NOTES

Follow this and additional works at: https://digitalcommons.law.yale.edu/ylj

Recommended Citation
NOTES, 58 Yale L.J. (1948).
Available at: https://digitalcommons.law.yale.edu/ylj/vol58/iss1/3

This Article is brought to you for free and open access by Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in Yale Law Journal by an authorized editor of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.
NOTES

FREE SPEECH AND FREE CHOICE IN REPRESENTATION ELECTIONS: EFFECT OF TAFT-HARTLEY ACT

SECTION 8(c)*

Demarcation between allowable free speech by employers and illegitimate coercion of employees has traditionally been founded on the relation between speaker and audience. Whether or not an employer's expression of anti-union views may interfere with the free choice of bargaining representatives has depended upon a congeries of such related factors as the economic and political strength of the employer, the extent of employee dependence upon him for

---

* General Shoe Corporation, 77 N.L.R.B. No. 18 (April 16, 1943).


2. The Board has stated its viewpoint as follows: "As the natural result of the employer's economic power, employees are alertly responsive to the slightest suggestion of the employer. Activities innocuous and without significance, as between two individuals economically independent of each other or of equal economic strength, assume enormous significance and heighten to proportions of coercion when engaged in by the employer in his relationship with his employees." 3 NLRB Ann. Rep. 125 (1935). Especially in the early years of the Wagner Act the employer's economic power was often reason for the NLRB to insist that he remain aloof from matters of employee self-organization, on the ground that his arguments against the union would be coercive per se. See Air Associates, Inc., 20 N.L.R.B. 356, 361-2 (1940), modified and enforcement granted, 121 F.2d 585 (2nd Cir. 1941); Protective Motors Service Co., 1 N.L.R.B. 639, 647 (1936); Pennsylvania Greyhound Lines, Inc., 1 N.L.R.B. 1, 22-3 (1935) enforcement in part granted, 91 F.2d 178 (3rd Cir. 1937), rev'd and full enforcement granted, 303 U.S. 261 (1938); accord, International Ass'n of Machinists v. National Labor Relations Board, 311 U.S. 72 (1940) ("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."); National Labor Relations Board v. W. A. Jones Foundry & Machine Co., 123 F.2d 552 (7th Cir. 1941); National Labor Relations Board v. Federbush Co., 121 F.2d 954 (2nd Cir. 1941).

There appears to be no case, however, wherein the finding of unfair labor practices was based on mere expression of opinion apart from other coercive circumstances. Consequently the courts were never faced with the question of the constitutionality of such a holding. The issue was clarified when the Supreme Court finally declared that strict neutrality was not demanded of the employer. National Labor Relations Board v. Virginia Electric & Power Co., 314 U.S. 469 (1941). The employer's economic position, however, remained an important yardstick for measuring the compulsion upon the listeners to heed his admonitions. See, e.g., Thompson Products, Inc., 60 N.L.R.B. 1381, 1385 (1945).

The political power of the employer has similarly been pertinent in evaluating the effectiveness of his anti-union actions. Republic Steel Corporation, 9 N.L.R.B. 219 (1938), modified and enforcement granted, 107 F.2d 472 (3rd Cir. 1939), decree construed, 114 F.2d 820 (3rd Cir. 1940), modified and remanded, 311 U.S. 7 (1940); Remington Rand, Inc., 2 N.L.R.B. 626 (1937), modified and enforcement granted, 94 F.2d 263 (2nd Cir. 1938), cert. denied, 304 U.S. 576 (1938); Alabama Mills, Inc., 2 N.L.R.B. 20 (1936),
a livelihood,\(^6\) sophistication of the worker audience,\(^4\) the history of labor relations in the locality and in the plant,\(^5\) and other circumstances immediately

modified and enforcement granted, (5th Cir. 1938); Somerville Manufacturing Company, 1 N.L.R.B. 864 (1936), enforcement denied, 98 F.2d 615 (3rd Cir. 1938), rev'd, 306 U. S. 601 (1939).

An ample collection of cases wherein the decision as to the legality of employer conduct turns upon economic and political factors may be found in the Board's Annual Reports. 1 NLRB ANN. REP. 73 (1936); 2 NLRB ANN. REP. 65 (1937); 3 NLRB ANN. REP. 59-62 (1938); 4 NLRB ANN. REP. 57-60 (1939); 5 NLRB ANN. REP. 32-7 (1940); 6 NLRB ANN. REP. 41-4 (1941); 7 NLRB ANN. REP. 42-5 (1942); 8 NLRB ANN. REP. 27-30 (1943); 9 NLRB ANN. REP. 36-9 (1944); 10 NLRB ANN. REP. 37 (1945); 11 NLRB ANN. REP. 34-6 (1946); 12 NLRB ANN. REP. 26-7 (1947).

