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# Labor Law -- Employer's Freedom of Speech -- The Captive Audience

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**Labor Law—Employer's Freedom of Speech—**
**The Captive Audience[1]**

To what extent and under what circumstances the employer may speak to his employees concerning labor matters arises in connection with that prohibition of the Wagner Act[2] which provides that it shall be an unfair labor practice for an employer "to interfere with, restrain or coerce employees"[3] in the exercise of the "right to self-organization, to form, join, or assist labor organizations . . . and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection."[4]

The constitutional issue of freedom of speech under the Act is usually raised in one of two ways: (1) where a certain utterance by the employer is alleged to be coercive *per se*,[5] or (2) where a certain utterance, possibly innocent standing alone, is elevated to the position of coercion when viewed against a background of anti-union conduct.[6] The National Labor Relations Board often describes the utterance as "inextricably intertwined" with other unfair practices.

The recent Board decision of In re *Clark Brothers*[7] raises the freedom of speech issue in still another situation;[8] namely, where an admit-

1912D, 906 (1911) (the nature of the doctrine of estoppel is to extend liability; it is not invoked for the purpose of enforcing a true obligation or one clearly defined by the terms of a contract).

[1] The scope of this note does not purport to cover the general problem of the employer's freedom of speech under the Wagner Act. Recent articles and notes on the broad question are the following: Daykin, *The Employer's Right of Free Speech in Industry Under the National Labor Relations Act* (1945) 40 ILL. L. REV.; Howard, *Freedom of Speech and Labor Controversies* (1943) 8 MO. L. REV. 25; Notes (1946) 34 CALIF. L. REV. 415; (1945) 14 FORDHAM L. REV. 59.

[2] NATIONAL LABOR RELATIONS ACT, 49 STAT. 449 (1935), 29 U. S. C. §151-166 (1940 ed.).

[3] *Id.* §158(1).

[4] *Id.* §157.

[5] The National Labor Relations Board's view of this type utterance is shown in the TENTH ANNUAL REPORT OF NATIONAL LABOR RELATIONS BOARD (1945) 37: "It is well established that free speech does not privilege statements which coerce employees in the exercise of their rights to self-organization. In many instances, the coercive element is inherent in the statement itself. . . . Typical of this class of statments, which are *per se* violative of Section 8(I), are those containing actual, implied, or veiled threats of economic reprisal." An example of this type of case is the following: Threat to move the plant. *In re* New Era Die Co., 19 N. L. R. B. 227 (1940), *affirmed as modified*, 118 F. (2d) 500 (C. C. A. 3rd, 1941).

[6] ". . . the Board has continued to hold that anti-union statements by an employer when an integral phrase of other anti-union conduct constitutes interference, restraint and coercion within the meaning of the Act." EIGHTH ANNUAL REPORT OF NATIONAL LABOR RELATIONS BOARD (1943) 29.

Often utterances are considered by the Board merely as evidence of the employer's intent: "The First Amendment to the United States Constitution does not preclude a fact-finding body from making an evidentiary use of speech any more than the Fifth Amendment prohibits it from weighing 'authority or power,' 'relation or opportunity,' inclination, motive, or non-verbal conduct." *In re* Dow Chemical Co., 13 N. L. R. B. 993, 1015 (1939).

[7] 70 N. L. R. B. No. 60, 18 LAB. REL. REP. 1360 (1946).

[8] Chairman Herzog of the National Labor Relations Board, in an address be-

tedly privileged speech[9] concerning the employees' organizational affairs is delivered by the employer (or associates) to his assembled employees on company premises during working hours, *i.e.*, to a "captive audience." For the first time the Board held that such a speech under these circumstances constituted an unfair practice, "wholly apart from the fact that the speech itself may be privileged under the Constitution."[10] The Board found that the respondent had projected himself into the run-off election between the CIO and the Association (independent union) by mailing anti-CIO bulletins to the employees, inserting paid advertisements in the local newspaper, and delivering two anti-union speeches to its assembled employees, on company premises and during working hours, one of the speeches being delivered by the company president an hour before the election.[11] The speeches explicitly stated that each employee would be "absolutely free to vote in accordance with [his] . . . own desire. . . . That there will be no retaliation or discrimination. . . ." And further (company president's speech) that "Nobody in this plant, as long as I am running it, will be discriminated against because of the way he votes or . . . thinks." The president's speech expressed praise over the "honorable and straight-forward way" of improving conditions in the plant by the cooperation of the independent union, and stated concern over the "possibility of disturbing the peaceful progress. . . ."[12]

