding, no question of speech as such is involved, and the utterance has a merely evidentiary character.¹⁴⁰ Where, however, the utterance itself is alleged to constitute the unfair labor practice, it would seem that the constitutional issue is raised. This may be the case where the utterance in isolated form is complained of or, as is more commonly the case, where a so-called “background” or “pattern” of conduct is relied upon to raise an otherwise non-coercive utterance to the stature of coercion. Certainly where such an utterance is urged as a contempt of a court’s decree the issue of free speech is squarely presented to the court. In addition, it seems clear that the constitutional privilege requires judicial review of a charge that such an utterance constitutes an unfair labor practice in violation of the Act. This is true, even though the Act does not call for punishment of the utterance. Freedom of speech would be violated merely by condemning a privileged utterance as an unfair labor practice, and, hence, unlawful.

Prior Restraint

The Wagner Act provides for a court decree giving legal sanction to the Labor Board’s cease and desist order enjoining future commission of unfair labor practices by the employer.¹⁴¹ A violation of the court decree will, of course, constitute a contempt of court. Since the Labor Board has attempted,

138. BROWN, *Fact and Law in Judicial Review* (1943) 56 HARV. L. REV. 899.

139. 6 WIGMORE, EVIDENCE (3d ed. 1940) §§ 1772-1792.

140. *In re Dow Chemical Co.*, 13 N. L. R. B. 993, 1015 (1939). “The First Amendment to the United States Constitution does not preclude a fact-finding body from making an evidentiary use of speech any more than the Fifth Amendment prohibits it from weighing ‘authority or power,’ ‘relation or opportunity,’ inclination, motive, or non-verbal conduct. Words like other behavior may be the means through which the violation is accomplished.”

141. NATIONAL LABOR RELATIONS ACT, 49 STAT. 449 (1935), 29 U. S. C. §§ 160(a)-160(e), incl. (1940).

and sometimes successfully, to have an employer adjudged in contempt of court because of utterances which the Board has deemed an unfair labor practice, the question arises as to whether and under what circumstances anticipatory judicial restraint on speech is permissible in the face of the Constitutional guaranty.

Indeed, it would seem entirely illogical and unnecessary to restrain future utterances not coercive on their face.¹⁴² As we have seen in the *Virginia Electric* case it is necessary to raise such statements to the stature of coercion by relating them to coercive misconduct. Since the Board with the aid of the courts has the power to restrain any conduct, other than utterances, which is of the nature of interference, restraint and coercion, it is unnecessary to rely on the non-coercive utterances in contempt proceedings. If the conduct which would raise the non-coercive utterance to the stature of coercion is absent, the utterance is harmless and certainly privileged. It is not contended, of course, that the Labor Board may not make an evidentiary use of employer utterances, in order to lend a character to accompanying conduct. Speech, which in itself, may be short of coercion, may unquestionably be used as evidence of an employer's intent, motive or purpose in regard to other conduct of an ambiguous or equivocal nature. But the use of unfriendly speech to establish the nature of equivocal conduct is quite different from the use of unfriendly conduct to buttress prior restraint on not-unfriendly speech, when we consider that freedom of expression is protected by a broad constitutional guaranty whereas the other conduct has no such protection.¹⁴³

The leading case on the question of prior restraint on utterances is *Near v. Minnesota*,¹⁴⁴ decided by the Supreme Court in 1931. The question in this case was the constitutionality of a statute authorizing a court to enjoin as a nuisance the production, publication or circulation, possession, sale or giving away of "a malicious, scandalous and defamatory newspaper, magazine or other periodical." The statute did not provide for any punishment except in case of contempt for violation of the court's order, but the effect of the statute was to suppress and enjoin such publication, i.e., to place prior restraint upon publication. The Court declared the statute unconstitutional on the ground that prior restraint on publication is inconsistent with the conception of liberty of the press as historically conceived and guaranteed. "It is the chief purpose of the guaranty to prevent previous restraints upon publication."¹⁴⁵ The

142. Cf. Van Dusen, *Freedom of Speech and the National Labor Relations Act* (1940) 35 LL. L. REV. 409, 422-423.

143. ". . . if the employer's speech is associated with discriminatory discharges or intimidation, 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." Jackson, J., in his concurring opinion in *Thomas v. Collins*, — U. S. —, —, 65 Sup. Ct. 315, 330 (1945).

