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EMPLOYER FREE SPEECH

*NORMAN F. BURKE**

APPROXIMATELY ten years have passed since the Wagner Act[1] was amended by the Labor Management Relations Act.[2] It was in this latter enactment that Congress specifically dealt with the problem of an employer's right to speak as a subject of labor legislation. The broad policy question before the National Labor Relations Board and the courts is to determine the balance to be struck where the employee's right of self-organization comes in conflict with the employer's freedom of speech as an individual. Implicit in the determination is the fact that there exists in the nature of things the subtle influence beyond the mere words inherent in an employer's speech to his employees due in large part to the variance of economic power in the relationship. This situation would quite naturally tend to impede an employee to some degree in the exercise of a subjective freedom of choice in regard to organizational matters. It was to this problem that the Congress addressed itself when it amended section 8 by adding subsection c, the so-called employer free speech amendment:

"The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."[3]

An attempt will be made to follow the development of the law in two areas as affected and not affected by this congressional norm; to state the present law, and to offer suggestions as to the future course of policy where the present law is thought to be inadequate. The first area will be a consideration of the question of the bounds of privileged speech and the extent to which the circumstances surrounding the utterance enter into a determination of the legal character of the speech. The second inquiry will be into the problem raised by a "captive audience" speech.

THE PRIVILEGE TO SPEAK

Decisions Prior to Section 8(c)

There was no substantive provision dealing with employer expression as such under the Wagner Act. But since in section 7 of that Act employees were protected in the exercise of ". . . the right to self-organization, to form, join or assist labor organizations . . ."[4] and since it was an

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1. 49 Stat. 449 (1935), 29 U.S.C.A. §§ 151-68 (1956).
2. 51 Stat. 136 (1947), 29 U.S.C.A. §§ 141-97 (1956).
3. 29 U.S.C.A. § 158(c) (1956).
4. 29 U.S.C.A. § 157 (1956).

unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7,"[5] the Board concluded that it was an unfair labor practice for the employer either by speech or by the distribution of literature to express his anti-union sentiments.[6] The Board showed little concern for the traditional notion that in a democratic society, before action is taken, both sides of any question should be heard. One factor the Board found of particular significance was the economic dependence of the employee on his employer; the employee's job was held at the will of the employer, and the will of the employer was generally not sympathetic toward employees who participated in union activity. Employees in this position could hardly give little weight to the views that their employer advocated. The Board, realizing the inherent coercive nature of any such speech, demanded virtual neutrality of the employer.[7]

The Supreme Court in the *Virginia Power* case,[8] one of its few decisions in the area of the interplay of the constitutional right of free speech and of the rights created by labor legislation, gave a less than clear view of its approval or disapproval of prior Board policy. The employer in this case had posted a bulletin and made speeches which the Court found in and of themselves to be noncoercive unless they were viewed in light of the circumstances in which they occurred. Since it was not clear upon what grounds the Board had based its unfair labor practice finding, the Court remanded the case. The Court subscribed to a "totality of conduct" test in holding that although the statements were not coercive as such their legality should be determined "by reliance on the surrounding circumstances."[9]

In the period between the *Virginia Power* decision in 1941 and the section 8(c) amendment some of the courts of appeals refused to enforce Board orders based on unfair labor practice findings arising from employer speech.[10] These cases rejected any duty of the employer to remain

5. 29 U.S.C.A. § 158(a)(1) (1956).

6. E.g., The Triplett Elec. Instrument Co., 5 N.L.R.B. 835 (1938) (handbill); Pacific Greyhound Lines, Inc., 2 N.L.R.B. 431 (1936) (speech).

7. E.g., Williams Mfg. Co., 6 N.L.R.B. 135 (1938); Harrisburg Children's Dress Co., 2 N.L.R.B. 1058 (1937). As a court of appeals more succinctly phrased the problem: "The position of the employer . . . carries such weight and influence that his words may be coercive when they would not be so if the relation of master and servant did not exist." NLRB v. Falk Corp., 102 F.2d 383, 389 (7th Cir. 1939).

8. NLRB v. Virginia Elec. & Power Co., 314 U.S. 469 (1941).

9. Id. at 479.

10. NLRB v. West Kentucky Coal Co., 152 F.2d 198 (6th Cir. 1945); NLRB v. J. L. Brandeis & Sons, 145 F.2d 556 (8th Cir. 1944); Budd Mfg. Co. v. NLRB, 142 F.2d 922 (3d Cir. 1944); NLRB v. American Tube Bending Co., 134 F.2d 993 (2d Cir.), cert. denied, 320 U.S. 768 (1943).

neutral and, absent statements of an outright threatening nature, the employer was held privileged to state his views. In each case the courts, while recognizing the *Virginia Power* decision as binding authority, seemed reluctant to look beyond the immediate conduct of the employer as the Supreme Court had allowed the Board to do. These decisions manifested the kind of concern for free speech which the Board had not found persuasive. This approach of the several courts of appeals began to be reflected in the Board's decisions toward the end of the period as it dismissed some complaints that clearly fell within the earlier proscriptions of the Board in the late nineteen thirties.[11] While this change of Board attitude was only one of degree and not of kind, one cannot help but wonder whether the Board had one ear turned toward the halls of Congress where debate was in progress on the proposed amendments to the Wagner Act.

Legislative History of Section 8(c)

This, in brief, was the background which preceded the enactment of the present section 8(c). The final version of the section was the distillate of two proposed bills that had little in common other than their subject. Either provision standing alone would have presented few problems of legislative intent. But when they were combined, Congress produced a statute that was not a model of clarity. The House bill provided that no employer speech would be, or be evidence of, an unfair labor practice unless it contained "by its own terms" a threat of force or economic reprisal.[12] On the other hand, the Senate bill said that "if such statement contains under all the circumstances no threat," it would not be an unfair labor practice, and no reference was made to the statement's use as evidence of other unfair labor practices.[13] Senator Taft said that he thought both groups' views on the subject conformed "substantially."[14] This opinion seems strained, particularly when the committee reports are considered. The House Committee was far from satisfied with the Board's policy and would not only in effect abolish the "totality of conduct" doctrine but also make noncoercive employer speech inadmissible as evidence of other alleged unfair labor practices.[15] The Senate Committee tacitly approved the "totality" doctrine and specifically said that statements could be used as evidence of other

11. E.g., United Welding Co., 72 N.L.R.B. 954 (1947); Bausch & Lomb Optical Co., 72 N.L.R.B. 132 (1947); Arkansas-Missouri Power Corp., 68 N.L.R.B. 805 (1946); and Ebco Mfg. Co., 67 N.L.R.B. 210 (1946) (all reversing trial examiners' findings of unfair labor practices arising from employer expression).

12. H.R. 3020, 80th Cong., 1st Sess. § 8(d) (1947).

13. S. 1126, 80th Cong., 1st Sess. § 8(c) (1947).

14. 93 Cong. Rec. 6443 (1947).

15. H.R. Rep. No. 245, 80th Cong., 1st Sess. 33 (1947).

unfair labor practices.[16] The conference agreement adopted the House bill with the modification of omitting from it the phrase "by its terms" and of adding to it the words "promises of benefit" found in the Senate version.[17] As finally framed, then, the totality doctrine of the *Virginia Power* case was not eliminated and the evidence exclusion rule remained.[18]

Before the substantive effect of the section is investigated a few comments may serve to point the direction. The Congress seemed to have had three different problems in mind when section 8(c) was enacted. *First,* Congress thought that in the administration of the Wagner Act the Board had imposed too rigorous a standard in defining "coercion" as applied to speech.[19] The fact that the Board had modified its position on this point apparently did not assuage most of the Congress. Although there was a change in standards under the guise of a constitutional "free speech" protection, it is submitted that the Board was not infringing upon this constitutional privilege to speak in an economic context during the period of the Taft-Hartley debates. As the parallel area of the degree of constitutional protection afforded picketing has developed, it can be observed that expression when coupled with economic power is considered by the Supreme Court to be different from and receives less protection than a person's speech as an individual.[20]

When the individual can reinforce his arguments with retaliation against his audience through the exercise of his economic power, then the statement should be recognized as being something more than an exercise of free speech.[21] Just as many forms of picketing are not protected as a form of mere expression so most employer statements *qua*

16. Sen. Rep. No. 105, 80th Cong., 1st Sess. 23-24 (1947).

17. H.R. Rep. No. 510, 80th Cong., 1st Sess. 45 (1947).

18. See generally, Cox, Some Aspects of the Labor Management Relations Act, 1947, 61 Harv. L. Rev. 1, 15-20 (1947).

19. See note 17 supra.

20. See e.g., Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949) where the Supreme Court upheld a state's issuance of an injunction against a union picketing to compel an employer to violate state law. In reply to the union's contention that the injunction invaded the picketers' freedom of speech, a portion of Mr. Justice Black's answer was that: ". . . it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed."