fore the Annual Convention of Industrial Relations Sections of the Printing Industry of America, 18 LAB. REL. REP. 338 (1946), lists four ways in which the issue of freedom of speech arises under the Act: First, *privileged statements:* "The Board has stated repeatedly in its recent decisions that an employer's right to express his opinion to employees in respect to labor issues is secured by the First Amendment *if* it falls short of being coercive. The statement must appeal to the employee's reason, not to fear . . . or merely corrects misstatements of fact in a union campaign. . . ." Second, *coercive utterances:* "When to persuasion other elements are added which bring coercion, or give it that character . . . 'the limit of right has been passed.' . . . Sound policy dictates, and the Wagner Act assumes, that employers should not intrude upon the choice, subject always to their constitutional right to express an opinion." Third, *utterances which are an integral part of an anti-union course of conduct:* "'. . . 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'" (citing National Labor Relations Board v. Virginia Electric and Power Co., 314 U. S. 469, 471 (1942)). Fourth, *speeches delivered to a captive audience.*

[9] Although the principal decision is not clear as to whether the Board in the absence of a captive audience would have held the speech privileged or as part of the complex of anti-union conduct, the fact is unimportant for our purposes, since the majority reached the result that the speech in its setting was coercive regardless of its constitutionally privileged character standing alone.

[10] *In re* Clark Bros., cited *supra* note 7, at p. 3 of the opinion.

[11] The Board affirmed the trial examiner's finding of (1) surveillance by the company's labor relations director over the union's activities; (2) discrimination against the CIO by unfair enforcement of a company rule prohibiting union solicitation on company premises during non-working hours; and (3) a determined campaign of literature and speeches by the company designed to insure the defeat of the CIO and the victory of the inside association.

[12] The specific points made in the vice-president's speech were: (1) The employees were free to join any organization they desired; (2) the company's war

The Board found, even though there were other unfair practices upon which to base its "cease and desist" order, that the "conduct of the respondent in compelling its employees to listen to a speech on self-organization under the circumstances . . . *independently* constitutes interference, restraint and coercion within the meaning of the Act."[13] The reasons given are these:

1. Rights guaranteed to employees by the Act include "full freedom to receive aid, advice and information for others" concerning these rights. Such freedom is meaningless when they are forced to receive such aid, advice, etc.

2. The employer's economic control during working hours gave him exclusive and assured access to his employees in the matter of their organizational activities.[14]

3. The compulsory assembly was not a necessary part of the speech. "The law may and does prevent such use of force without denying the right to speak."

4. The use of the employer's economic power to compel his employees to listen to such speeches independently violated Section 8(1) of the Act.[15]

5. The *American Tube Bending* case[16] did not decide the issue involved here—whether a privileged speech to a captive audience thereby ceases to be privileged—for although the facts were similar in that case (pre-election speech to a captive audience) the Board at that time had never considered the question independently.

Board Member Reilly vigorously dissented on these grounds:

1. The case of *National Labor Relations Board v. Virginia Electric*

record was a "shining light" against the background of strife in plants where outside unions were in charge; (3) the management believed that successful operation of the plant could best be achieved by an inside union; (4) the outside union was mainly interested in the dues it would collect from the employees; and (5) it would be extremely "difficult to maintain the same harmonious relationship which now exists should an outside organization inject itself into ours."

The president's speech specifically stated: (1) Company wages were considerably higher than wages in CIO plants. (2) The company and its employees would not be making the most of its opportunities were an outside union voted in. (3) Each employee was free to vote as he desired without fear of any discrimination.

[13] *In re* Clark Bros., cited *supra* note 7, at p. 3 of the opinion; italics added.

[14] The Board's emphasis on the employer's economic control is expressed in THIRD ANNUAL REPORT OF NATIONAL LABOR RELATIONS BOARD (1938) 125: "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. See National Labor Relations Board v. Falk Co., 102 F. (2d) 383 (C. C. A. 7th, 1939) . *Contra:* National Labor Relations Board v. Ford Motor Co., 114 F. (2d) 905 (C. C. A. 6th, 1940); *cert. denied,* 312 U. S. 689 (1941).

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

[16] National Labor Relations Board v. American Tube Bending Co., 134 F. (2d) 993 (C. C. A. 2d, 1943), *cert. denied,* 320 U. S. 768 (1943).