144. 283 U. S. 697, 51 Sup. Ct. 625 (1931). For a history of this case, see Foster, *The 1931 Personal Liberties Cases* (1931) 9 N. Y. U. L. Q. REV. 64, 66-71. See also Note, *Previous Restraints upon Freedom of Speech* (1931) 31 COL. L. REV. 1148, and (1931) 30 MICH. L. REV. 279.

145. *Near v. Minnesota*, 283 U. S. 697, 713, 51 Sup. Ct. 625, 630 (1931).

Court recognized, however, that the Constitutional privilege does not provide immunity from subsequent punishment for the publication, where a civil wrong or a crime has been committed, and, in the case in question, it pointed out that the libeler remained criminally and civilly liable for his defamatory statements. The Court enumerated certain exceptions to the immunity from previous restraint of utterance, viz., (a) in certain instances in time of war,¹⁴⁶ (b) when the publications are obscene and violate the primary requirements of decency, and (c) when they endanger the security of the community by tending to incite acts of violence and the overthrow by force of organized government. Reference was also made to a statement by Mr. Justice Holmes in *Schenck v. United States*,¹⁴⁷ referring to language in *Gompers v. Bucks Stove & Range Co.*,¹⁴⁸ to the effect that the constitutional guaranty of free speech does not "protect a man from an injunction against uttering words that may have all the effect of force." While the last cited exception was merely dictum without the weight of an adjudicated point of law it represents the greatest extent to which the Supreme Court has thus far suggested a limitation on the immunity to prior restraint. *Near v. Minnesota* is still the law. It has been reaffirmed in subsequent cases.¹⁴⁹

In a fairly recent labor case Mr. Justice Frankfurter reiterated the doctrine of *Near v. Minnesota* by stating, "Right to free speech in the future cannot be forfeited because of dissociated acts of past violence."¹⁵⁰ The Third Circuit Court of Appeals has given specific application to this principle in *Edward G. Budd Mfg. Co. v. National Labor Relations Board*.¹⁵¹ The Board in that case urged upon the court, in a proceeding to have the employer punished for contempt of court, the very misconduct of the employer upon which the court had granted a decree enforcing the Board's cease and desist order, as a basis for infusing a coercive tenor into employer utterances made subsequent to the decree. The court refused to adjudge the employer in contempt of court, pointing out that if the Board's contention were followed, "then an employer, once a decree abating unfair labor practices is entered against him, can never again speak or write in expression of his views on labor problems without being haled before the decreeing court for contempt."¹⁵²

Finally, any possible doubt that attempts at prior restraint of expression

146. Seditious utterances, citing *Schenck v. United States*, 249 U. S. 47, 52, 39 Sup. Ct. 247, 249 (1919); obstruction of the recruiting service or publication of sailing dates of transports and the number and location of troops. See Chafee, *Freedom of Speech* (1941) 10.

147. 249 U. S. 47, 39 Sup. Ct. 247 (1919).

148. 221 U. S. 418, 439, 31 Sup. Ct. 492 (1911).

149. *Hamilton v. Regents*, 293 U. S. 245, 262, 55 Sup. Ct. 197, 204 (1934); *Grosjean v. American Press Co.*, 297 U. S. 233, 244, 56 Sup. Ct. 444, 446 (1936); *Thornhill v. Alabama*, 310 U. S. 88, 97, 60 Sup. Ct. 736, 742 (1940).

150. *Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U. S. 287, 296, 61 Sup. Ct. 552, 556 (1941).

