California Law Review

Volume 34 | Issue 2 Article 5

June 1946

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California Law Review

Published Quarterly throughout the Year by Students of the School of Jurisprudence of the University of California, Berkeley, California. Indexed in Index to Legal Periodicals, Public Affairs Information Service and in Current Legal Thought.

Subscription Price, $3.50 Current Single Copies, 90 Cents

Comment

LABOR LAW: EMPLOYERS' RIGHT OF FREE SPEECH UNDER N.L.R.A.

THE PROBLEM

In 1935 Congress passed the National Labor Relations Act[1] committing the government to a policy of protecting the collective bargaining principle and the right of labor freely to organize. Pursuant to this objective section 8 states: "It shall be an unfair labor practice for an employer (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 of this title. (2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it." This provision is similar to one contained in the Railway Labor Act of 1926,[2] concerning which the Supreme Court said, " 'Influence' in this context plainly means pressure, the use of the authority or power of either party to induce action by the other in derogation of what the statute calls 'self organization' . . . . Freedom of choice in the selection of representatives on each side of the dispute is the es-

[1] 49 STAT. (1935) 449, 29 U.S.C. (1940) § 151.
[2] 44 STAT. (1926) 577, 45 U.S.C. (1940) § 151.

sential foundation of the statutory scheme."[3] That the fundamental purpose of the N.L.R.A. is the same—freedom in the selection of the bargaining agent—has been reaffirmed by the courts many times.[4] A typical statement by the Court is: "The history of the Act and its language show that its ruling purpose was to protect interstate commerce by securing to employees the rights established by § 7 to organize, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for that and other purposes . . . . To secure to employees the benefits of self organization and collective bargaining through representatives of the employees own choosing, the Board was authorized by § 10(c) to order the abandonment of unfair labor practices and to take affirmative action which would carry out the policy of the Act."[5]

The First Amendment to the Constitution says, "Congress shall make no law . . . abridging the freedom of speech or of the press . . . ." A problem was immediately posed when the National Labor Relations Board charged an employer with violating the Act by something which he said and something which he published. The Board charged the employer with interference and/or dominance, an unfair practice under section 8(1) and/or (2); the employer countered by charging the Board with abridging his exercise of the constitutional right of free speech.[6]

The problem for the Court was not new. It was essentially the problem of construing a statute so as to preserve the statutory purpose without violating the individual freedom involved. The Court had met this situation in many fields: anarchy statutes;[7] censorship of mails;[8] parade regulations.[9] Another aspect of the labor field itself became the center of a controversy, the Court holding peaceful, truthful picketing to be "within that area of free discussion that is guaranteed by the Constitution"[10] but holding that when picketing became violent it assumed the character of coercion and was no longer protected by the Constitution.[11] In deciding these cases and the cases under the N.L.R.A. the Court laid down certain formulae and rules.

Following the lead of Justice Brandeis, the Court has universally

[3] Texas and N. O. R. Co. v. Ry. Clerks (1930) 281 U. S. 548, 568, 569.

[4] N.L.R.B. v. Newport News Co. (1939) 308 U. S. 241, 251.

[5] N.L.R.B. v. Greyhound Lines (1938) 303 U. S. 261, 265, 267.

[6] N.L.R.B. v. Union Pacific Stages (C.C.A. 9th, 1938) 99 F. (2d) 153, 178.

[7] Whitney v. California (1927) 274 U. S. 357.

[8] Milwaukee Pub. Co. v. Burleson (1921) 255 U. S. 407.

[9] Cox v. New Hampshire (1941) 312 U. S. 569.

[10] Thornhill v. Alabama (1940) 310 U. S. 88, 102.

[11] Milk Wagon Drivers v. Meadowmoor Co. (1941) 312 U. S. 287, 293. Similarly, even peacefnl picketing was held not to be protected when conducted in a situation in which a state, pursuant to its police power, properly could prohibit such activity. Carpenters Union v. Ritter's Cafe (1942) 315 U. S. 722.

held that to justify an abridgment or limitation of free speech there must be found a clear and present danger that the speech will bring about the substantive evils that Congress or the state has a right to prevent.[12] The clear and present danger involved under the N.L.R.A. would be the danger to the collective bargaining principle.[13] It has been held that speech, to be the speech protected by the Constitution, must be an appeal to reason and not to fear. It must be an approach to the intellect and not be coercive in nature, the latter being a verbal act which may be proscribed.[14] Along with the last may be added another principle: speech otherwise free may be limited by associating it with other acts which give to it the character of coercion, thereby transforming it into a verbal act.[15]

It is the purpose of this comment to discuss the specific problems involved in the application of these principles to the N.L.R.A. (1) What speech is absolutely prohibited an employer? (2) If the employer may voice his opinion in a labor matter to his employees, when and under what circumstances may he do so? (3) How have the Board and the courts dealt with the apparently conflicting purposes of the statute and the Constitution? (4) What problems of law remain to be solved in this field, and what is the best solution of them?