*and Power Co.*[17] definitely affirmed the employer's constitutional right to express his opinion on labor matters when such utterances fall short of coercion, either standing alone or when viewed in the totality of the employer's conduct. Expressly relying on this decision, Judge Learned Hand of the Second Circuit Court of Appeals in the case of *American Tube Bending Co.*[18] reversed the Board's finding of unfair labor practice under Section 8, Subsection 1[19] where the facts were practically identical with those of the principal case.[20] The Board's petition for *certiorari,* "advancing many of the identical arguments advanced in this case"[21] was denied.

2. Admitting that the denial of *certiorari* was not necessarily conclusive, he argued that all doubt on the point was dissipated when in the next term in the case of *Thomas v. Collins,*[22] the Supreme Court, noting with approval the *American Tube Bending* ruling, held unconstitutional a state statute requiring registration by union organizers, and "made it clear that the right to make arguments for or against unions was fully privileged by the First Amendment, and that it applied to employers as well as to employees and union organizers."[23]

3. Recently there has been a "disturbing tendency of the Board to

[17] 314 U. S. 469 (1941) (remanded for further finding); 319 U. S. 533 (1943) (Board order affirmed).

[18] N. L. R. B. v. American Tube Bending Co., cited *supra* note 16.

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

[20] Board Member Reilly dissenting in the principal case, *In re* Clark Bros., 70 N. L. R. B. No. 60 (1946), at p. 9 of the opinion, discusses the American Tube Bending case with these words: "In this case an employer on the eve of an election had assembled his employees during working hours to listen to a paper which he read advising them against voting for a union in the coming election. The text of this speech contained arguments implying that outside organizers were insincere in their expressed solicitude for the welfare of the employees. It is implied that the company would never sign a closed-shop agreement, and appealed to the employees who wished to continue the friendly relationship which existed between themselves and the company to vote for the employer (that is, vote 'NO') rather than for the union."

[21] *Id.* at p. 9 of the opinion Board Member Reilly dissenting: "For example, the compulsory audience feature and the superior economic power feature were points (1) and (2) in the Board's brief."

[22] 323 U. S. 516 (1945). Mr. Justice Rutledge, speaking for the majority, says: ". . . Short of that limit [coercion] the employer's freedom cannot be impaired. . . . Of course the espousal of the cause of labor is entitled to no higher constitutional protection than the espousal of any other lawful cause." 323 U. S. 516, 538 (1945). Mr. Justice Black and Mr. Justice Murphy joined Mr. Justice Douglas in a concurring opinion emphasizing that the court's previous cases dealing with the employer's freedom of speech were in harmony with those concerning labor's right of free speech. 323 U. S. 516, 543 (1945). Mr. Justice Jackson in a separate concurring opinion stated: "Labor is free to turn its publicity on any labor oppression, substandard wages, employer unfairness, or objectionable working conditions. The employer, too, should be free to answer, and to turn publicity on the records of the leaders or the unions which seek the confidence of his men. . . . We are applying to Thomas a rule the benefit of which in all its breadth and vigor this Court denies to employers in the National Labor Relations Board cases." 323 U. S. 516, 547 (1945).

[23] *In re* Clark Bros., cited *supra* note 7, at p. 9 of the opinion, Board Member Reilly dissenting.

return to its old line of decisions on the theory that because there is some minor aspect of interference, a speech should be viewed as part of a 'pattern of coercive conduct.' . . ."[24]

4. While the courts, in the *Virginia Electric* and *American Tube Bending Co.* cases,[25] repudiated the earlier Board doctrine of employer neutrality, they did not repudiate any doctrine that the employer "did not have access to public media of expression," for no prior Board decision had dealt with the captive audience situation.

5. "Granted that this company, like most industrial concerns, has greater economic power than its own employees, such an analogy, when referring to an election contest undertaken by one of the most powerful CIO unions, is fallacious."[26]

Before analyzing the merits of the contentions of the majority and dissenting Board members in the principal case, it will prove of value to note the only federal court decision in point at the date of this writing: *National Labor Relations Board v. Montgomery Ward and Co.*[27] decided in October, 1946, two months *after* the *Clark Brothers* case. This case disagrees with the result reached in the principal case. The facts were these: The Board petitioned the court for enforcement of an order[28] entered by it requiring the company to cease and desist from alleged unfair labor practices, to offer reinstatement with back pay to certain discharged employees, and to post appropriate notices. The Board found that the respondent had violated Section 8(1) of the Act[29] by (a) certain discriminatory discharges, (b) by certain anti-union isolated remarks made by minor supervisory employees over a fifteen months period, and (c) by speeches delivered a week before the election by the company's Labor Relations Manager to captive audiences on respondent's time and property. The speaker stated that a libel suit had recently been filed by the company against the CIO for certain false propaganda; that the company was unalterably opposed to the closed shop; that each employee was free to join the union; and that the respondent "stands ready at all times to bargain collectively with any union which has been selected by a majority of the employees in any bargaining unit."[30]

[24] *Id.* at p. 10 of the opinion, Board Member Reilly dissenting, citing *In re* Goodall Company, 68 N. L. R. B. 31 (1946); and *In re* Monumental Life Insurance Co., 67 N. L. R. B. 35 (1946).