3. Threats to reduce employees' privileges in a company town: Good Coal Company, 12 N.L.R.B. 136 (1939), enforcement granted, 110 F.2d 501 (6th Cir. 1940), cert. denied, 310 U. S. 630 (1940); Carlisle Lumber Company, 2 N.L.R.B. 248 (1936), modified and enforcement granted, 94 F.2d 138 (9th Cir. 1937), cert. denied, 304 U. S. 757 (1938).

Threats to move a plant or to shut down altogether if the union wins: The Pickwick Company, 69 N.L.R.B. 314 (1946); A. J. Showalter Company, 64 N.L.R.B. 573 (1945). Authorities are collected in 1 NLRB ANN. REP. 73 (1936); 2 NLRB ANN. REP. 64-5 (1937).

4. North Carolina Finishing Co. v. National Labor Relations Board, 133 F.2d 714 (4th Cir. 1943) (union "a bunch of Germans . . . to hamper defense work"); R. R. Donnelley and Sons Company, 60 N.L.R.B. 635 (1945) (employer implied that there was something unpatriotic and subversive in self-organization during the war emergency); Auburn Foundry, Inc., 26 N.L.R.B. 878 (1940), modified and enforcement granted, 119 F. 2d 331 (7th Cir. 1941) (CIO "a bunch of communists and thugs" who "would get your money and wouldn't do you any good"); Arcade-Sunshine Company, Inc., 12 N.L.R.B. 259 (1939) enforcement granted, 118 F.2d 49 (D. C. Cir. 1940), modified upon rehearing, 118 F.2d 49 (D. C. Cir. 1940), cert. denied, 313 U. S. 567 (1941) (negro employees are told that the AFL was unfriendly to negroes); Lane Cotton Mills Co., 9 N.L.R.B. 952 (1939), enforcement granted, 111 F.2d 814 (5th Cir. 1940), petition for writ of cert. dismissed on motion of petitioner, 311 U.S. 723 (1940). For a full discussion of the status of employers' untruthful or misleading statements, see Comment, Labor Law: Employers' Right of Free Speech under N.L.R.A., 34 CALIF. L. REV. 415, 417-23 (1946). More extensive citations may be found in 2 TELLER, LABOR DISPUTES AND COLLECTIVE BARGAINING § 286 (1940) (Supp. 1947).


The context which the Board has considered in evaluating equivocal statements is not limited to the labor record of the individual employer. E.g., Eagle & Phenix Mills, 11 N.L.R.B. 361 (1939), enforced by consent, (5th Cir. 1939) (employees were told to "look at what had occurred in other places and Huntsville and Meritas" before voting for the union. In light of the prevailing belief that the formation of unions at the Huntsville and Meritas mills were the cause of their shut-downs, the employer's reference to them was held a warning of similar retaliation).
surrounding the speech itself. The Wagner Act, as interpreted by the courts, originally gave the NLRB discretionary authority to measure these variables and to judge whether the employer was within bounds.

Board policy toward management speech in union matters evolved under two complementary procedures: the unfair labor practice proceeding and the representation case. In the former, employer speech was held an unfair labor practice where it interfered with, restrained or coerced employees in the free elective choice of representatives. The employer might, within the protection of the First Amendment, have voiced his opinion as to the desirability of a

6. Its setting, apart from an anti-labor history, may transform speech into a proscribed verbal act. See, e.g., Elastic Stop Nut Corp. v. National Labor Relations Board, 142 F.2d 371, 375 (8th Cir. 1944), cert. denied, 323 U.S. 722 (1944) (employees are particularly susceptible to interference in a new plant, and the employer must remain neutral during an organizational drive).

Associated acts may render otherwise lawful speech "interference." See note 13 infra. Or the locus of the utterances may be the coercive element. Clark Brothers Co., 70 N.L.R.B. 802 (1946), enforcement granted, 163 F.2d 373 (2d Cir. 1947) (compulsory meeting on company premises during working hours); Van Raalte, Inc., 69 N.L.R.B. 1326 (1946) (same). But cf. Merry Brothers Brick and Tile Co., 75 N.L.R.B. 136 (1947).