21. See NLRB v. Virginia Elec. & Power Co., 314 U.S. 469, 478 (1941): "In determining whether the Company actually interfered with, restrained, and coerced its employees, the Board has a right to look at what the Company has said, as well as what it has done." See also, Thomas v. Collins, 323 U.S. 516, 543 (1945) where Mr. Justice Douglas, concurring, said: "No one may be required to obtain a license in order to speak. But once he uses the economic power which he has over other men and their jobs to influence their action, he is doing more than exercising the freedom of speech protected by the First Amendment. That is true whether he be an employer or an employee."

employer should be regarded as carrying a message which goes beyond the traditional notion of speech as speech.[22] Be that as it may, section 8(c) certainly gives an employer a statutory right to speak on the subject of unionization under the conditions imposed by the section.[23] *Second,* Congress considered the situation where, although the alleged employer speech complained of is not by its own terms an unfair labor practice, when it is coupled with other circumstances surrounding the speech, it supports the speech unfair labor practice charge.[24] *Finally,* Congress evidenced an intent to legislate concerning the factual situation where an employer's noncoercive statement is sought to be used as evidence of another alleged unfair labor practice.[25] The result of Congress's effort will now be looked into more closely.

Decisions Subsequent to Section 8(c)

Section 8(c) by its term privileges employers' expressions which are not a "threat of reprisal" or a "promise of benefit." Each phrase has led to the creation of a body of decisions which has marked the bounds where a statement of opinion or prophecy passes from the area of privilege to that of a threat of reprisal and where a lawful reference to past, present or future working conditions becomes an unlawful promise of benefit.[26] Where the line is drawn between these alternatives is difficult to determine and, more important, the criterion used is even more elusive. The judgment process necessary to answer this question is probably more peculiarly based on individual background and experience of the members of the Board than any other in labor relations and to a large extent has made precedent a shaky if not meaningless basis upon which to predict the result in a novel situation.[27]

One of the constantly recurring alleged threats of reprisal is an employer's statement that if the plant is unionized it will close or move. In the *Chicopee Mfg. Corp.* case,[28] the Board certified an election even

22. For a contrary view see Rose, Is the NLRB Tampering with Freedom of Speech?, 15 U. Pitt. L. Rev. 462 (1954), who contends that the Board's rulings on the subject of employer speech have virtually always offended the constitutional right of free speech.

23. The Board felt that the ". . . section appears to enlarge somewhat the protection previously accorded by the original statute and to grant immunity beyond that contemplated by the free speech guarantees of the Constitution." 13 NLRB Ann. Rep. 49 (1948).

24. See note 15 supra.

25. See note 16 supra.

26. For a collection of decisions rendered during the first few years following the enactment of § 8(c) see Daykin, The Employer's Right of Free Speech Under the Taft-Hartley Act, 37 Iowa L. Rev. 212, 223-28 (1952).

27. That this is particularly true when Board membership changes as a result of changes in national administrations, see generally, Wirtz, The New National Labor Relations Board; Herein of "Employer Persuasion", 49 Nw. U.L. Rev. 594 (1954).

28. 107 N.L.R.B. 106 (1953).

though prior to the election the employer had told an employee that "if the union won, [the employer] . . . would be forced to move the plant." The new Board held the statements ". . . as nothing more than predictions of the possible impact of wage demands upon the Employer's business. A prophecy that unionization might ultimately lead to loss of employment is no threat that the Employer will use its economic power to make its prophecy come true."[29] Using this statement as a premise the Board has reached different results in factual situations where the form of expression used with respect to closing or moving varied slightly but whose effect on the employees could hardly have been as discreetly measured and weighed to justify the variance in the decisions; thus these decisions place a premium on form rather than substance.[30]

There is at least one issue which the Board has decided almost uniformly and that is that employer statements which "threaten" employees with discharge for participation in union activities are unlawful.[31] Less direct and more carefully prepared antiunion campaigning has been allowed where the statements are deemed to have been made in answer to union propaganda.[32] Some statements on the other hand take such a patently unlawful form that their presence only reflects a complete disregard for or of the NLRA.[33] Many cases have presented a rather clear situation of a "promise of benefit" when an employer, for example, conditions the granting of a wage increase[34] or the improvement of working conditions[35] upon a no-union vote by the employees. Short of such direct promise the employer is privileged to recount to his employees the benefits of the past.[36]

With respect to the question of whether under section 8(c) the Board

29. Id. at 107.

30. Compare Senorita Hosiery Mills, Inc., 115 N.L.R.B. 1304 (1956) and The Lux Clock Mfg. Co., 113 N.L.R.B. 1194 (1955) (holding that the expression was not an unfair labor practice since it was only a prediction of the economic consequences of unionization), with Lanthier Mach. Works, 116 N.L.R.B. 1029 (1956), Sardis Luggage Co., 114 N.L.R.B. 446 (1955), and Diaper Jean Mfg. Co., 109 N.L.R.B. 1045 (1954) (holding that the expression was an unfair labor practice since it was a threat to close the plant rather than operate with a union in the plant).

31. E.g., Reeves Bros., 116 N.L.R.B. 422 (1956); Raymond Pearson, Inc., 115 N.L.R.B. 190 (1956); Delta Finishing Co., 111 N.L.R.B. 659 (1955).

32. E.g., Robberson Steel Co., 114 N.L.R.B. 344 (1955).

33. E.g., Margaret Ann Grocery Stores, 115 N.L.R.B. 1676 (1956); Vanadium Corp., 114 N.L.R.B. 428 (1955); Campbell Coal Co., 112 N.L.R.B. 941 (1955).

34. E.g., Vancouver Plywood Co., 116 N.L.R.B. 1476 (1956); Wilson & Co., 115 N.L.R.B. 327 (1956); Southwestern Motor Truck Lines, 113 N.L.R.B. 1122 (1955).

35. E.g., Rugcrafters of Puerto Rico, Inc., 112 N.L.R.B. 724 (1955).

36. E.g., Stratford Furniture Corp., 116 N.L.R.B. 1721 (1956); American Laundry Mach. Co., 107 N.L.R.B. 511 (1953) (the Board refused to set aside an election even though the statement "incidentally" announced a wage increase).

could consider factors other than the employer's speech in determining whether the speech was an unfair labor practice, the Board's course has had a shifting history. In its early administration of section 8(c), absent a situation where the speech and conduct were "one,"[37] the Board refused to consider as a basis of a speech unfair labor practice finding the circumstances accompanying the speech, and a fortiori, the employer's past history of labor relations.[38] This view was abandoned several years later. In reviewing a trial examiner's finding of an alleged threat of reprisal the Board stated that "the substance and context of the statement, and the position of the speaker in relation to his audience, are equally, if not more significant factors in determining whether a statement is free from any threat of reprisal or promise of benefit."[39] While it was questionable whether the scope of inquiry would be extended beyond the immediate circumstances of the speech, under recent decisions the coerciveness of the expression will be "determined by viewing the entirety of an employer's statements and actions."[40]

The most informative court of appeals case on this question is *NLRB v. Kropp Forge Co.*[41] The Board had based a pre-section 8(c) unfair labor practice finding upon two conversations which were part of a campaign by the employer to maintain a company union, but in themselves contained no threats or promises.[42] When the Board petitioned the court of appeals for enforcement the employer argued that the newly enacted section 8(c) forbade only the use of statements "in themselves" threatening or promising. The court rejected this argument in granting enforcement and concluded that the expressions were to be considered, as they had been before 1947, as part of a course of conduct of the employer. The court stated:

"It also seems clear to us that in considering whether such statements or expressions are protected by Section 8(c) of the Act, they cannot be considered as isolated words cut off from the relevant circumstances and background in which they are

37. Alliance Rubber Co., 76 N.L.R.B. 514 (1948) (employer's "total conduct" of coupling a speech with a poll of his employees immediately thereafter held unlawful).