[25] N. L. R. B. v. Virginia Electric and Power Co., and N. L. R. B. v. American Tube Bending Co., cited *supra* notes 17 and 16 respectively.

[26] *In re* Clark Bros., cited *supra* note 7, at p. 11 of the opinion, Board Member Reilly dissenting.

[27] 157 F. (2d) 486 (C. C. A. 8th, 1946).

[28] *In re* Montgomery Ward and Co., Inc., 64 N. L. R. B. 80 (1945).

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

[30] N. L. R. B. v. Montgomery Ward and Co., cited *supra* note 27 at 498. The full text of the speech is not appended to the opinion, but may be found more fully set out in the report of the Board, cited *supra* note 28.

The court found (1) that the discharges were for good cause and not discriminatory;[31] (2) that the remarks of the supervisory employees were to be regarded as their individual views " 'when, as here, an employer has clearly defined his attitude of noninterference . . . ,' "[32] and (3) that, therefore, the speech was to be considered only in the light of the captive audience situation, and when so considered it was constitutionally privileged by the First Amendment. The Board's argument that compulsory attendance at the meetings was a species of coercion was rejected by the court with these observations: (1) The employer certainly has the "right to meet . . . employees for discussion and presentation of matters of policy of mutual interest";[33] (2) the First Amendment is concerned with the freedom of thought and expression of the speaker or writer, not with the condition under which the auditor receives the message. Thus, the permission of the audience is not a condition precedent to the right of free speech under the First Amendment; (3) "speech is very frequently invoked as a means to persuade those who do not agree with the speaker and may not even wish to hear him";[34] (4) respondent employed a convenient means of communicating with its employees; the employees were paid and not "inconvenienced in the least"; (5) "free speech is not limited to ineffective speech"; (6) the occasion on which the employer elects to utter his thoughts is not to be considered as an element of coercion."[35]

It is submitted that the court's second statement as listed above makes an unwarranted assumption. That is, that the speech in its full setting is privileged and that the desire of the listeners to receive the information is of no importance. Thus, a speech privileged in the theater does not lose that protection because the audience desires not to hear certain remarks. But before we may reach this conclusion as to the constitutional protection of the speech we must first consider the conditions under which the auditor hears the speech as an element in determining its constitutional protection.[36] If "interference, restraint or

[31] N. L. R. B. v. Montgomery Ward and Co., cited *supra* note 27, at 496.

[32] *Id.* at 501, quoting National Labor Relations Board v. Brandeis and Sons, 145 F. (2d) 556, 567 (C. C. A. 8th, 1944).

[33] *Id.* at 499. *Cf.* Texas and New Orleans R. R. v. Brotherhood of Railway Clerks, 281 U. S. 548, 568 (1930), where the court said: "The meaning of the word 'influence' [replaced in the Wagner Act by the word "interference"] . . . is not to be taken as interdicting the normal relations and innocent communications which are a part of all friendly intercourse, albeit between employer and employee."

[34] N. L. R. B. v. Montgomery Ward and Co., cited *supra* note 27, at 499.

[35] *Id.* at 499. Certainly the Board interpretation that the privilege of an utterance is to be determined in its context would refute this conclusion. See note 6 *supra*. So likewise would the reasoning of the court in the *Virginia Electric* case, cited *supra* note 20.

[36] See the statement of Judge Learned Hand in *National Labor Relations Board v. Federbush Co.*, 121 F. (2d) 954, 957 (C. C. A. 2d, 1941) where it is said: "Words are not pebbles in alien juxtaposition; they have only a communal existence, and not only does the meaning of each impenetrate the other, but all in

coercion"[37] of employees is forbidden by the Act[38] and if the courts hold that coercion, whether by acts, utterances or a combination of both, is not privileged[39] by the First Amendment, then the question becomes, Is the captive audience labor speech a form of coercion? To use this factual approach to the problem would seem preferable to the doctrinaire approach used by the court in the *Ward* case.[40]

Reverting to the *Clark Brothers* decision[41] let us examine the several arguments there advanced by the Board.