151. 142 F. (2d) 922 (C. C. A. 3d, 1944).

152. *Id.* at 928.

on labor matters are unconstitutional would seem to be eliminated by the decision in *Thomas v. Collins*.¹⁵³

*Speech Which May Be Prohibited*¹⁵⁴

If it is the function of the courts to determine whether or not words are privileged and thereby to give a constitutional meaning and effect to the provisions of the Wagner Act, what general principles should guide the courts in this task? It has been long established that the First Amendment to the Constitution while prohibiting legislation abridging freedom of speech and of the press was not intended to give immunity to every possible use of language.¹⁵⁵ Since the Bill of Rights, including the First Amendment, was derived from concepts of personal liberty embodied in the English common law as adopted by the colonies,¹⁵⁶ which had long been subject to all recognized exceptions, there was clearly no intention to disregard these exceptions when incorporating the general principles into the fundamental law.¹⁵⁷ Thus the publication of libels, blasphemous or indecent articles, or other publications injurious to public morals or to private reputation were never deemed to be within the protection of the First Amendment.¹⁵⁸ It appears, therefore, that the immunity granted by the First Amendment means only that every man shall have a right to speak, write, and print his opinions upon any subject whatever, without any prior restraint, so long as such utterances are not harmful in character when tested by such standards as the law affords.¹⁵⁹

What, then, are the standards which the law affords? Mr. Justice Holmes, speaking for a unanimous Supreme Court in *Schenck v. United States*,¹⁶⁰ laid down the following test:

"The question in every case is whether the words used are used in such circumstances and are of such nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."¹⁶¹

That the "clear and present danger" test has been adopted as the legal standard of privileged utterances by the Supreme Court has been demonstrated beyond doubt. It has afforded practical guidance in a great variety

153. — U. S. —, —, 65 Sup. Ct. 315, 322-323, 325, 328 (1945).

154. See Corwin, *Freedom of Speech and Press Under the First Amendment: A Resume* (1920) 30 YALE L. J. 48; Goodrich, *Does the Constitution Protect Free Speech?* (1921) 19 MICH. L. REV. 487.

155. *Frohwerk v. United States*, 249 U. S. 204, 206, 39 Sup. Ct. 249, 250 (1919); *Gitlow v. New York*, 268 U. S. 652, 666, 45 Sup. Ct. 625, 630 (1925); *Schaefer v. United States*, 251 U. S. 466, 474, 40 Sup. Ct. 259, 261-262 (1920).

156. *Kilbourn v. Thompson*, 103 U. S. 168, 202 (1880).

157. *Robertson v. Baldwin*, 165 U. S. 275, 281, 17 Sup. Ct. 326, 329 (1897).

158. *Ibid.*

159. 2 STORY, CONSTITUTION (5th ed. 1891) 635; 2 COOLEY, CONSTITUTIONAL LIMITATIONS (8th ed. 1929) 886.

160. 249 U. S. 47, 39 Sup. Ct. 247 (1919).

161. *Id.* at 52, 39 Sup. Ct. at 249.

of cases in which the scope of constitutional protection of freedom of expression was in issue, viz., convictions under the espionage acts,¹⁶² a criminal syndicalism act,¹⁶³ an "anti-insurrection" act,¹⁶⁴ actions for breach of the peace¹⁶⁵ and revocation of the grant of citizenship.¹⁶⁶ The Court has also suggested in *Thornhill v. Alabama*¹⁶⁷ that the "clear and present danger" test is an appropriate guide in determining the constitutionality of restrictions upon picketing. The court held that no clear and present danger of destruction of life or property, or the invasion of the right of privacy, or breach of the peace is inherent in the activities of a person who approaches the premises of an employer and publicizes the facts of a labor dispute involving the latter. In another case decided the same day as the *Thornhill* case, involving the constitutionality of an anti-picketing statute of the State of California, the court said:

"Publicizing the facts of a labor dispute in a peaceful way through appropriate means, whether by pamphlet, by word of mouth or by banner, must now be regarded as within that liberty of communication which is secured to every person. . . ."¹⁶⁸

Other language used by the court in the *Thornhill* case would seem to be pertinent on the issue of employer freedom of speech. After pointing out that every expression of opinion "has the potentiality of inducing action in the interests of one rather than another group in society," the court observes that "the group in power at any moment may not impose penal sanctions on peaceful and truthful discussions of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests. . . ."¹⁶⁹ Again pertinent was the holding by the Supreme Court in a later case¹⁷⁰ that the constitutional guaranty of freedom of discussion permits resort to peaceful persuasion even where there is no immediate employer-employee dispute and that a state cannot lawfully limit peaceful picketing to those presently employed by the employer. The court said that the right to free speech "is to be guarded with a jealous eye."¹⁷¹

Further clarification of the "clear and present danger" test will be found

162. *Schenck v. United States*, 249 U. S. 47, 39 Sup. Ct. 247 (1919); *Abrams v. United States*, 250 U. S. 616, 40 Sup. Ct. 17 (1919).

163. *Whitney v. California*, 274 U. S. 357, 47 Sup. Ct. 641 (1927).

164. *Herndon v. Lowry*, 301 U. S. 242, 57 Sup. Ct. 732 (1937).

165. *Cantwell v. Connecticut*, 310 U. S. 296, 60 Sup. Ct. 589 (1940); *Chaplinsky v. New Hampshire*, 315 U. S. 568, 62 Sup. Ct. 766 (1942).

166. *Schneiderman v. United States*, 314 U. S. 597, 63 Sup. Ct. 1333 (1943). See *Kennedy, The Schneiderman Case—Some Legal Aspects* (1943) 12 *FORDHAM L. REV.* 231, especially note 53 at 250.

167. 310 U. S. 88, 105, 60 Sup. Ct. 736, 745-746 (1940).

168. *Carlson v. California*, 310 U. S. 106, 113, 60 Sup. Ct. 746, 749 (1940). See also *Hague v. C. I. O.*, 307 U. S. 496, 512, 59 Sup. Ct. 954, 962-963 (1939); *Cafeteria Employees Union v. Angelos*, 320 U. S. 293, 64 Sup. Ct. 126 (1943).

169. *Thornhill v. Alabama*, 310 U. S. 88, 104, 60 Sup. Ct. 736, 745 (1940).

170. *A. F. of L. v. Swing*, 312 U. S. 321, 61 Sup. Ct. 568 (1941).

171. *Id.* at 325.

in the recent case of *Bridges v. California*.¹⁷² Mr. Justice Black, delivering the opinion for the Court, stated that the likelihood, however great, that a substantive evil will result cannot alone justify a restriction upon freedom of speech or the press. The evil itself must be substantial and serious and even the expression of legislative preferences or beliefs cannot transform minor matters of public inconvenience or annoyance into substantial evils of sufficient weight to warrant curtailment of liberty of expression.¹⁷³ We quote from the opinion:

"What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished. Those cases do not purport to mark the furthestmost constitutional boundaries of protected expression, nor do we here. They do no more than recognize a minimum compulsion of the Bill of Rights. For the First Amendment does not speak equivocally. It prohibits any law 'abridging the freedom of speech, or of the press'. It must be taken as a command of the broadest scope that explicit language, read in the context of liberty-loving society, will allow."¹⁷⁴

The Court concluded that the guaranties contained in the First Amendment were intended by the framers of the Bill of Rights to have "the broadest scope that could be countenanced in an orderly society."¹⁷⁵

The "clear and present danger" test has probably never been more forcefully utilized by the Supreme Court than by the majority of the Court in *Thomas v. Collins*. It is noteworthy that the majority opinion in that case gave new and stronger expression to the "clear and present danger" which will warrant an abridgement of speech. Such a "clear and present danger" was characterized by Mr. Justice Rutledge, who delivered the opinion of the Court, as one which must be "grave and immediate,"¹⁷⁶ "actual or impending,"¹⁷⁷ or "threatened not doubtfully or remotely."¹⁷⁸