38. Tygart Sportswear Co., 77 N.L.R.B. 613 (1948); The Bailey Co., 75 N.L.R.B. 941 (1948).

39. J. S. Abercrombie Co., 83 N.L.R.B. 524, 530 (1949), petition for review denied, 180 F.2d 578 (5th Cir. 1950). See also Cary Lumber Co., 102 N.L.R.B. 406 (1953).

40. The Lux Clock Mfg. Co., 113 N.L.R.B. 1194, 1196 (1955). See also West Point Mfg. Co., 115 N.L.R.B. 448 (1956); Cornell-Dubilier Elec. Corp., 111 N.L.R.B. 277 (1955).

41. 178 F.2d 822 (7th Cir. 1949), cert. denied, 340 U.S. 810 (1950). In view of the variance between the Senate and House bills and reports on this question, a court would seem justified in ignoring the legislative history. In the words of Mr. Justice Holmes, "We do not inquire what the legislator meant; we ask only what the statute means." Holmes, Theory of Legal Interpretation, in Collected Legal Papers 203, 207 (1921).

42. Kropp Forge Co., 68 N.L.R.B. 617 (1946).

spoken. A statement considered only as to the words it contains might seem a perfectly innocent statement, including neither a threat nor a promise. But, when the same statement is made by an employer to his employees, and we consider the relation of the parties, the surrounding circumstances, related statements and events and the background of the employer's actions, we may find that the statement is a part of a general pattern which discloses action by the employer so coercive as to entirely destroy his employees' freedom of choice and action. To permit statements or expressions to be used on the theory that they are protected either by the First Amendment or by Section 8(c) of the Act would be in violation of Section 7 and contrary to the expressed purpose of the Act. Therefore, in determining whether such statements and expressions constitute, or are evidence of unfair labor practice, they must be considered in connection with the position of the parties, with the background and circumstances under which they are made, and with the general conduct of the parties. If when so considered, such statements form a part of a general pattern or course of conduct which constitutes coercion and deprives the employees of their free choice guaranteed by Section 7, such statements must still be considered as a basis for a finding of unfair labor practice. To hold otherwise would nullify the guaranty of employees' freedom of action and choice which Section 7 of the Act expressly provides. Congress, in enacting Section 8(c) could not have intended that result."[43]

This same interpretation of section 8(c) has been followed by other courts of appeals both in granting and denying enforcement of Board orders.[44] These decisions revived the "totality of conduct" doctrine and reflect the realistic view that words often have meaning only when considered under the circumstances in which they were expressed.

The question of whether noncoercive expression could be used as evidence of other unfair labor practices was considered shortly after the passage of section 8(c). The Board followed the command of the statute and refused to base its findings upon employer statements which would naturally have given meaning to the acts in question.[45] The exclusion of an expression as evidence, of course, is only commanded by the statute if the statement is privileged. That is, a threatening remark, not being within the terms of section 8(c), may be used as evidence.[46] This fact is important for in many cases the employer's conduct includes threatening

43. 178 F.2d at 828-29. Approved and applied expressly in Richards and Associates, 110 N.L.R.B. 132, 139-40 (1954).

44. NLRB v. Fulton Bag and Cotton Mills, 175 F.2d 675 (5th Cir. 1949) and NLRB v. Gate City Cotton Mills, 167 F.2d 647 (5th Cir. 1948) (both granting enforcement); NLRB v. Corning Glass Works, 204 F.2d 422 (1st Cir. 1953) and NLRB v. Arthur Winer Inc., 194 F.2d 370 (7th Cir. 1952) (both denying enforcement).

45. Consumers Cooperative Refinery Ass'n, 77 N.L.R.B. 528 (1948) (alleged discriminatory discharge).

46. Nash-Finch Co., 103 N.L.R.B. 1695 (1953), enforcement denied on other grounds, 211 F.2d 622 (8th Cir. 1954) (the Board considered an employer's threats even though they were made more than six months before the filing of a charge under § 8(a)(3)).

words; these expressions may be used in determining whether other alleged unfair labor practices are present.[47]

The motivation for an employer's conduct is of critical importance in determining the lawfulness of his actions. This is true whether the issue be one of measuring his good faith in bargaining[48] or his reason for discharge of an employee.[49] A literal reading of section 8(c) would certainly stultify the inquiry into an employer's motive by denying the Board the use of an important source of evidence. Consideration of an employer's remarks in most cases would not be conclusive of an issue but they certainly would be influential in making any intelligent judgment. This would be true whether the allegation be of a violation of either the duty to bargain collectively or the obligation to refrain from discriminatory conduct. But in the face of the evidentiary provision of section 8(c), the Board only on rare occasions has failed to follow the statute in its literal terms. Several years after section 8(c) was enacted, in the *Long-Lewis* case,[50] the Board was willing to consider an employer's antiunion speech as evidence in determining his motive. In that case, the Board based a finding of a violation of section 8(a)(5) upon conduct including an antiunion speech, some portions of which were held not violative of section 8(a)(1), delivered to his employees immediately after he received the union's request to negotiate a contract. In a recent case[51] where a discriminatory discharge was found, the Board adopted the trial examiner's conclusion based upon evidence which included a privileged

47. E.g., Howard-Cooper Corp., 39 L.R.R.M. 1212 (1957); Harrisburg Bldg. Units Co., 116 N.L.R.B. 339 (1956); Merchandiser Press, Inc., 115 N.L.R.B. 1441 (1956); and Ben Corson Mfg. Co., 112 N.L.R.B. 323 (1955) (threats used as evidence of a refusal to bargain); Wilson & Co., 115 N.L.R.B. 327 (1956); Raymond Pearson, Inc., 115 N.L.R.B. 190 (1956); Cadillac Marine & Boat Co., 115 N.L.R.B. 107 (1956); and United Cigar-Whelan Stores Corp., 114 N.L.R.B. 1219 (1955) (threats used as evidence of a discriminatory discharge).

48. NLRB v. Montgomery Ward & Co., 133 F.2d 676, 686 (9th Cir. 1943) defines the duty to bargain as ". . . the obligation of the parties to participate actively in the deliberations so as to indicate a present intention to find a basis for agreement, and a sincere effort must be made to reach a common ground." Such a subjective standard places emphasis on the parties' motivation.

49. St. Louis Car Co., 108 N.L.R.B. 1523, 1524-25 (1954), posed the importance of determining an employer's motive in discharge cases well, when the Board said, "the question of determining the motive that prompted an employer in effecting a discharge is inherently difficult. The professed motive is not always the real one. There is no ready made measuring rod by which it is possible to determine whether the professed motive is in fact the true motive or only a subtle pretext intended to disguise an unlawful one. The Board brings to bear on this question its considerable experience in appraising motives in related situations and its collective good sense and judgment."

50. Long-Lewis Hardware Co., 90 N.L.R.B. 1403 (1950).

51. Southern Desk Co., 116 N.L.R.B. 1168 (1956).

antiunion notice and letter. The examiner admitted the evidence over objection of the employer solely for the purpose of showing the employer's hostility to unionization activities in the past.