8. The courts have uniformly maintained that freedom of speech is not violated when the employer's expressions of views are judged in the light of the total record. The leading precedent is National Labor Relations Board v. Virginia Electric & Power Company, 314 U.S. 469 (1941), where it was said: "If the Board's order here may fairly be said to be based on the totality of the Company's activities during the period in question, we may not consider the findings of the Board as to the coercive effect of the bulletin and the speeches in isolation from the findings as respects the other conduct of the Company." National Labor Relations Board v. Trojan Powder Co., 135 F.2d 337 (3rd Cir. 1943), cert. denied, 320 U.S. 763 (1943); National Labor Relations Board v. Federbush Co., 121 F.2d 954 (2d Cir. 1941) ("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. 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.").


11. See note 1 supra.
union in his plant, but was forbidden from threatening physical or economic reprisals or promising benefits for any action which his employees might take with respect to the union.12 Even where employer speech did not contain open threats, viewed in the complex of employer activities it was sometimes held to carry expressions of implied coercion.13 Such pre-election utterances were declared unfair labor practices and subject to a cease and desist order.

In the representation cases, the Board, fashioning standards of election integrity case by case, assumed the power to set aside a representation election as unfair.14 Where unfair labor practices were not involved, the Board set aside elections for such matters as misconduct of a Board agent,15 defects in

12. Thus, the Supreme Court, in National Labor Relations Board v. Virginia Electric & Power Company, 314 U.S. 469 (1941), summed up its conclusions as follows: "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. If the total activities of an employer restrain or coerce his employees in their free choice, then those employees are entitled to the protection of the Act. And in determining whether a course of conduct amounts to restraint or coercion, pressure exerted vocally by the employer may no more be disregarded than pressure exerted in other ways." Id. at 477. But see National Labor Relations Board v. Stone, 125 F.2d 752, 756 (7th Cir. 1942), cert. denied, 317 U.S. 649 (1942). Precedents are collected in 2 TELLER, op. cit. supra note 4, §§ 252, 283, 284.

It is less certain that anti-union sentiments by the employer could be expressed with impunity during the earlier years of the Act. See note 2 supra. Until the air was cleared by the Virginia Electric case, supra, the circuit courts appeared to disagree in respect to the employer's right to register any opinion in union affairs. Compare National Labor Relations Board v. Federbush Co., Inc., 121 F.2d 954 (2d Cir. 1941) with National Labor Relations Board v. Ford Motor Company, 114 F.2d 905 (6th Cir. 1940). See also, Daykin, The Employer's Right of Free Speech in Industry under the National Labor Relations Act, 40 ILL. L. REV. 185 (1945); Morgan, Employer's Freedom of Speech and the Wagner Act, 20 TUL. L. REV. (1946); Sinsheimer, Employer Free Speech—A Comparative Analysis, 14 U. CHI. L. REV. 617 (1947); 2 TELLER, op. cit. supra note 4, § 252.

13. Lawful speech so connected with an unlawful act as to convey the impression that the act would follow non-compliance with the employer's wishes: Jacksonville Paper Co. v. National Labor Relations Board, 137 F.2d 148 (5th Cir. 1943), cert. denied, 320 U. S. 772 (1943) (discriminatory discharge); Indianapolis Glove Company, 5 N.L.R.B. 231 (1938) (employer sponsored company-dominated union).

Intimidatory nature of speech appears when examined as part of a coercive anti-union campaign: National Labor Relations Board v. Trojan Powder Company, 135 F.2d 337 (3rd Cir. 1943), cert. denied, 320 U. S. 768 (1943); National Labor Relations Board v. Stone, 125 F. 2d 752 (7th Cir. 1942), cert. denied, 317 U.S. 649 (1942); Van Raalte Co., 55 N.L.R.B. 146 (1944).

Illegal interference when speech was made to "forced" listeners on company grounds and company time: Clark Brothers Co., 70 N.L.R.B. 802 (1946), enforcement granted, 163 F.2d 373 (2d Cir. 1947). Contra: National Labor Relations Board v. Montgomery Ward & Co., 157 F.2d 486 (8th Cir. 1946).

14. This power was never expressly granted by the Act. See note 10 supra. Nor do the Congressional Reports mention Board authority to void elections. See H. R. REP. No. 1147, 74th Cong., 1st Sess. (1935); SEN. REP. No. 573, 74th Cong., 1st Sess. (1935).