We must start with the assumption that the Wagner Act was never intended by Congress to abridge the employer's constitutional right to give free expression to his views. The substantive evil aimed at in the Act is the use by an employer of his superior economic position to prevent his employees from exercising the rights recognized by the Wagner Act. As related to the issue of free speech the specific evil, which Congress has sought to prevent, is the employer's interference with, restraint or coercion of employees in the exercise of their right of self-organization. We have seen that words which have all the effect of force, which corrupt or override the will of the employees, were intended by Congress to be prohibited by the Act, and that such prohibition undoubtedly does not infringe the provisions of the First Amendment. If the

172. 314 U. S. 252, 62 Sup. Ct. 190 (1941).

173. *Citing Schneider v. State*, 308 U. S. 147, 161, 60 Sup. Ct. 146, 150 (1939).

174. *Bridges v. California*, 314 U. S. 252, 263, 62 Sup. Ct. 190, 194 (1941).

175. *Id.* at 265, 62 Sup. Ct. at 195.

176. *Thomas v. Collins*, — U. S. —, —, 65 Sup. Ct. 315, 325 (1945).

177. *Id.* at —, 65 Sup. Ct. at 323.

178. *Ibid.*

language used by the Supreme Court in *Bridges v. California*¹⁷⁹ applies, then "the likelihood, however great, that a substantive evil will result cannot alone justify a restriction upon freedom of speech or the press."¹⁸⁰ At least one court has intimated that even though the utterances of an employer do not actually influence employees, they are still within the condemnation of the Act.¹⁸¹ Such a view may be justified if the utterances actually tend to be coercive, even though they do not have the desired effect. However, it is a far cry from prohibition of such restraint, directive speech and slightly suggestive words which the Labor Board has apparently condemned. It may be that the test to be applied admits of very little break-down, in view of the myriad forms which speech takes, either in its isolated state, or as an integral part of an employer's conduct. However, certain fairly specific observations appear to be warranted. It has often been held that the constitutional right of free expression is just as clearly the right of employers, as it is of employees.¹⁸² The opinions of the Supreme Court which have upheld the right of free speech, especially in the cases where the right was asserted by employees, would give to the First Amendment the broadest possible scope. This judicial interpretation would appear to mean that an employer's statement can neither be branded nor restrained as an unfair labor practice unless by itself, or in the circumstances in which it is uttered, it clearly and unequivocally tends to be coercive. One may go so far as to say (especially in the light of what has been said and decided in *Thomas v. Collins*) that the First Amendment requires the courts to resolve in favor of the employer the question whether or not an employer's utterances are within its protection, if there is a reasonable doubt whether the utterances tend to threaten or intimidate. This may appear to be an extreme statement in view of the present state of the decisions which have involved employer utterances, having in mind that in the *Virginia Electric* case the Supreme Court, despite the fact that the Court found it "difficult to sustain a finding of coercion in respect to them [the employer's utterances] alone," at the end of its opinion softened its attitude by merely expressing doubt as to the "adequacy" of the utterances.¹⁸³ Nevertheless, an interpreta-

179. 314 U. S. 252, 263, 265, 62 Sup. Ct. 190, 194, 195 (1941).

180. *Id.* at 262, 62 Sup. Ct. at 193.

181. *Humble Oil & Refining Co. v. N. L. R. B.*, 113 F. (2d) 85, 92 (C. C. A. 5th, 1940). *Cf. Press Co. v. N. L. R. B.*, 118 F. (2d) 937, 942 (1940), in which the court stated, "Before oral statements of an employer may be held to be an unfair labor practice, it must appear that they interfered with, restrained, or coerced employees in the rights guaranteed by the Act, that is to say, the right to join labor organizations, to bargain collectively, and to engage in concerted activities."