First, the argument of the majority in the *Clark* case that the *American Tube Bending*[42] decision did not decide this particular issue concerning a captive audience appears to be inaccurate. In that case Judge Learned Hand, speaking for the court, held that a letter sent to the employees a few days before an election and a speech[43] delivered to a captive audience the night before the election in which the employer expressed his favoritism for an open shop, and appealed to the workers to support the management's policies did not constitute interference, restraint, and coercion in light of the *Virginia Electric* case.[44] It may be true, that, as the Board says, the question of the employer's captive audience speech was not presented to the court as an independent finding of the Board; yet, in harmony with the Board's own views that utterances do not stand alone but must be considered in their context, the court evidently viewed the question of the constitutionality in its whole setting, captive audience and all: ". . . it is necessary also to give the setting in which they [the speech and letter] were uttered. . . . The speech . . . was read by the president . . . on the eve of the election to three shifts of employees assembled in the factory. . . ."[45] Then, so as to leave no doubt, the court states: "The question may be divided into two parts: first, whether the statements in the letter and the speech uttered *at that time and under those circumstances* could be regarded as coercive at all [and if coercive were they privileged under the First Amendment]."[46] The effect of the captive audience upon the question

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."

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

[38] *Id.* §151-166 (1940 ed.).

[39] National Labor Relations Board v. Virginia Electric and Power Co., 314 U. S. 469 (1941).

[40] N. L. R. B. v. Montgomery Ward and Co., cited *supra* note 27.

[41] *In re* Clark Bros. Co., Inc., 70 N. L. R. B. No. 60, 18, 1360 LAB. REL. REP. (1946).

[42] N. L. R. B. v. American Tube Bending Co., cited *supra* note 16.

[43] The speech is discussed in footnote 20 *supra.*

[44] N. L. R. B. v. Virginia Electric and Power Co., cited *supra* note 17.

[45] N. L. R. B. v. American Tube Bending Co., cited *supra* note 16, at 994.

[46] *Ibid.*

of the coercive nature of the speech surely seems to have been considered by the court as a part of the "time and circumstances."

Another theory that the Board applies in the principal case, namely, that by the use of compulsion the employer obtained "exclusive access to its employees"[47] during working hours, may actually have been true. However, its significance must be measured in the light of the opportunities that organized labor has to present its case to the employees. For example, the employer is forbidden to prohibit union solicitation and activities on company property during non-working hours.[48] And as Board Member Reilly points out in his dissent, a powerful industrial union, as was there involved, has as much if not more ecnoomic power to influence the election than does the average industrial concern.[49]

One of the Board's principal justifications for finding interference, restraint, and coercion in the captive-audience speech is that the captive aspect of the audience was separable from the speech as such.[50] This idea is found in the concurring opinion of Mr. Justice Jackson in *Thomas v. Collins*[51] where he said:

"And if the employees or organizers associate violence or other offense against the laws with labor's free speech, or if the employer's speech is associated with discriminatory discharges or intimidation, the constitutional remedy would be to stop the evil, but permit the speech, if the two are separable; and only rarely and when they are inseparable to stop or punish speech or publication."[52]

The Board's conclusion on this point is in accord with the rule of *Budd Mfg. Co. v. National Labor Relations Board*[53] where a prior anti-labor attitude once purged was not allowed to subsequently form the context for an anti-labor speech.

[47] *In re* Clark Bros., cited *supra* note 7, at p. 3 of the opinion.

[48] Republic Aviation Corp. v. National Labor Relations Board, 142 F. (2d) 193 (C. C. A. 2d, 1944), *affirmed*, 324 U. S. 793 (1945); National Labor Relations Board v. Le Tourneau Co. of Georgia, 143 F. (2d) 67 (C. C. A. 5th, 1944), *reversed*, 324 U. S. 793 (1945).

[49] *In re* Clark Bros., cited *supra* note 7, at p. 11 of the opinion.

[50] *In re* Clark Bros., cited *supra* note 7, at p. 3 of the opinion.

[51] 323 U. S. 516 (1945).

[52] *Id.* at 547. *Cf.* Milk Wagon Drivers Unions of Chicago, Local 753 v. Meadowmoor Dairies, Inc., 312 U. S. 287, 132 A. L. R. 1200 (1940); Nann v. Raimist, 255 N. Y. 307, 147 N. E. 690, 73 A. L. R. 669 (1931) (opinion by Judge Cardozo).