15. Knox Metal Products, Inc., 75 N.L.R.B. 277 (1947) (Board agent failed to chal-
NOTES

1948]

16. River Raisin Paper Company, 70 N.L.R.B. 1343 (1946) (before the parties had an opportunity to file exceptions to the Regional Director's report on challenges, the challenges he recommended be overruled were opened and counted); Hunt Foods, Inc. 70 N.L.R.B. 1312 (1946) (official election notices not received from Regional Office in time to be properly posted); Louis Marx Co., 70 N.L.R.B. 1242 (1946) (employees in one department not afforded same voting opportunity as those in other departments).

The Board has consistently sustained objections to an election where the secrecy of ballot had not been maintained. E.g., Pennsylvania Greyhound Lines, 4 N.L.R.B. 597 (1937).

17. Acme Brewing Co., 74 N.L.R.B. 146 (1947) (union contestant distributed a new and more favorable contract executed by it, to become effective after the election); Sears Roebuck & Company, 47 N.L.R.B. 291 (1943) (union displayed sample ballots bearing the name of the Regional Director, thereby giving rise to the erroneous impression that the Board was lending its support to that union); National Tea Company, 41 N.L.R.B. 774 (1942) (acts of violence directed against rival union). But cf. Merrimac Mills Co., 65 N.L.R.B. 308 (1946) (references to rival union as "phoney stooge outfit" and "Company union" did not prevent employees from exercising a free choice).

18. Thus, eleventh hour announcements that the War Labor Board had approved wage increases, which tend to influence employees to vote for a particular union credited with securing the increase or for no union at all were held a restraint upon free choice. Seneca Knitting Mills, Inc., 59 N.L.R.B. 754 (1944); Continental Oil Company, 58 N.L.R.B. 168 (1944). But cf. Chicago Mill & Lumber Company, 64 N.L.R.B. 349 (1945). See also P. D. Gwaltney, Jr. and Company, 74 N.L.R.B. 371 (1947) ("Citizens Committee" threatened to lynch organizers and promised reprisal by Ku Klux Klan in the event of union victory). This case was cited by the Board as precedent for its order setting aside the election in the General Shoe Corporation case, pp. 170-2 infra. But it is distinguishable, as are all the decisions cited in notes 15-18 supra, in that the misconduct interfering with free choice was not engaged in by the employer, and therefore could not be an unfair labor practice under the Act.

19. Hercules Motor Corporation, 73 N.L.R.B. 650 (1947); Charles H. Bacon Company, 55 N.L.R.B. 1189 (1944); Tennessee Copper Company, 8 N.L.R.B. 575 (1933); But see Howell Electric Motors Company, 62 N.L.R.B. 1337, 1344 n. 12 (1945). In addition, the Board has held that employer conduct sufficient to vitiate election results prior to a court ruling that such conduct was not an unfair labor practice, was no longer adequate grounds for setting aside an election. Merry Bros. Brick & Tile Co., 75 N.L.R.B. 136 (1947); Columbia Broadcasting System, Inc., 70 N.L.R.B. 1368 (1946).

The coincidence of standards in both proceedings should not be unexpected, for the courts, in reviewing unfair practice cases, were setting constitutional bounds for free speech which should be equally inviolate in representation cases. Consider, however, J. L. Brandeis & Sons v. National Labor Relations Board, 142 F.2d 977 (8th Cir. 1944), cert. denied, 323 U.S. 751 (1944) (court reversed the Board's findings that the conduct which vitiated the election also constituted an unfair labor practice).
ceedings appears to have followed as a matter of course from its evaluation of the speech as an unfair practice. 20

The validity of pre-existing standards for both sanctions used by the Board has been doubtful since the enactment of Section 8(c) of the Taft-Hartley Act, 21 providing that “the expressing of any views . . . shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit.” This clearly restricts the Board’s use of the cease and desist order, since it now at least limits the context of surrounding circumstances in which non-threatening arguments may be appraised. 22 In addition it might be held to limit the previous administrative practice of setting aside an election, since the standards for so doing have been linked traditionally to the unfair labor practice.