The two court of appeals cases in point have grudgingly recognized the importance of an employer's expression as an element in determining the legality of any act in labor relations. In the case of *Pittsburgh S.S. Co. v. NLRB*[52] the Board had based its finding of an unfair labor practice of general antiunion conduct on two groups of nonthreatening letters sent to the employees just prior to an election. The court stated that section 8(c) "was specifically intended to prevent the Board from using unrelated noncoercive expressions of opinion on union matters as evidence of a general course of unfair labor conduct."[53] Using this statement as their premise they concluded that while the letters were not unrelated and were to be considered on their merits, the Board's findings could not be supported, and therefore enforcement was denied.

The *Indiana Metal* case[54] presented the Seventh Circuit with two distinct opportunities to consider the problem. First, in refusing to enforce the portion of the Board's order grounded upon an alleged discriminatory discharge, the court held that nonthreatening letters sent by an employer to his workers were inadmissible as evidence when they were sent four weeks after the firing which was the basis of the charge. Second, with respect to an alleged violation of section 8(a)(1) in instituting paid holidays and an insurance program, the court sustained a Board finding that the employer committed an unfair labor practice. The Board had held that the institution of these new benefits was an attempt to influence the employees in the selection of a representative and thus it was unlawful.[55] This finding was based upon such evidence as the timing of the announcement of the holiday pay and insurance contracts, the employer's financial position, and also the sending of several letters to the employees reminding them of the new benefits.[56] It would seem that by sustaining the Board the court approved of the use of the privileged letters as evidence in support of the charge and this position would appear particularly sound where, as here, the employer's motive in instituting such benefits might otherwise remain ambiguous. On the

52. 180 F.2d 731 (6th Cir. 1950), aff'd, 340 U.S. 498 (1951). With respect to the court of appeal's treatment of the evidence question, the Supreme Court commented: "Since we do not disturb the conclusion of the Court of Appeals that these letters are not substantial evidence of an unfair labor practice, we express no opinion on the possible effect of § 8(c) of the Taft-Hartley Act." 340 U.S. at 501, n.

53. Id. at 735.

54. Indiana Metal Products Corp. v. NLRB, 202 F.2d 613 (7th Cir. 1953).

55. Indiana Metal Products Corp., 100 N.L.R.B. 1040, 1041 (1952).

56. Id. at 1042-43.

other hand, it might be argued that the theory of the court of appeals was that the benefits and the letters to the employees were not severable and that this conduct in its entirety was unlawful. While the court's opinion on the question is not unequivocal it would appear that it concluded that the creation of the new economic benefits timed as they were during an organizing campaign was unlawful and that the letters were used as evidence illuminating the employer's intent.[57] The Seventh Circuit was thus willing in one instance to bar and in another to allow the use of employer expression as evidence.

Both cases appear to support the proposition that the expressions of an employer may be used as evidence at least when they are temporally related to the alleged unfair labor practice. These two courts of appeals have successfully ameliorated some of the thrust of section 8(c) as a rule of evidence. In each case the declarations allowed amounted to no more than the application of the common-law verbal act doctrine. Senator Taft specifically indorsed this interpretation of the evidence provision.[58] The Board would do well to follow the same tack.

There was another field of Board activity where what an employer said might carry with it the kind of influence which would not allow the freedom to participate in union activities that the Wagner Act contemplated. This area was representation elections. Before the 1947 amendments the Board had applied the equivalent standard in exercising its discretion whether to set an election aside as it had in determining whether an unfair labor practice had occurred.[59]

Although by its terms section 8(c) spoke only of employer speech in situations where alleged unfair labor practices had been committed, the 80th Congress undoubtedly contemplated that the section would be equally applicable to representation cases. This may be inferred from the attitude of the Congress in general on the subject of employer speech[60] and more specifically from the fact that the Board had an

57. "In the literature which the union distributed among the employees, it listed insurance benefits paid for by the employer among benefits which the union had achieved in other plants. Where economic benefits are instituted for the purpose of thwarting self-organization, the courts have held the same to be an unlawful interference. . . . The Board found unlawful interference and there is substantial evidence in the record to sustain such finding." 202 F.2d at 620.

58. "It should be noted that this subsection is limited to 'views, argument, or opinion' and does not cover instructions, directions, or other statements which might be deemed admissions under ordinary rules of evidence. In other words this section does not make incompetent, evidence which would ordinarily be deemed relevant and admissible in courts of law." 93 Cong. Rec. 6444 (1947).

59. E.g., Hercules Motors Corp., 73 N.L.R.B. 650 (1947); Columbia Broadcasting System, Inc., 70 N.L.R.B. 1368 (1946); Arkansas-Missouri Power Corp., 68 N.L.R.B. 805 (1946).

60. See note 17 supra.

established practice in the past of applying the same standard in both situations. The Board, however, ignored its former equation when it decided the *General Shoe* case in 1948.[61] It held in that case that even though an employer's expression contained no threat of reprisal or promise of benefit and therefore was not an unfair labor practice, the election would be set aside since the employer's conduct "created an atmosphere calculated to prevent a free and untrammeled choice by the employees."[62] One commentator while voicing the opinion that "in creating the dichotomy between unfair labor practices and representation cases, the Board appears to be in the inconsistent position of construing legally non-coercive expression of opinion as creative of an illegally coercive atmosphere,"[63] nevertheless approved of the decision. The only legal justification for the decision would appear to be that it allowed the Board to give content to otherwise equivocal words by considering the circumstances surrounding the expression at a time when section 8(c) had not been given workable context by the courts and to give recognition to conduct that could not be imputed to the employer under the then new Taft-Hartley agency provisions. While the case was followed in 1950,[64] when the personnel of the Board changed in 1953 the practice was tacitly overruled.[65] Particularly with the expansion of the permissible area of inquiry to which employer expression is now subject under such cases as *Kropp Forge*,[66] the Board's former policy which flouted the statute seems wisely abandoned.[67]

The Captive Audience Problem

During the early administration of the Wagner Act when the Board demanded neutrality of employers with respect to their union senti-

61. General Shoe Corp., 77 N.L.R.B. 124 (1948).

62. Id. at 126.

63. Note, Free Speech and Free Choice in Representation Elections: Effect of Taft-Hartley Section 8(c), 58 Yale L.J. 165, 174 (1948).

64. Metropolitan Life Ins. Co., 90 N.L.R.B. 935 (1950).

65. L. G. Everist, Inc., 112 N.L.R.B. 810 (1955); Repcal Brass Mfg. Co., 110 N.L.R.B. 193 (1954); A. S. Abell Co., 107 N.L.R.B. 362 (1953); National Furniture Mfg. Co., 105 N.L.R.B. 1300 (1953). In 1954, among the proposed amendments to the Taft-Hartley Act included in S. 2650 was one which would have amended section 8(c) by adding to it the clause: "nor shall it be the basis for setting aside an election conducted under section 9." 100 Cong. Rec. 93 (1954). This proposed amendment was not reported out of the Committee on Labor and Public Welfare at the end of the 83d Congress.

66. See pp. 272-73 supra.

67. There were some practical procedural disadvantages to the Board's practice under the General Shoe philosophy. The Board could not order the employer to cease and desist from his interference where his conduct did not amount to an unfair labor practice; thus enabling him to postpone an election through his own conduct. Conversely, since the setting aside of an election is probably not a final order, the employer could not get judicial review on that Board determination. See note 63 supra.

ments the fact that an employer assembled and delivered an antiunion speech on company time and property to his employees, a "captive audience," was not critical. If the speech without more was considered coercive then investigation into the surroundings was hardly needed. When the Supreme Court in the *Virginia Power* case indicated that, in situations where more was needed to sustain an unfair labor practice based on an alleged coercive speech than the speech itself, the Board might look at the circumstances surrounding the speech, it was natural for the Board to consider the fact that the speech was given at the factory on company time. This setting added an additional psychological barrier to the imbalance present due to the difference in economic power. For example, in *American Tube Bending Co.*,[68] the employer combined letters to his employees with a speech on the day before an election to an assembly of workers in the plant on working time to express his antiunion sentiments. The Board placed emphasis in its finding of a violation of section 8(a)(1) on the fact that the speech here ". . . brought heavily into play the economic dependence of the employees upon the [employer] . . . for their livelihood,"[69] and thus on the record as a whole supported the charge. The Board was unsuccessful in its attempt to have its order enforced and the court of appeals ignored the factor of the nature of the audience.[70]

The sensitiveness which the Board had for mass-assembly speech was brought out strongly in *Clark Bros. Co.*[71] In addition to other conduct that was found to be unlawful, the employer suspended operations one hour before an election and gave an antiunion speech to an assembly of employees during working time. The Board held that the compelling of workers to listen to the speech was in itself a violation of their rights guaranteed under section 7. The Board did not base their finding, as the trial examiner had, on a "constitutional right of non-assembly," but rather on the fact that the exercise of the employer's economic power in compelling the employees to listen itself deprived the employees of free choice.[72] The court of appeals granted enforcement of the Board's order but not on the grounds that the act of compelling the employees to listen was unlawful.[73] While the court concluded that under the circumstances

68. 44 N.L.R.B. 121 (1942).