SPEECH: PER SE COERCIVE

The clearest example of speech that falls into the category of an illegal verbal act is speech that by word or symbol contains a threat. The threat may be of outright discharge for union activity,[16] or a threat to withdraw from the employees the "welfare" benefits they are receiving, if the union gets in.[17] The warning may not be so obvi-

[12] Taylor v. Mississippi (1943) 319 U.S. 583, 589; Thomas v. Collins (1944) 323 U.S. 516, 529; Note (1943) 146 A.L.R. 1017, 1025; for a comprehensive discussion of free speech in general, see Note (1941) 29 CALIF. L. REV. 366.

[13] N.L.R.B. v. Pick Mfg. Co. (C.C.A. 7th, 1943) 135 F. (2d) 329, 331; Note (1943) 146 A.L.R. 1026.

[14] Milk Wagon Drivers v. Meadowmoor, *supra* note 11; Van Dusen, *Freedom of Speech and the National Labor Relations Act* (1940) 35 ILL. L. REV. 409, 411.

[15] Thomas v. Collins, *supra* note 12, at 537 and concurring opinion by Justice Jackson, at 547.

[16] Valley Mould and Iron Corp. v. N.L.R.B. (C.C.A. 7th, 1940) 116 F. (2d) 760, 762, *cert. den.*, (1941) 313 U.S. 590, "If this business is not stopped someone is going to be asked to take a vacation"; N.L.R.B. v. Colton (C.C.A. 6th, 1939) 105 F. (2d) 179, 181; N.L.R.B. v. Clarksburg Pub. Co. (C.C.A. 4th, 1941) 120 F. (2d) 976, 979; N.L.R.B. v. Jahn & Ollier Engraving Co. (C.C.A. 7th, 1941) 123 F. (2d) 589, 593; N.L.R.B. v. Faultless Caster Corp. (C.C.A. 7th, 1943) 135 F. (2d) 559, 561.

[17] Big Lake Oil Co. v. N.L.R.B. (C.C.A. 5th, 1945) 146 F. (2d) 967, 969, 970. In this case the assistant superintendent had stated that "if this union business come up . . . that they might do away with the hospital, and bonus and all." Previously at a meeting of the employees he had asked whether there was any law which required the company to give a Christmas bonus or maintain a hospital and swimming pool. The court agreed with the Board that these questions were calculated to intimidate since they suggested

ous; it may be more subtle but nevertheless just as effective in its intended effect to forestall the union. Examples of such statements include those to the effect that: the company will close down the plant if the union comes in;[18] the plant will move out of town if unionization is accomplished;[19] no work will be available at the La Grange plant to members of the A.F.of L., the company will not go along with the A.F.of L.;[20] the president would rather close the plant than deal with outside labor organizations;[21] or, the more devious statement that the company will not bargain with the union even if it does obtain a majority, this made in the hope that the employees will feel that it would be hopeless to vote for the union anyway.[22] This last threat is usually accompanied by an emphasis on the point that the Act does not force the company to come to an agreement with the union, which is true enough, but the obvious effect is to leave with the employee the feeling that the company will not bargain and that no one can force it to bargain.

Some speech which is innocuous on its face may be a thinly disguised threat, the plain meaning of which none of the employees can miss. Speaking of a letter sent by the company to each employee, the third circuit court pointed out in *N.L.R.B. v. Trojan Powder Co.*[23] that "The last letter, which called for the no strike statement, is certainly capable of being understood to suggest that unless such statement were forthcoming from the employee group there would not be new work at the plant, even though the words are chosen with a fine

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that these benefits might be withdrawn. In the case of *In re* Shartle Bros. Machine Co. (1945) 60 N.L.R.B. 533, 534, 535, both the vice-president of the company and the assistant superintendent warned of loss of privileges if the union came in.

[18] N.L.R.B. v. New Era Die Co. (C.C.A. 3rd, 1941) 118 F. (2d) 500, 503; N.L.R.B. v. Asheville Hosiery Co. (C.C.A. 4th, 1939) 108 F. (2d) 288, 290, 291; Rapid Roller v. N.L.R.B. (C.C.A. 7th, 1942) 126 F. (2d) 452, 455; N.L.R.B. v. American Pearl Button Co. (C.C.A. 8th, 1945) 149 F. (2d) 311, 314.