In a recent consolidated decision, In the Matter of General Shoe Corpora-


21. 61 STAT. 136 (1947), 29 U.S.C. § 141 et seq. (Supp. 1947); 61 STAT. 140 (1947) § 8(c), 21 U.S.C.A. § 158(c) (Supp. 1947). The section reads in full: “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.” The absence of protection for oral expressions is obviously an error in drafting carried over from the House Bill. This inadvertence was recognized in Senate debate. 93 CONG. REC. 6503 (1947).

Some excellent critical analyses of the Act are already available. VAN ARKLE, AN ANALYSIS OF THE LABOR-MANAGEMENT RELATION ACT, 1947 (1947); COX, SOME ASPECTS OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, 61 HARV. L. REV. 1, 274 (1948); Foley, UNION UNFAIR LABOR PRACTICES UNDER THE TAFT-HARTLEY ACT, 33 VA. L. REV. 697 (1947); Lockhart, THE “NEW” NATIONAL LABOR RELATIONS ACT IN OPERATION: FIRST EIGHT MONTHS, 32 MINN. L. REV. 663 (1948); Mulroy, THE TAFT-HARTLEY ACT IN ACTION, 15 U. CHIC. L. REV. 595 (1948); Sutherland, REASONS IN RETROSPECT, 33 CORN. L. Q. 1 (1947); Comments, 42 ILL. L. REV. 444, 458, 468, 479, 487, 492, 500 (1947); Notes, 96 U. PA. L. REV. 67, 85, 101 (1947). In this discussion, attention will focus on the impact of Section 8(c) upon employer speech. The problem of its possible effects on union conduct is discussed in B.N.A., THE NEW LABOR LAW 47 (1947); VAN ARKLE, op. cit. supra, at 53; Foley, supra, at 704–5; Note, 42 ILL. L. REV. 458, 463–7 (1947); 22 LAB. REL. REP. (Analysis) 10–11 (1948); 2 P-H LAB. SERV. § 21,447 (1947). The Board has recently ruled that Section 8(c) expressly precludes a finding that pickets were engaging in intimidatory conduct under the law when they “villified and verbally abused as scabs” those employees who deserted the striker’s ranks. Sunset Line and Twine Company, 79 N.L.R.B. No. 207 (Oct. 22, 1948).

22. This limitation appears to exclude only variables in the general context of the speech, such as the economic strength of the parties, the previous history of labor relations, and the “atmosphere” surrounding the speech. It probably does not preclude the consideration of outside circumstances referred to in the speech in order to determine the plain meaning of the employer’s language. See Eagle & Phenix Mills, 11 N.L.R.B. 361 (1939), supra note 5. In precluding the use of the “expressing of any views . . .” as evidence of an unfair labor practice or its motivation, the Section appears to restrict a use against which there is no constitutional inhibition. This would give the speaker more protection than he would receive if charged with a criminal offense. For a discussion of this issue, see VAN ARKLE, op. cit. supra note 21, at 23–6.
tion, the Board, while refusing to issue a cease and desist order, nevertheless invalidated a certification election in which the complaining union was defeated. Findings indicated that shortly after the arrival of Boot and Shoe Workers Union organizers in the General Shoe plant the employer embarked upon an intensive anti-union campaign which culminated in the distribution of a series of letters and leaflets, publication of a full page newspaper advertisement attempting to illustrate the worthlessness of the union, and in the proselyting of employees in their homes by supervisors under company instructions to dissuade them from selecting the union as bargaining agent.

On the day before the election the president of the company had small groups of employees brought to his office to hear a speech which construed the election as a matter of loyalty to the company, and seemed to imply that disloyalty would be followed by unpleasant consequences which the president might or might not be able to avoid.

In deciding the case prior to the Taft-Hartley modifications, the Trial Examiner had concluded that the employer's oral and printed statements were in-

23. 77 N.L.R.B. No. 18 (April 16, 1948).
24. The Board did order the company to cease and desist from interrogating its employees as to their union membership. This conduct, however, was not within the purview of Section 8(c), nor was it relied upon in setting aside the election.
25. The letters outlined the advantage of working for the Corporation, which was more interested than "any outsider" in its employees. Employees were advised "to determine whether [they] want to change the relationships that have existed in General Shoe Corporation for so many years."

One leaflet read in part: "You know that men were brought back who had been wounded to stand in front of unions and BEG them to do their share of the work.

"YOU KNOW men stayed overseas unnecessarily for many months just because unions were on strike.

"YOU KNOW men were killed because materials and ammunition did not get to them because of strikes."