69. Id. at 133.

70. NLRB v. American Tube Bending Co., 134 F.2d 993 (2d Cir.), cert. denied, 320 U.S. 768 (1943).

71. 70 N.L.R.B. 802 (1946).

72. Id. at 805, where the Board said, ". . . we must perform our function of protecting employees against that use of the employer's economic power which is inherent in his ability to control their actions during working hours. Such use of his power is an independent circumstance, the nature and effect of which are to be independently appraised."

73. NLRB v. Clark Bros. Co., 163 F.2d 373 (2d Cir. 1947).

the employer's remarks were coercive, it stated by way of dictum in answer to the Board's contention that the "captive audience" was per se an unfair labor practice, that "We should hesitate to hold that he may not do this on company time and pay, provided a similar opportunity to address them were accorded representatives of the union."[74] This thought was the harbinger of later Board action.

Although the court of appeals was reticent to voice its approval or disapproval of the Board's theory in *Clark Bros.*, the Congress was not. The Senate was sufficiently disturbed by the Board's decision to mention it by name as one of a brace of cases which it was their intent that section 8(c) overrule.[75] The Board was responsive to this expression of Congress and when the first opportunity presented itself declared that the compulsory audience speech as such could not be the basis of an unfair labor practice finding.[76]

The Bonwit Teller Case and Doctrine

The importance of the compulsory audience as a factor or element of coercion was slight until the *Bonwit Teller* decision in 1951.[77] The employer, a department store, had a no-solicitation rule which applied during working and nonworking hours on the selling floor. This rule was privileged due to the nature of its business.[78] After having made a noncoercive antiunion speech during working hours six days before an election, the employer refused the union's request for an opportunity to reply under similar circumstances. The Board held the refusal to be the basis of an unfair labor practice finding upon two alternative grounds. First, the enforcement of a valid, broad no-solicitation rule violates section 8(a)(1) when the rule is applied discriminatively. It is applied with discrimination where, as here, the employer seeks to campaign verbally and denies the union an opportunity to reply. Second, "that the right of employees, guaranteed by Section 7 of the Act, freely to select or reject representation by a labor organization necessarily encompasses the right to hear both sides of the story under circumstances which reasonably approximate equality."[79] The Board grasped the suggestion that the court of appeals had made in the *Clark Bros.* case and emphasized that it was what the employer refused to do, not what he did or said that violated the NLRA. Under its second criterion the

74. Id. at 376.

75. See note 16 supra.

76. The Babcock & Wilcox Co., 77 N.L.R.B. 577 (1948).

77. Bonwit Teller, Inc., 96 N.L.R.B. 608 (1951).

78. E.g., Marshall Field & Co. v. NLRB, 200 F.2d 375 (7th Cir. 1953) (extends the privilege to public nonselling areas and nonpublic employee cafeterias).

79. 96 N.L.R.B. at 612.

Board noted that due to the circumstances of the case and in the light of the other unfair labor practices committed it was not satisfied, regardless of the fact, as the dissent pointed out, that there were meeting halls available in the metropolitan area.

When the Board sought enforcement of its order, the Second Circuit affirmed the finding but only upon the theory that there had been a discriminatory application of the no-solicitation rule.[80] This interference with the employees' right to organize arose where the employer enforced a privileged no-solicitation rule against the employees while itself delivering an antiunion speech on company time and property. Under the court's theory, if the employer abandoned the rule it would have no duty to give the union an opportunity to reply. The Board's order, however, was based upon its second rationale for it had ordered that the employer grant the union equal opportunity to speak each time the employer spoke, regardless of the absence of a rule.[81] Since the Second Circuit's theory of what constituted the unfair labor practice was based upon a narrower ground than that on which the Board's order was framed, it refused to enforce the order and remanded the case to the Board for the appropriate modification.[82]

The Second Circuit again applied this discrimination theory in the *American Tube Bending* case.[83] In this case an industrial employer had a rule which was unlawful under the *Republic Aviation* rule[84] in that it barred solicitation during nonworking time. The employer's speech to the employees while the unlawful rule was in effect was held to be an unfair labor practice even though the remarks were otherwise privileged under section 8(c). These two Second Circuit decisions rejected the Board's equal opportunity doctrine. If there was any doubt of this after *Bonwit Teller,* it was settled in *American Tube,* where the court said that if ". . . the Board's order in the case at bar had depended upon the [employer's] refusal, or failure, to allow [the union representative] . . . to address the employees on the property during working hours it could not stand."[85] Thus the rule of the two cases is that it was an unfair labor practice to discriminate against the employees and it was an unlawful discrimination to establish a privileged no-solicitation rule or an invalid no-solicitation rule while presenting an antiunion noncoercive speech.

80. Bonwit Teller, Inc., v. NLRB, 197 F.2d 640 (2d Cir. 1952), cert. denied, 345 U.S. 905 (1953).

81. 96 N.L.R.B. at 615.

82. Chief Judge Swan, dissenting, who wrote the Clark Bros. opinion, see note 73 supra, said that § 8(c) privileged the statements. 197 F.2d at 646.

83. NLRB v. American Tube Bending Co., 205 F.2d 45 (2d Cir. 1953).

84. Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945).

85. 205 F.2d at 46.

The progeny of the *Bonwit Teller* case did not have as a basis the narrow theory of the Second Circuit. Rather, stress was given to the second rationale of the Board's decision in the *Bonwit Teller* case, that is, the equal opportunity concept. Elections were set aside regardless of the absence of a no-solicitation rule when equal opportunity was not given to the union to reply.[86] The equal opportunity reasoning was also applied in unfair labor practice proceedings. In *Metropolitan Auto Parts, Inc.*,[87] the employer made a noncoercive speech on company time and property while ignoring the union's request to be allowed to reply. The Board found the employer guilty of an unfair labor practice even though he had neither a no-solicitation rule nor was it shown that facilities other than the employer's shop were inadequate for the union's purposes. The broad reach of the *Bonwit Teller* doctrine was based on the employer speaking *and* not affording the union equal opportunity to reply and therefore gave the employer a choice; he could remain silent with respect to organizational affairs when addressing a "captive audience" and thus keep the union from claiming time to speak during working hours, or, if he did speak and the union requested an opportunity to reply, he must allow the union the use of substantially the same forum. By no means a Hobson's choice, this was another attempt by the Board to deal with the "captive audience" in the light of the realities surrounding organizational activity.

The Livingston Shirt Decision

These alternatives were not to confront employers for long. In a matter of months after these decisions which gave broadest extension to the *Bonwit Teller* case,[88] the Board with its reconstituted membership decided *Livingston Shirt*.[89] The case was set in the not uncommon situation in the South of an alignment of the forces of the community with the industrial employer to enter the lists against the would-be union. The employer had a no-solicitation rule which forbade organizational activities only during working hours. His antiunion activity included several noncoercive speeches to the assembled employees during working hours while denying the union equal opportunity to reply. After several elections, which the union lost, had been set aside, the union filed an unfair labor practice charge. The Board majority dismissed the complaint, holding:

86. E.g., Bernardin Bottle Cap Co., 97 N.L.R.B. 1559 (1952); Biltmore Mfg. Co., 97 N.L.R.B. 905 (1951).

87. 102 N.L.R.B. 1634 (1953). Followed in Onondaga Pottery Co., 103 N.L.R.B. 770 (1953); Seamprufe, Inc., 103 N.L.R.B. 298 (1953).