[19] N.L.R.B. v. Faultless Caster Corp., *supra* note 16; but see Diamond T Motor Car Co. v. N.L.R.B. (C.C.A. 7th, 1941) 119 F. (2d) 978, 979, where an identical statement was discounted because the listener did not appear to heed the warning; the company had no anti-labor history; and the vice-president later assured the employees that they could do as they wished.

[20] N.L.R.B. v. Aluminum Products Co. (C.C.A. 7th, 1941) 120 F. (2d) 567, 571.

[21] N.L.R.B. v. Auburn Foundry (C.C.A. 7th, 1941) 119 F. (2d) 331, 335; see also N.L.R.B. v. Sunbeam Electric Mfg. Co. (C.C.A. 7th, 1943) 133 F. (2d) 856, 860.

[22] N.L.R.B. v. Sunbeam Electric, *ibid.* at 860 ". . . and the repeated assertion that if the union won the election the company would go on as before, in effect ignoring the union as a bargaining agent, were calculated to intimidate the employees"; *In re* Julius Cohn (Comas Mfg. Co.) (1944) 59 N.L.R.B. 208, 209, "The respondent then went on to state, in effect, that he would never agree to a closed shop even if the Union were selected by the employees as their exclusive bargaining representative. Such a statement . . . is itself unlawful for it bespeaks a determination not to bargain with the Union on so vital a matter as the closed shop, 'a frequent subject of negotiations between employers and employees'."

[23] (C.C.A. 3rd, 1943) 135 F. (2d) 337, 339, *cert. den.*, (1943) 320 U.S. 768.

sense of Victorian delicacy." Typical of such statements is one listed by the Board in *In re Tomlinson of High Point, Inc.*[24] as being evidence of coercion. The company wound up an anti-union article with the admonition to its employees that, ". . . the first high wind that comes along will blow you away, and probably you will never know why." Other statements found by the courts to be threatening include: a statement by the vice-president to employees that the company had stiff competition which it had to meet, and that materials and wages must be in line;[25] the statement that "the ones that sign it [a revocation of the union as the bargaining agent] will be the ones that will get the gravy around the shop."[26]

A second type of speech which, if it will not of itself support a charge of interference, will be strong evidence of interference, is that which may be called untruth or colored truth. This type of speech or publication emphasizes certain facts and distorts their real meaning by passing over lightly, or omitting entirely, other facts. Examples of this type include statements: misinterpreting, in an article in the house organ, the Supreme Court's decision upholding the N.L.R.A. in 1937;[27] misleading the employees into believing they were already engaging in the collective bargaining contemplated by the Act;[28] implying that a strike would result and that men could not be transferred among departments, thereby necessitating lay-offs;[29] listing the benefits voluntarily given and asking the employees to check to see whether their union friends in other plants were getting such treatment, (these statements were contained in a letter circularized the day before the election; the Board thought that it went further than appealing to employee loyalty and justified an inference that in the event a union were formed these voluntary benefits would be withdrawn);[30] telling negro employees that the A.F.of L. was unfriendly

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[24] (1944) 58 N.L.R.B. 982, 994.

[25] N.L.R.B. v. W. A. Jones Foundry & Machine Co. (C.C.A. 7th, 1941) 123 F. (2d) 552, 553.

[26] N.L.R.B. v. New Era Die Co., *supra* note 18, at 503.

[27] *In re* R. R. Donnelley & Sons Co. (1945) 60 N.L.R.B. 635, 636, "In an article appearing in the respondent's official house organ, . . . and in a letter addressed to respondent's employees, . . . the respondent interpreted the Supreme Court's opinion in an unfair and distorted manner which was designed to, and which did, leave the employees with the impression that the Act in practical application was meaningless and that therefore it was to their best interest not to organize."

[28] *In re* Tomlinson of High Point, *supra* note 24, at 983.

[29] N.L.R.B. v. Sunbeam Electric Mfg. Co., *supra* note 21, at 859.

[30] Peter J. Schweitzer, Inc. v. N.L.R.B. (App. D.C. 1944) 144 F. (2d) 520. There the court was not so certain this was interference, holding that a company could remind its employees of benefits they were receiving from the company. However, it ordered the company to post a notice that the benefits would not be withdrawn.

to negroes;[31] and lastly, telling employees that the Board could not make them join a union, and proceedings would not interfere with the policies of the company.[32] From these examples the conclusion is not to be drawn that inaccuracies or even outright lies will alone support a charge of coercion. What is indicated is that such statements along with other factors can be used as evidence of company attitude or interference.