[53] 142 F. (2d) 922 (C. C. A. 3d, 1944). *Cf.* National Labor Relations Board v. Reliance Mfg. Co., 143 F. (2d) 761 (C. C. A. 7th, 1944); National Labor Relations Board v. American Laundry Machinery Co., 152 F. (2d) 400 (C. C. A. 2d, 1945); National Labor Relations Board v. American Manufacturing Co., 132 F. (2d) 740 (C. C. A. 5th, 1943); National Labor Relations Board v. M. E. Blatt Co., 143 F. (2d) 268 (C. C. A. 3d, 1944), *cert. denied*, 323 U. S. 744 (1944). See also 2 TELLER, LABOR DISPUTES AND COLLECTIVE BARGAINING (supplement 1946) §252, n. 60j.

For a discussion of the rule against prior restraint of freedom of speech as decided in the leading case of *Near v. Minnesota*, see Notes (1931) 31 COL. L. REV. 1148; 17 CORN. L. Q. 126; 40 YALE L. Q. 967, 968.

Previous to the *Clark Brothers* case numerous captive audience situations came before the Board and courts, but the issue of captive audience plus an otherwise privileged speech was never independently dealt with. They are valuable, however, to show the Board's reasoning on the captive audience situation. The results reached, in general, were that the speeches were either (1) coercive and unprivileged *per se*,[54] (2) coercive because of a background of other unfair practices,[55] or (3) privileged.[56] The first classification, coercive *per se*, is illustrated by the case of In re *Twin City Milk Producers Association*[57] where the Board found the employer's speech coercive on its face, and said:

"Delivered in a setting where the listeners were economically dependent upon, and compelled to give heed to, the speaker, the whole tenor of the speech [was coercive]."[58]

The case of In re *Thompson Products, Inc.*,[59] illustrates the Board's view where a speech is delivered to a captive audience and raised to the position of coercion by other conduct. The Board in that case said:

"In view of the economic dependence of the listeners upon [the company] . . . and in view of the compulsion upon the listeners to give heed, the adjurations . . . passed from the realm of free competition of ideas envisaged by the First Amendment. When viewed against the general atmosphere of hostility to outside unions engendered by publications, [the speeches] were bound . . . to interfere with the free choice of the employees."[60] The election was set aside.

The case of In re *Oval Wood Corp.*[61] illustrates the third holding of the Board in the past captive audience cases. Here the employer on the eve of the election contrasted the negative aspects of union membership with the company's past generosity, and questioned the assistance of "total strangers." The Board concluded that the speech was privileged, saying:

[54] Cases in this category are: *In re* Pioneer Electric Co., 70 N. L. R. B. 59 (1946); *In re* Van Raalte, Inc., 69 N. L. R. B. 1326 (1946); *In re* Twin City Milk Producers Association, 61 N. L. R. B. 69 (1945); National Labor Relations Board v. Luxuray, Inc., 123 F. (2d) 106 (C. C. A. 2d, 1941). See note 5 *supra*.

[55] *In re* Jordanoff Aviation Corp., 69 N. L. R. B. 1189 (1946); *In re* Monumental Life Ins. Co., 67 N. L. R. B. 244 (1946); *In re* Winona Knitting Mills, Inc., 67 N. L. R. B. 1 (1946); *In re* Grove Regulator Co., 66 N. L. R. B. No. 135 (1946); *In re* H. Linsh and Co., 62 N. L. R. B. 276 (1945); *In re* Thompson Products, Inc., 60 N. L. R. B. 1381 (1945); National Labor Relations Board v. Quality Service Laundry Co., 131 F. (2d) 182 (C. C. A. 4th, 1942), *cert. denied*, 318 U. S. 775 (1943); National Labor Relations Board v. Sunbeam Electric Mfg. Co., 133 F. (2d) 856 (C. C. A. 7th, 1943). See note 6 *supra*.

[56] Cases in this category are: *In re* Republic Drill and Tool Co., 66 N. L. R. B. No. 96 (1946); *In re* Oval Wood Dish Corp., 62 N. L. R. B. 1129 (1945); Diamond T Motor Car Co. v. National Labor Relations Board, 119 F. (2d) 978 (C. C. A. 7th, 1941). See note 11 *supra*.

[57] 61 N. L. R. B. 69 (1945).

[58] *Id.* at 83.

[59] *In re* Thompson Products, Inc., 60 N. L. R. B. 1381 (1945).

[60] *Id.* at 1386.