88. Ibid.

89. Livingston Shirt Corp., 107 N.L.R.B. 400 (1953).

"that, in the absence of either an unlawful broad no-solicitation rule (prohibiting union access to company premises on other than working time) or a privileged no-solicitation rule (broad, but not unlawful because of the character of the business), an employer does not commit an unfair labor practice if he makes a preelection speech on company time and premises to his employees and denies the union's request for an opportunity to reply."[90]

In a representation case decided the same day, *Peerless Plywood Co.*,[91] the Board set aside an election where the employer had delivered an otherwise privileged speech less than twenty-four hours before the election. Basing its rationale on the intrinsic nature of such a speech to upset the unfettered choice of representatives by the employees, the Board announced the rule that any electioneering speech by either the employer or the union to a compulsory assembly of workers on company time less than twenty-four hours before an election would be grounds for setting the election aside.[92]

The ruling of the *Livingston Shirt* case abolished the broad *Bonwit Teller* doctrine by rejecting the alternative rationale in the *Bonwit Teller* case, namely, that section 7 guarantees to employees the right to "hear both sides under circumstances which approximate equality."[93] If this reassessment of what standard will satisfy the employees' needs to hear both the pros and cons on organizational activity before exercising their right of choice is accepted, then the reasoning of Chairman Farmer and Member Rodgers with respect to section 8(c) seems persuasive. If the exercise of a statutory privilege of speech imposes a correlative duty to donate working time to the union to reply, then the privilege is to a great degree emasculated. The fact that the Board itself "grafted" a proscription on employer speech by the *Peerless* rule does not detract from the statutory application adopted, for the twenty-four hour election rule almost assumes *de minimis* proportions in comparison with the burden placed upon an employer under the broad *Bonwit Teller* doctrine. The *Peerless* rule does, however, reflect the view that the present Board recognizes that when an employer speaks he is exercising more than a constitutional right of free speech. That is, it is doubtful that an employer could successfully object to the setting aside of an election under the *Peerless* rule on the grounds of impairment of his right of speech.[94]

90. Id. at 409.

91. 107 N.L.R.B. 427 (1953).

92. Id. at 429. For some of the wrinkles which have been developed in the application of this arbitrary rule, see 21 NLRB Ann. Rep. 69-70 (1956); 20 NLRB Ann. Rep. 59-60 (1955); 19 NLRB Ann. Rep. 64-66 (1954).

93. 107 N.L.R.B. at 406.

94. Cf. NLRB v. Shirlington Supermarket, Inc., 224 F.2d 649 (4th Cir.), cert. denied, 350 U.S. 914 (1955). The Fourth Circuit in reviewing the Board's finding of a

It is to the major premise of the *Livingston Shirt* decision, that is, the reassessment, that Member Murdock, dissenting, aimed his most effective fire. He stated the basic issue of the case very well when he asked ". . . whether, in fact, those means of communication available to a union under normal circumstances are sufficient to meet the problems posed by an employer's exclusive use of company time and property for anti-union purposes."[95] While two members of the majority generalized that the "time-honored and traditional means" of union organizing did not include the employer's natural forum, Member Murdock argued from experience that it was necessary to allow the union equal opportunity for in no other manner could the union discount the employer's inherent advantage. It would seem that the Board erred in not accepting Member Murdock's poignant argument that the alternatives open to the union are insubstantial in comparison with the employer's plant as a forum and as a locus of authority. The dollar cost to an employer of allowing the union time in most cases can hardly be considered an important factor in rationalizing the decision, for over the long run the strife which occurs in the organizational phase will tend to create antagonism on all sides whether the workers eventually become organized or not. And, after all, how serious can the financial burden be on an employer to allow the union equal time if he can afford to take the plant's time to state his own views? As was noted in the area of defining the permissible limits of speech the decision of questions today running to the fundamentals of the unionization of workers seems to be colored by a predisposition which does not complement an expert body such as the NLRB.

Exceptions to the Livingston Shirt Rule

The extent to which the two exceptions to the general rule of *Livingston Shirt* were to be given recognition was soon tested. In one case the Sixth Circuit in *NLRB v. F. W. Woolworth Co.*[96] refused to enforce a Board order based on a pre-*Livingston Shirt* ruling that an employer had committed an unfair labor practice in a situation substantially the

refusal to bargain upheld the Board's action in setting aside an election where the employer gave a captive audience speech several hours before the election without granting the union an opportunity to reply. The court considered the Bonwit Teller doctrine controlling due to the date when the election occurred, but the court's broad rationale would seem applicable to the Peerless rule. "The fact that the Board no longer follows the holding of the Bonwit Teller case . . . is no reason why it should not hold such a speech prejudicial to a fair election and set aside the result of the election on that ground. The question here is not one of free speech or of unfair labor practices, but of the Board's judgment in holding last minute, one sided appeals to employees on company time and property prejudicial to a fair election and setting the election aside for that reason." 224 F.2d at 653.

95. 107 N.L.R.B. at 421.

96. 214 F.2d 78 (6th Cir. 1954).

same as the original *Bonwit Teller* case.[97] The employer had a privileged no-solicitation rule in force at his retail store, made a speech on company time and property to his employees, and refused to grant the union a similar opportunity to address the employees. The majority of the court decided that the case was controlled by the privilege conferred by section 8(c). Although the majority attempted to distinguish the *Bonwit Teller* case, the reasoning of each court must be considered in conflict on the issue of the effect of section 8(c) upon an employer's speech when he attempts to enforce a privileged no-solicitation rule.[98]

The Sixth Circuit's decision seems unsound as a matter of legal theory and of labor policy. The employer who operates a retail store is given the privilege of enforcing a no-solicitation rule in the first instance because, due to the nature of his business, the law has deemed that the employees' right to organize must be sacrificed to the extent that such activity interrupts the efficient operation of a retail establishment.[99] Few would argue that this is unreasonable for the probable disruptive effect and confusion which would be engendered by allowing organizational activity to take place in the public and quasi-public areas of a retail store might be great. But yet the very reason which justifies the rule is gone when an employer speaks under those conditions. Once the reason for the limitation on employees' rights is gone, it would seem that the enforcement of the rule should be unlawful. The rule's sole purpose becomes obviously one of frustrating organizational activities in contradiction of section 7. As a matter of policy, a privileged no-solicitation rule should be confined to the limits of its justification, for such a rule, even where justified, places the employees in a more difficult position to obtain information about their rights as guaranteed by federal law than would be true were the rule not present. Natural reluctance of employees when away from the job to expend time and

97. F. W. Woolworth Co., 102 N.L.R.B. 581 (1953).

98. Compare Hand, J., "However, neither § 8(c) nor any issue of 'employer free speech' is involved in this case. . . . Bonwit Teller chose to avail itself of that privilege [a privileged no-solicitation rule] and, having done so, was in our opinion required to abstain from campaigning against the Union on the same premises to which the Union was denied access; if it should be otherwise, the practical advantage to the employer who was opposed to unionization would constitute a serious interference with the right of his employees to organize", Bonwit Teller, Inc., 197 F.2d 640, 645 (2d Cir. 1952), cert. denied, 345 U.S. 905 (1953), with Allen, J., "In light of the sweeping statutory provision and the legislative history [of § 8(c)] a no-solicitation rule cannot prevent an employer from conferring with his employees on his own premises and on his own time and the rule is not discriminatorily applied because of the employer's refusal to permit the union to campaign on its premises when there are adequate facilities for access to the employees." NLRB v. F. W. Woolworth Co., 214 F.2d 78, 81 (6th Cir. 1954).