Another argued the following five points: (1) Unions mean strikes and the employees and the Company lose money; (2) Unions make workers dissatisfied, and unhappy workers are poor shoemakers; (3) Unions penalize the better employees by not recognizing merit; (4) Unions cost money contributed by workers to promote jobs and potential power for union leaders, and (5) Unions set employees and management at war with each other and are thus bad for both.

A mimeographed letter accused the Union of attempting to poison the minds of the workers, and asked them to "show the Southern Spirit of Independence and the will to think for yourselves." Intermediate Report, p. 5-6, General Shoe Corporation, 77 N.L.R.B. No. 18 (April 16, 1947).
26. On several occasions the foremen went further, advising employees that all unions were "fit for was to cause strikes and trouble making" and to "go ahead and vote for it if you wish" but they would be sorry afterward." Said one employee: "[I was asked by a foreman] if I would like to work beside of a nigger, and I told him I wouldn't and he said if we got a union, that is what would happen." Id. at 4.
27. The Trial Examiner considered especially significant, in the light of the intemperate speech as a whole, the employer's assertions that the government refused to allow unions at the Oak Ridge atom bomb plant because "possibly the government knew that union meant trouble and they couldn't afford to have it while they were producing the atom bomb. Is there anything more important to you than your own job?" Id. at 10.
tegral parts of a coercive anti-union campaign, and were therefore unfair labor practices and sufficient grounds for setting aside the election. Further than this, even if the speech itself was privileged under the Constitution, it achieved a coercive effect when delivered to an audience which had lost the freedom to determine whether they wanted to listen. The Trial Examiner had held that since few of the employees visited in their homes by a supervisor would have the temerity to refuse him admittance, they were as much a "captive audience" as those employees ordered to the president's office during working hours. "Suggestions" made in this atmosphere were calculated to and did interfere with their untrammeled choice of bargaining representatives.

The Board, after passage of the Taft-Hartley Act, felt constrained by Section 8(c) to disregard the frame of reference which had guided the Trial Examiner. In holding that the speech, standing alone, contained no overt threat of reprisal or promise of benefit, the Board unanimously agreed that the statements were not unfair practices. Nevertheless, a majority of the Board vacated the election. Its rationale was that Section 8(c) applied only to unfair labor practice cases and did not nullify "the Board's own administrative standards" of election integrity. Although the employer's activities were "not held to constitute unfair labor practices within the meaning of the amended Act, certain of them created an atmosphere calculated to prevent a free untrammeled choice by the employees." The attempts to influence forced listeners at the plant and in their homes went "far beyond the presently accepted custom of campaigns directed at employees' reasoning faculties. . . ."

28. He stated: "In the instant case viewed in the setting in which they were made, respondent's utterances achieved a coercive effect. Respondent repeatedly disparaged the character of the Union leaders, and their motives, indicated that a union victory would disrupt the harmonious relationship existing between management and labor, said that the advent of the Union would cause strikes and subsequent loss of earning to employees, claimed that the Union could not obtain any benefits that the employees did not have, saying that the Union could only "ask"; and stated that the Union would only force employees to pay dues and "unknown assessments" which it claimed was all, plus political power, the Union really wanted. Respondent by repeatedly referring to strikes during the war and by their statements about such strikes made apparent that it considered joining the Union to be unpatriotic. Such a campaign occurring in a 'county seat in an agricultural community' which had a population of only 5,000 or 6,000 and in which respondent controlled 600 to 650 jobs could not but exploit the dependence of the employees upon respondent for employment." Ibid.

29. The Examiner relied squarely upon Clark Brothers Co., 70 N.L.R.B. 802 (1946), enforcement granted, 163 F. 2d 373 (2d Cir. 1947). The Clark decision, overruled sub silentio in the General Shoe Corporation case, has been more overtly overruled, under the mandate of Section 8(c), in Babcock & Wilcox Co., 77 N.L.R.B. No. 96 (May 13, 1948).

30. Two dissenting members vigorously maintained that until present "the Board has consistently overruled objections to elections predicated upon the anti-union utterances of an employer prior to an election where such expressions of opinion could not be found violative of the Act . . . [T]he Board cannot justify setting aside elections merely because the employer avails himself of the protection which the statute specifically provides." General Shoe Corporation, 77 N.L.R.B. No. 18 (April 16, 1948).
Under the new Act, the Board's refusal to find an unfair labor practice from the general context of the speech seems required, if not by the wording of Section 8(c), by the intent of its drafters. It is much less certain, however, that Congress meant to prohibit the Board from finding implications of reprisal in the speech itself. Although the Senate's clear grant of such discretion was not incorporated into the final measure, the more stringent House provision was so qualified as to make it at least arguable that the Board had retained power to control implied coercion. Despite this, the Trial Examiner's conclusion that the office speech itself carried thinly veiled threats was rejected, apparently by reason of the amendment.