182. *Coppage v. Kansas*, 236 U. S. 1, 20, 35 Sup. Ct. 240, 246 (1915); *Edward G. Budd Mfg. Co. v. N. L. R. B.*, 142 F. (2d) 922, 926 (C. C. A. 3d, 1944); *Continental Box Co. v. N. L. R. B.*, 113 F. (2d) 93, 97 (C. C. A. 5th, 1940); *Midland Steel Products Co. v. N. L. R. B.*, 113 F. (2d) 800, 804 (C. C. A. 6th, 1940). See also *Hearings before Committee on Education and Labor, United States Senate*, 76th Cong., 1st Sess. (1939) 173.

183. Judge Learned Hand in *N. L. R. B. v. American Tube Bending Co.*, 134 F. (2d) 993, 995 (1943), *cert. denied*, 320 U. S. 768, 64 Sup. Ct. 84 (1943), has recognized the

ton, which is in accord with the announced constitutionality of the Wagner Act, must be favored, unless the Court is going to announce a standard for testing restraint of employer speech different from that which it has within recent years consistently followed in striking down restrictions on labor's right of expression.

What employer utterances, then, may the Labor Board lawfully condemn? It would appear that only utterances which on their face or, when characterized or colored by unequivocally coercive conduct, tend to threaten or intimidate employees, fall both within the condemnation of the Act and outside the protection of the Constitution. Utterances which consist merely of derogatory remarks, expressions of preference, or advice regarding labor unions, would appear to lie within the protection of the First Amendment.

Conclusion

Strictly speaking, the problem resolves itself into a balancing of two interests: the preservation of the right of free speech as guaranteed by the Constitution, and the recognition of the right of employees to organize and bargain collectively without interference, restraint or coercion from their employers, as guaranteed by an Act of Congress. Clearly, under our constitutional system, to the extent that the interests are irreconcilably in conflict, those created by legislative enactment must bow to that guaranteed by the Constitution, for the latter expressly forbids the passage of any Act by Congress which abridges freedom of speech. As we have seen, however, freedom of speech is not absolute and the individual liberty guaranteed has been subject to some restriction for the public welfare, particularly where the safety of the nation is at stake in time of war. Freedom of speech is subordinate to the rights of the nation to preserve itself.¹⁸⁴

In the field of labor relations the right of free speech of employees has been zealously guarded by the courts, and statutes restricting the right to picket or to solicit membership in unions in any manner short of breach of the peace have been stricken down as being unconstitutional. It is only when we try to ascertain the status of an employer's right of free speech that the law is uncertain—chiefly because of decisions growing out of enforcement of the Wagner Act. It must be borne in mind, however, that the Wagner Act is not an emergency measure but is designed to govern the normal relations between employees and employers. Its purpose is to place employee and employer on an equal plane for purposes of collective bargaining. If it has failed in its purpose the proper remedy is to strengthen the Act, not to undermine by restriction as to one party a constitutionally guaranteed right. The fact is, of course, that the Wagner Act cannot lawfully deprive an employer of any right of free speech which he possessed prior to its adoption. The mere labeling of certain conduct as being an unfair labor practice cannot place any

"ambiguity" of the Supreme Court's reasoning resulting from that Court's expression of mere doubt as to the coercive nature of the utterances in the *Virginia Electric* case.

184. ROTTSCHAEFFER, CONSTITUTIONAL LAW (1939) 757.

conduct protected by the First Amendment under the prohibitions of the Act. Any other construction of the Wagner Act would not be consonant with its declared constitutionality.

By all the force of existing law, part of which has been reviewed herein, an employer would seem to be entitled to the same rights and privileges under the First Amendment as any other group of citizens, including employees. But we are uncertain as to whether this is actually the law. So long as there is doubt as to how the Supreme Court stands on this vital question, it is to be hoped that an early opportunity will be afforded for a clarifying decision.