99. See note 78 supra. See also NLRB v. May Dep't Stores Co., 154 F.2d 533 (8th Cir. 1946).

effort to hear both sides of organizational pros and cons makes enforcement of the rule all the more burdensome. The fear of employer surveillance undoubtedly adds to the distaste of attending union meetings off the employer's premises.[100] The Second Circuit's decision would seem to be more enlightened.[101]

The other exception to *Livingston Shirt* was before the Board in *Johnston Lawn Mower Corp.*[102] The employer imposed upon its employees a no-solicitation rule which was unlawful since it applied to both working and nonworking time. While this rule was being enforced it carried on antiunion noncoercive campaigning during company time and on company property. It rejected the union's request to be allowed opportunity to carry on electioneering under similar conditions. The Board held "that the [employer] . . . violated Section 8(a)(1) of the Act (1) by maintaining a rule prohibiting solicitation on company property during nonworking hours, and (2) by campaigning against the Union on company time and property while enforcing such rule."[103] The Board's recognition of these two exceptions seems sound as a matter of legal theory and fundamental policy. The extent to which the Sixth Circuit's decision has cast a shadow of substance which other courts of appeals will accept remains to be seen.[104] At present, the *Woolworth* case should be considered *cantat extra chorum.*

Babcock & Wilcox Case and the Livingston Shirt Rule

One of the factors which seems to underlie the Board's decisions in *Livingston Shirt* and the cases that have followed its theme is that the union's ability to reach employees on the *company's premises* was preserved. That is, the Board's application of the *Livingston Shirt* rule assumed that where it applies the union could not be denied access to company property during nonworking time. Thus, in *Livingston Shirt* the Board observed that "[the employer's] . . . rule prohibited solicita-

100. E.g., Margaret Ann Grocery Stores, 115 N.L.R.B. 1676 (1956); United Cigar-Whelan Stores Corp., 115 N.L.R.B. 1214 (1956).

101. For a contrary view of the merits of the Woolworth decision see Comment, Labor Relations-Free Speech for Whom?, 10 Miami L.Q. 37, 43-45 (1955).

102. 110 N.L.R.B. 1955 (1954).

103. Id. at 1955-56; accord, Williamson-Dickie Mfg. Co., 115 N.L.R.B. 356 (1956). In Johnston Lawn Mower Corp., 107 N.L.R.B. 1086 (1954), the Board set aside an election on similar grounds.

104. The Court of Appeals for the District of Columbia followed the reasoning of the Second Circuit and rejected that of the Sixth Circuit in resolving the question of the effect of § 8(c) on distribution rules. The court held in United Steelworkers v. NLRB, 243 F.2d 593 (D.C. Cir. 1956), that an employer commits an unfair labor practice when he enforces an employee no-distribution rule during nonworking time while at the same time he distributes antiunion noncoercive literature. This holding reversed the Board's ruling on the point in Nutone, Inc., 112 N.L.R.B. 1153, 1154-55 (1955).

tion only during working hours. This rule was therefore not unlawful. Indeed, nowhere in the record does it appear that the [union] . . . was denied access to [the employer's] . . . premises after working hours."[105] In the *Rath Packing Co.* case[106] the Board refused to set aside an election where the employer did not grant the union's request to speak to the employees after it learned that the employer had made a speech to the employees on company time and property. There were no no-solicitation rules in the plant and the employees were apparently free to discuss union affairs at will. In answer to the union's argument that by "requesting" the union organizer not to park his car in the company parking lot the employer violated the *Livingston Shirt* rule, the Board said ". . . the union representative entered the Employer's parking lot and spoke to the employees without objection by the Employer even after he had agreed not to park on the Employer's property."[107]

It was in a parallel context that the Board's theory of the employer's duty to open up its premises was upset. The context was whether an employer committed an unfair labor practice by denying nonemployee union organizers access to its property. The case was *Babcock & Wilcox.*[108]

The Steelworkers Union was attempting to organize a plant employing about 500, about forty per cent of whose employees lived in a town of 21,000 located a few miles from the plant. No union member was an employee. About ninety per cent of the employees reached the plant by auto, using a driveway from the main highway to reach a parking lot some one hundred yards away from this intersection. The union had on three occasions distributed pamphlets at the intersection but this activity was frustrated when the local police forbade the distribution because of the traffic hazard created. The union made a request to the employer to be allowed to distribute pamphlets in the company parking lot during nonworking hours. The employer refused, stating that its policy had been and would continue to be not to permit any distributions by any group on its property.

The Board held the refusal an unfair labor practice and ordered the employer to allow the union to distribute in the parking lot.[109] The

105. 107 N.L.R.B. 400, 409.

106. 115 N.L.R.B. 302 (1956).

107. Id. at 306. Where an illegal no-solicitation rule is an element of the unfair labor practice the employer by abolishing the rule eliminates the basis of the finding under the Second Circuit's reasoning. To this extent the suggestion in the text is limited. It should be noted that in Williamson-Dickie Mfg. Co., 115 N.L.R.B. 356 (1956), some employees were union members, while in Johnston Lawn Mower Corp., 110 N.L.R.B. 1955, 1957 (1954), the union had no employee members and was denied entry to the employer's premises.

108. NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956).

109. The Babcock & Wilcox Co., 109 N.L.R.B. 485, 493-94 (1954).

Fifth Circuit denied enforcement on the grounds that the employees' right to self-organize was not interfered with when nonemployee union organizers were denied access to the premises.[110] The Supreme Court affirmed the Fifth Circuit's distinction between the status of employees and nonemployees but indicated that the circumstances of the situation would be considered in determining whether the employees' rights under section 7 were adequately protected, holding:

"that an employer may validly post his property against nonemployee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution. In these circumstances the employer may not be compelled to allow distribution. . . ."[111]

The question raised by the *Babcock & Wilcox* case when coupled with the *Livingston Shirt* rule is whether an employer who has no union employees, and under the Supreme Court standard[112] can keep the union off the property, commits an unfair labor practice by speaking to his employees during company time "about" unionization while denying the union equal opportunity to reply. It is not enough to say that since facilities on the outside fulfilled the criterion of *Babcock & Wilcox* initially that the question is answered. To the extent that it is more difficult for the organizing union to attempt to neutralize the antiunion prophecies and warnings which are permitted today by the present Board than it is for it to disseminate a general organizational "message" to employees in the *Babcock & Wilcox* sense, there is a distinction which should make a legal difference. Putting the same thought in other terms, the adequacy of "available channels" open to the union assumes a different proportion when the circumstances include an adamant employer speech. A literal application of the *Livingston Shirt* rule would go far enough toward denying employees their right to select a bargaining representative to be objectionable as violative of section 7. Two members of the majority of the Board in the *Livingston Shirt* case justified their decision on the grounds that barring the union from the use of the employer's forum would not interfere with union activity for one of the

110. NLRB v. Babcock & Wilcox, Co., 222 F.2d 316 (5th Cir. 1955). On similar grounds the Tenth Circuit denied enforcement of a Board order issued in Seamprufe, Inc., 109 N.L.R.B. 24 (1954) in NLRB v. Seamprufe, Inc., 222 F.2d 858 (10th Cir. 1955). The Sixth Circuit granted enforcement of a Board order issued in Ranco, Inc., 109 N.L.R.B. 998 (1954) in NLRB v. Ranco, Inc., 222 F.2d 543 (6th Cir. 1955) on similar facts. All three cases were decided in 351 U.S. 105, the first two being affirmed and the last being reversed.

111. 351 U.S. 105, 112 (1956).

112. Ibid.

". . . time-honored and traditional means by which unions have conducted their organizational campaigns . . ." which remained was ". . . individual contact with employees on the employer's premises outside working hours. . . ."[113] But under the *Babcock & Wilcox* decision in the captive audience context this is no longer true. To deny the union the medium which the employer uses under these circumstances would give the union virtually no way to discount the impact upon the employees which the employer's words in their surroundings impart.