[61] 62 N. L. R. B. 1129 (1945).

". . . the respondent made no threat . . . and coupled its statement of preference with clear expressions assuring the employees that [he] would not resort to reprisal to retaliate against any exercise of any right guaranteed in the Act. Under the doctrine of the *American Tube Bending* case, such conduct fell within the guaranty of free speech and is not a violation of the Act."[62] From a reading of the previous captive audience cases this conclusion seems warranted: The significance attached by the Board to the coercive element in the captive audience situation has thus run the whole gamut. The reasoning of the *Clark Brothers* case[63] is at best difficult to reconcile with that of a case like *Thompson Products* decision[64] and is completely at odds with such a view as taken in the *Oval Wood Corp.* case.[65]

The Board's finding that the captive audience as a fact added the element of coercion to an otherwise presumably privileged speech would not seem in keeping with (1) the extent to which Congress apparently intended that the employer should be allowed to speak to his employees on organizational matters, and (2) extensive constitutional protection to language given by the First Amendment. As to (1), above, it clearly appears that Congress was aware of the judicial interpretation of the Railway Labor Act (the legislative forerunner of the Wagner Act), as to the clause used therein "interference, influence, and coercion,"[66] and being cognizant of such interpretation intended to extend its liberal application even further in the Wagner Act as regard to the employer's right to speak on labor matters.[67] As to (2), above, the recent Supreme

[62] *Id.* at 1138.
[63] Cited *supra* note 7.
[64] Cited *supra* note 59.
[65] Cited *supra* note 61.
[66] RAILWAY LABOR ACT, 44 STAT. 577 (1926), 45 U. S. C. §152 (1940).
[67] The Supreme Court in *Texas and New Orleans R. R. v. Brotherhood of Railway and Steamship Clerks*, 281 U. S. 548 (1930), had interpreted the Railway Labor Act Section, which stated: "Representatives for the purposes of this Act, shall be designated by the respective parties . . . without interference, influence or coercion exercised by either party over the self-organization of representatives by the other," (RAILWAY LABOR ACT OF 1926, 44 STAT. 577 §2(3) (1926), 45 U. S. C. §152 (1940)), as meaning: ". . . 'Interference' with freedom of action and 'coercion' refer to well understood concepts of law. . . . 'Influence' in this context plainly means pressure, the use of authority or power of either party to induce action by the other in derogation of what the statute calls 'self-organization.' The phrase covers the abuse of relation or opportunity so as to *corrupt or override the will*. . . ." Texas and New Orleans R. R. v. Brotherhood, *supra* at 568, italics added.

Before the Senate Committee on Education and Labor on S. 1958 (SEN. REP. No. 573, 74th Cong., 1st Sess. (1935)) which eventually became the National Labor Relations Act, Senator Walsh, its Chairman, explained the omission of the word "influence": "I do not think there is anything in this bill to prevent an employer . . . from posting a notice, or writing . . . or personally stating to each [employee] that he thinks their best interest is to form a company union . . . that he is violently opposed to [some organizer] who is attempting to organize a union . . . that is why we struck out the word 'influence.'"

See Salny, *"Free Speech" Under the National Labor Relations Act* (1940-1941) LAW SOC. JOURNAL, 414, 425. See also note: (1945) 14 FORDHAM LAW REV. 59, 78.

Court decisions of *Thomas v. Collins*[68] and *Thornhill v. Alabama*[69] on the closely parallel situation of the employee's freedom of speech in picketing and other labor matters would seem to indicate that the Board's narrow construction of what constitutes coercive speech in the principal case is not in harmony with the constitutional protection extended labor's activities.[70]

Admittedly, the constitutional protection to speech is not an absolute one.[71] One may not under the guise of free speech falsely shout fire in a theater.[72] Nor may one speak or publish obscene matter where prohibited by statute.[73] The advocacy of violence or unlawful means to accomplish a political result may be constitutionally prevented.[74] Likewise, in the field of economic competition Congress may impose limitations upon utterances which by their coercive nature actually deprive employees of their right of collective bargaining. But it is submitted that the definition of interference, restraint or coercion[75] can only be

[68] 323 U. S. 516 (1945).

[69] 310 U. S. 88 (1940). The court has used language in this case and the *Thornhill* case, cited *supra* note 68, which might indicate an unwillingness to follow the Board's restricted interpretation of the constitutional protection extended the employer's speech in the *Clark Brothers* case, cited note 7 *supra*. For example consider these statements:

"The idea is not sound therefore that the First Amendment's safeguards are wholly inapplicable to business or economic activity.