The Board might have circumvented Section 8(c) by holding that affirmative conduct other than speech was not protected. Thus, company instructions to supervisors, supervisors' visits to employees in their homes, the summoning of employees to assemble in the president's office, all might have been found to exceed the mere expression of "views, argument, or opinion" and therefore be unfair labor practices. But merely shifting the stigma of illegality from speech to other acts involved in the totality of employer conduct might be considered a patent violation of Congressional intent.

31. The House bill, which provided that speech was not coercive unless "by its own terms" it threatened reprisals, intended to exclude both the "totality of conduct" and "captive audience" criteria. H. R. Rep. No. 245, 80th Cong., 1st Sess. 53, 54 (1947). While the Senate version would have permitted the Board to consider statements "under all the circumstances" the final bill retained most of the House provision, only omitting the requirement that coercion appear in the statement explicitly. Sen. Rep. No. 105, 80th Cong., 1st Sess. 23-4, 35 (1947); H. R. Rep. No. 510, 80th Cong., 1st Sess. 8, 45 (1947). Some commentators determined that Section 8(c) has not materially affected existing Board practice. Cox, supra note 21, at 17; 2 P-H LAB. SERV. PAR. 20,001, 20,845, 21,447 (1947). Another has questioned the constitutionality of the amendment in legislating away the qualifications placed on free speech by the courts. Mulroy, supra note 21, at 612-13.

32. Sen. Rep. No. 105, 80th Cong., 1st Sess. 35 (1947). It is difficult to see how the Senate provision would have altered pre-existing practice. The minority members of the Senate Committee on Education and Labor which reported the bill hailed it as "excellent." Id., Part 2 at 41. Contrast this with their attacks upon Section 8(c) in its final form. 93 Cong. Rec. 6446, 6496, 6503 (1947).

33. See note 31 supra.

34. This argument appears more valid in the light of ambiguous Senate debate on the final measure. Senator Taft assured his colleagues that certain fact situations under Section 8(c) "involve a consideration of the surrounding circumstances." 93 Cong. Rec. 6446 (1947). Also confusing is his statement: "We accepted the House provision which was perhaps a little stronger than the Senate provisions, but not substantially different in principle." Id. at 6445.

35. See note 28 supra.

36. The implied conclusion here that the Board may no longer expose disguised threats is borne out by the decision in Wrought Iron Range Company, 77 N.L.R.B. No. 85 (May 7, 1948) (by implication). This case is amply considered in 22 LAB. REL. REP. (Analysis) 9 (1948).

37. The Board had drawn this distinction in Ames Spot Welder Co., Inc., 75 N.L.R.B. 352 (1947), holding the questioning of an employee about his union membership not an expression of opinion within the meaning of the new section. Senator Taft himself had emphasized this limitation of Section 8(c). 93 Cong. Rec. 6550 (1947).
In refusing to extend the amendment's protection to election cases the Board chose a novel and perhaps contradictory avoidance of legislative purpose. While it seems to have been the spirit of Section 8(c) that speech which did not constitute an unfair labor practice should not be restricted in any way, Congress apparently neglected to consider criteria for free elections on the assumption that these tests would continue to correspond to criteria for unfair practices. In creating the dichotomy between unfair labor practice 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.

Actually, however, the Board has asserted that conduct, heretofore an unfair labor practice, may still interfere with the free choice of bargaining representatives, although such conduct no longer violates the act.

The decision, while salvaging Board discretion in representation cases, is nevertheless a dubious guarantee that elections will be free. Since the Board may not order the cessation of conduct except in the realm of unfair labor practices, an employer may continue to harangue employees in his office or


39. But no constitutional objections to the Board's position may be raised, since the practice of examining employer speech in its total context has been declared an allowable qualification upon free speech under the Constitution. See note 5 supra. The safeguards of Section 8(c) exceed decisional safe-conduct, and in disregarding these additional protections the Board raises only questions of statutory interpretation.