If this argument were sufficient to persuade the Board not to apply the *Livingston Shirt* rule literally, then one alternative for the Board would be to carve out an exception from its ambit. An exception to meet the problem could be phrased as follows: for the employer to exercise his right to keep a union off his premises while he both delivers an antiunion speech to a captive audience and denies the union an opportunity to reply under similar circumstances would be an unfair labor practice. This exception would be a revival of the *Bonwit Teller* doctrine where the three elements above were present. The choice for the employer who wanted to make a captive audience speech would be either to allow the union opportunity to reach the employees during nonworking time on company premises *or* to allow it equal time at the same forum which he used. Each alternative would be governed by the employer's policy with respect to union access to company property. This result allows the employer to call the tune and is consistent with the reasoning of the majority[114] in the *Livingston Shirt* case. The exception recognizes that while the employer generally has a right of free speech and of unfettered use of his property, when these two traditional values are placed in the pans of the scale they are outweighed by the employees' guaranteed right to self-organize.

But this type of argument can be used to prove too much. One criticism which could be made of the Board's various approaches in dealing with the captive audience problem is that it resulted in a uniformity of treatment regardless of the circumstances. Should a New England employer of several dozen employees who runs a small machine shop where no effort is made to bar union representatives from the premises during nonworking hours and a Southern industrial factory which is complete with an industrial relations staff and antiunion history be governed by the same immutable standard? If the hypothetical Northern employer delivers innocuous remarks to an assembly of his employees about

113. 107 N.L.R.B. 400, 406.

114. Since the Board split 2-2-1 there was no majority rationale. The concurring member did not adopt the reasoning of the other two members with whom he joined in voting to dismiss the complaint.

unionization and the Southern employer gives a blood-and-thunder "non-coercive" antiunion speech to a captive audience of his employees, should both be treated the *same,* with the result that both have to allow the union an equal opportunity to reply as would have been the case under the Board's *Bonwit Teller* doctrine, or neither be required to allow the union equal time as is the rule under *Livingston Shirt*?

The answer to both questions should be in the negative for the standard adopted should be more responsive to some of the circumstances present in an organizational campaign at a particular company. Just as the *Bonwit Teller* doctrine and the *Livingston Shirt* rule did not meet this need, neither does an exception such as formulated to fit the *Babcock & Wilcox* situation have sufficient flexibility. A rule governing this type of organizational activity today which does not recognize at least the differences in the geographical area of the country in which the activity occurs, the relative strength of the union and an employer, and the ability in fact of the union to reach the employees appears to be a head-in-the-sand approach.

The solution is not an easy one. An arbitrary across-the-board rule has some appeal. Whether it be in the form of *Bonwit Teller* or *Livingston Shirt,* it allows the parties to predict in advance the legal consequences of their conduct, and the Board to administer a standard which creates little call for their intervention. A rule, on the other hand, which is sensitive to the circumstances places the Board in a better position to effectuate the policies of the NLRA. In many cases the result will be the same whether the criterion be rigid or supple. In the close case, however, one cannot use both principles; one cannot have both certainty of result and flexibility; either alternative is paid for at a price. With the variation in the acceptance of unionization as an integral part of industrial life in the present economy, it seems that recognition *should* be given to the situation of the parties involved in the particular case.

In the near future the Board will undoubtedly be called upon to pass on the applicability of the *Livingston Shirt* rule where an employer under the *Babcock & Wilcox* case has kept the union off his property. Any Board treatment of the captive audience problem should be responsive to the circumstances of the case. The present rule is not. Earlier in this article it was suggested that the Board's reassessment of the methods necessary to allow the union to disseminate and the employees to receive adequate information was unsound. These two criticisms, coupled with the fact that a factual situation will probably be before the Board shortly, make a refocusing on the problem timely. It is hoped that a reappraisal will lead the Board to overrule the *Livingston Shirt* decision.

A Proposed Alternative Theory

Having rejected the *status quo* it is necessary to offer an alternative theory. This proposed standard is grounded on an analogy to Holmes' prima facie theory of torts.[115] This rule would be that it is a prima facie violation of section 8(a)(1) for an employer to give a speech on company time and property and to deny the union equal opportunity to reply unless under the circumstances the refusal can be justified. This watered-down version of the *Bonwit Teller* doctrine would allow an employer to come forward with evidence in an attempt to show that under the circumstances his refusal should not be deemed an interference with his employees' rights under section 7. Over a period of time certain circumstances would become guideposts by which employers and unions could govern their conduct. One factor which would be of importance would be the presence or absence of union access to the employees during nonworking time on company property. This would help to ameliorate the organizational barrier placed before the employees by the *Babcock & Wilcox* rationale. If an employer showed that he was willing to allow the union on the premises during nonworking time in some instances this would justify his refusal. It is to be expected, however, in most situations the employer would rather allow the union equal time to answer his twenty or thirty minute speech than to open up the plant to union organizers' campaigning during coffee breaks and lunch hours. On the other hand, some situations might arise where the union would not want the time to speak to the employees as its appeal to the employees of an employer who has continuously stayed six months "ahead" of the union would be fruitless, particularly if a recent installment of "benefits" had been granted. Another factor would be the relative financial strength of the union and the employer as tending to show who should bear the economic burden of neutralizing employer captive audience speeches. A third factor and probably the most important is the nature of the community where the organizational activity takes place. This encompasses the sophistication of the employees, the location of the plant, the size of the town or city and its attitude toward labor organizations.

The generality of these guides and the myriad of factual situations which potentially could confront the Board is appreciated. The Board's job in a delicate area of labor relations is, however, more than to promulgate per se rules and to enforce them like a policeman. As the Supreme Court has said "the detection and appraisal of . . . imponderables [is] . . . indeed one of the essential functions of an expert administrative agency."[116] After some boundaries are established the argument that a

115. See Cox, Labor Law 63 (3d ed. 1954).

116. International Ass'n of Machinists v. NLRB, 311 U.S. 72, 79 (1940).

flexible standard is inadministrable will be dimmed. In the long run the rule treats employers and unions less like mutual combatants by making the parties work out their own ground rules under the peculiar circumstances of their case. To some degree it demotes law to the position of a sword in the closet and, however slight the degree, it would seem to be a move in the right direction.

CONCLUSION

It was observed in the first portion of the article that section 8(c) has served as a basis for excusing employer comments that undoubtedly influenced employees against freely considering unionization. If this was the aim of the amendment it has fulfilled its mission.[117] To a large extent the "totality of conduct" doctrine is presently followed by the Board and the Board's practice has been accepted by the courts of appeals. But it seems that the doctrine is more apt to be used today to find statements privileged than nonprivileged.[118] Isolated instances where employer statements were used to explain acts have been found but the present statute continues to stand as an imposing and anomalous rule of evidence regardless of Senator Taft's contrary remarks.[119]

The consideration of the captive audience problem leads one to the conclusion that the present treatment of the question is unsound both from the standpoint of industrial practice and legal approach. Fundamentally section 8(c) is not in issue. It has served to divert attention from the question of the degree of protection that employees will be given under section 7.

In both inquiries section 8(c) served to cloud thinking about basic issues. The lesson of the Board's and the courts' experience in the application of section 8(c) is that passage of a statute is not the way to handle this type of delicate problem in labor relations. Even if action to amend were a political reality, the solution would not lie here, in legislative action. Enough harm has been done through this means. The only feasible way to obtain any sensible result in these affairs is to allow the administrative process personified by the NLRB to guide the way. Although our federal system is in theory one of laws and not of men, for the policy of any enactment to be carried forward, there is no substitute for men dedicated to its cause.

117. See, e.g., Hearings Before the Committee on Labor and Public Welfare of the Senate, 83d Cong., 2d Sess., pt. 6 at 3231, where Mr. Boyd E. Payton of the T.W.U.A. said, "We ascribe to the free speech and agency provisions of the Taft-Hartley Act—more than to any of its other objectionable provisions—our failure to organize textile workers in recent years." See also, Hearings, supra, at 3230 for the data upon which the statement was based.

118. E.g., The Lux Clock Mfg. Co., 113 N.L.R.B. 1194 (1955).

119. See note 58 supra.