". . . in the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution. . . . The right thus to discuss, and inform people concerning, the advantages and disadvantages of unions and joining them is protected . . . as part of free speech. . . .

". . . whatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, must have clear support in public danger, actual or impending. Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation. It is, therefore, in our tradition to allow the widest room for discussion, the narrowest range for restriction." Thomas v. Collins, 323 U. S. 516, 530-532 (1945).

"Abridgment of the liberty of such discussion can be justified only where the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion." Thornhill v. Alabama, 310 U. S. 88, 104 (1940).

[70] Other cases giving extensive protection to picketing under the First Amendment are: American Federation of Labor v. Swing, 312 U. S. 321 (1941); Carlson v. California, 310 U. S. 106 (1940). *Cf.* Carpenters and Joiners Union of America, Local No. 213 v. Ritter's Cafe, 315 U. S. 722 (1940); Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies, Inc., 312 U. S. 287 (1941).

See Teller, *Picketing and Free Speech* (1942-43) 56 HARV. L. REV. 180, for an excellent argument opposing the inclusion of picketing under the protection of the First Amendment. The opposite view is taken in an able presentation by Dodd, *Picketing and Free Speech: A Dissent* (1942-43) 56 HARV. L. REV. 513.

[71] Frohwerk v. United States, 249 U. S. 204 (1919), where the statement is made that the First Amendment "cannot have been, and obviously was not, intended to give immunity for every possible use of language."

[72] "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic." Schenck v. United States, 249 U. S. 47, 52 (1919).

[73] Williams v. State, 130 Miss. 827, 94 So. 882 (1923).

[74] Gitlow v. People of State of New York, 268 U. S. 652 (1925).

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

extended to the point, as applied to utterances, where there is clear and present danger[76] that such utterances unless restrained will deny the employees rights guaranteed by the Act.[77] From the words of one court it would appear that all speech by the employer is protected "unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion."[78]

Undoubtedly, a privileged speech delivered to a captive audience under certain unusual circumstances and over objections of the employees might clearly constitute coercion and thereby lose its constitutional protection. But the Board's finding as a fact that a speech, regardless of its privileged nature standing alone, delivered to a captive audience thereby becomes coercive and ceases to be privileged seems an unwarranted denial of freedom of speech and a departure from the traditional interpretation of the First Amendment.

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**Federal Income Taxation—Dividend Income—Accrual Accounting**

In July, 1946, the Circuit Court of Appeals for the Seventh Circuit in the case of *Commissioner of Internal Revenue v. American Light and Traction Company*[1] held that a dividend declared in 1937 to stockholders of record at specified date in December, 1937, and payable in January, 1938, was taxable as income in 1938, when paid in 1938, *regardless of whether the stockholder was on an "accrual basis" or on a "cash basis."* The court concluded that the date of actual receipt, and not the date of declaration, determined the taxability of the income. The commissioner's contention throughout that the "record date" should be controlling brought no comment from the court other than that this was the first time such a theory had been urged.

The cases on this precise point are few. The decision in the principal case followed primarily that of *Tar Products Corp. v. Commissioner*[2] decided in September, 1942, which had overruled a Board of Tax

[76] The "clear and present danger" test as generally applied by the courts in freedom of speech cases was first used by Mr. Justice Holmes speaking for a unanimous court in *Schenck v. United States*, 249 U. S. 47 (1919). It has since been used in a series of important cases: Abrams v. United States, 250 U. S. 616 (1919) (Holmes, J., dissenting); Schaefer v. United States, 251 U. S. 466 (1920) (Brandeis, J., dissenting); Pierce v. United States, 252 U. S. 239 (1920) (Brandeis, J., dissenting); Gitlow v. People of New York, 268 U. S. 625 (1925) (Holmes, J., dissenting); Whitney v. California, 274 U. S. 357 (1927) (concurring opinion by Brandeis, J.); People v. Garcia, 37 Cal. App. (2d) 753, 98 P. (2d) 265 (1939); Cantwell v. Connecticut, 310 U. S. 296 (1940). For more recent cases see note 70 *supra*.

[77] 49 STAT. 449 (1935) 29 U. S. C. §151-166 (1940 ed.).

[78] Mr. Justice Brandeis in Whitney v. California, 274 U. S. 357, 377 (1927).

[1] 156 F. (2d) 398 (C. C. A. 7th, 1946).

[2] 130 F. (2d) 866 (C. C. A. 3rd, 1942).