40. 49 STAT. 453 (1935), 29 U.S.C. § 160 (1946), as amended, 61 STAT. 146 (1947), (§ 10) 29 U.S.C.A. § 160 (Supp. 1947). The employer too is in a difficult tactical position, since cease and desist orders are the only ones which the circuit courts may review. National Labor Relations Board v. Falk Corporation, 308 U.S. 453 (1940); American Federation of Labor v. National Labor Relations Board, 308 U.S. 401 (1940); J. L. Brandeis & Sons v. National Labor Relations Board, 142 F.2d 977 (8th Cir. 1944); *Note, Judicial Review of Representation Cases Under the National Labor Relations Act*, 28 Geo. L. J. 666 (1940). The Administrative Procedure Act has not altered this rule. Ohio Power Co. v. N.L.R.B., 164 F.2d 275 (6th Cir. 1947), noted. 32 Minn. L. Rev. 807 (1948). The General Shoe Corporation, which maintains that the Board has acted ultra vires and in derogation of the First Amendment, apparently has no direct way of testing its contention in the circuit court. It may, however, seek indirect judicial review of the election case. Where the union wins in a new election, the Corporation might refuse to bargain collectively, and an unfair labor practice proceeding would follow. Should the Corporation then refuse to obey a cease and desist order, it might collaterally attack the Board ruling setting aside the original election in an enforcement suit brought before the circuit court.

The Board is now contemplating an enforcement proceeding in respect to the cease and desist order, note 24, supra. The Corporation has indicated that, in any court action, it will seek to have the Board's order in the representation case set aside. Letter to Mr. Paul
send supervisors to propagandize them in their homes. Should these activities cause union defeat in an election which the Board subsequently determines was not a free one, the employer’s sole penalty is the inconvenience of submitting to another election. The disfavored union still is denied status as bargaining representative.

Furthermore, the union’s right to secure a new election before the normal waiting period has elapsed now appears of nominal value, for the Board will direct a new election only when the Regional Director is advised that the “circumstances permit a free choice of representatives.” Since the employer may not be enjoined from continuing in his course of anti-union conduct the Board would be unable to maintain the appropriate “circumstances” and a new election might well be postponed indefinitely. Even should the Board order another balloting, there is no bar to a repetition of misconduct sufficient to vitiate the results.

Ineffectual as the General Shoe Corporation decision may be, the Board’s unwillingness to disregard the coercive color which surrounding circumstances may cast upon apparently innocuous speech is to be welcomed. This retention of a broad range of criteria may be opposed on the ground that unions have gained in strength since the early days of the Wagner Act, and no longer require such infant protection. It should be pointed out, however, that the Wagner Act was designed not to shelter unions but to guarantee employees the free choice of bargaining representatives. Furthermore, overall union strength is no counter-balance in non-union plants and in regions which are economically backward and where labor is largely unorganized.

If a realistic evaluation of employer speech involves all the elements which

Stykes, Regional Director of the NLRB, from Bass, Berry & Sims, attorneys for respondent.

41. Following the Taft-Hartley Act had the union lost in a valid election, a new election could not be held within the following twelve months. 61 Stat. 143 (1947) (§ 9(c) (3), 29 U.S.C.A. § 159(c) (3) (Supp. 1947). Where an election is set aside, however, a new one may be ordered whenever the Regional Director determines that conditions permit free choice. But this may be no more than a paper gain.

42. In almost all cases the employer’s campaign is directed against an outside union, which is attempting either to organize the plant or to unseat the incumbent bargaining representative. In rare instances where the “inside union” is subjected to the coercive campaign, its defeat in an election which is vacated will not alter its bargaining position.

43. General Shoe Corporation, 77 N.L.R.B. No. 18 (April 16, 1945). This is the standard Board order in decisions setting aside an election.

44. Cases tracing the evolution of a more liberal outlook on employer speech, and resting to a large degree upon the growing strength of the labor movement, are collected in 2 Teller, op. cit. supra note 4, § 252.

45. That these areas are potential centers of employer coercion is currently illustrated by the number of unfair labor practice and representation cases arising in the southern states. While the number of unfair labor practice cases during the fiscal year 1947 declined 8% from 1946 in the New England states, the number rose 24% in the South Atlantic states, and by 31.8% in the East South Central states. 12 NLRB Ann. Rep. 63-9 (1943). Although these statistics do not show the number of “coercion” cases, there is no reason not to assume that these have risen proportionately. Representation cases, an accurate in-