A third type of speech which, at least in the opinion of the Board and certain circuits, does not receive the protection of the First Amendment is that of intemperate name-calling by the employer. Typical statements are those to the effect that: union organizers are agitators, spies, traitors, saboteurs;[33] the union is a bunch of racketeers;[34] organizers are two-timers, organization is sowing seeds of dissension while you are away (contained in a letter from the company to employees in the service which came to the attention of the men in the plant);[35] C.I.O. are Communists and thugs "who would get your money and wouldn't do you any good."[36] That the factor of mildness or violence of the language used is an important element in the Board's decisions is indicated in the case of *In re Agar Packing and Provision Corp.*,[37] the Board distinguishing the leading case of *American Tube Bending Co. v. N.L.R.B.*,[38] wherein the employer was exonerated of the charge of interference. The Board said that the *American Tube* case ". . . is distinguishable not only because no coercive course of conduct was there established in the light of which the letter and speech . . . could be properly appraised, but also because [the] letter and speech . . . [were] 'temperate in form,' and the employer made it clear . . . that he would loyally abide by the results at the polls."[39]

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[31] N.L.R.B. v. Arcade-Sunshine Co. (App. D.C. 1940) 118 F. (2d) 49, 50, *cert. den.*, (1940) 313 U. S. 567. In a talk to forty of the company's negro employees during an organizational campaign a speaker for the company "cautioned them against haste in deciding what organization to join and . . . told them of 'the former attitude of the American Federation of Labor toward negroes which had not been friendly'."

[32] *In re* Jahn & Ollier Engraving Co. (1940) 24 N.L.R.B. 893.

[33] *In re* Donnelley & Sons Co., *supra* note 27; *In re* Agar Packing and Provision Corp. (1944) 58 N.L.R.B. 738, 744.

[34] N.L.R.B. v. Federbush (C.C.A. 2d, 1941) 121 F. (2d) 954, 955.

[35] *In re* Shartle Bros. Machine Co., *supra* note 17, at 542-546.

[36] N.L.R.B. v. Auburn Foundry, *supra* note 21.

[37] *Supra* note 33.

[38] (C.C.A. 2d, 1943) 134 F. (2d) 993, *cert. den.*, (1943) 320 U. S. 768.

[39] *Supra* note 33, at 744, n. 18. But in this connection see language in N.L.R.B. v. J. L. Brandeis & Sons (C.C.A. 8th, 1944) 145 F. (2d) 566, "One may descend to vilification, false statement or exaggeration and still be protected in his right of free speech." Also note an interesting cross reference at this point to the recent problem before the Court as to whether untruthful or inflammatory statements on the picket line are protected by freedom of speech. Cafeteria Union v. Angelos (1943) 320 U. S. 293.

Whether speech standing alone will be held to be coercive seems to depend on the answer found by the court to the question: would it reasonably tend to subvert the free will of the employees or the employee in the choice of a bargaining agent? The most obvious of this type of case is the first listed above. In these expressions, the Board and courts find not free speech in the constitutional sense, but verbal acts which undermine the purposes of the Act and are therefore illegal.

Conflicting views immediately arose under the Act as to whether even a mere opinion, expressed by an employer to his employees, would be interference and therefore interdicted by section 8. The theory against allowing an employer to say anything, however temperate and impartial, was that the employee fearing for his job would accept any opinion or indication of preference by his employer as a direct command which he had better obey. While this probably has never been the rule of the courts or the Board, much language in their opinions would give that impression on a cursory reading. Impetus was given to this idea by the often-quoted statement from *International Ass'n of Machinists v. N.L.R.B.* that "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."[40] This was cited with approval in *N.L.R.B. v. Link-Belt Co.*[41] but in neither case did the charge rest on anything as flimsy as a slight suggestion nor even on utterances alone, and it seems safe to say that at no time was the Court really called upon to consider whether employer-opinion, without more, was interference.[42]

The attitude of the Board was more limiting of the employer's right to anti-union expression than that of some of the courts, prior to the case of *Virginia Electric Co. v. N.L.R.B.*[43] Moreover, this attitude seemed to have had the blessing of the Supreme Court in the *International Ass'n of Machinists* and *Link-Belt* cases already referred to. At no time, however, did the Board flatly deny that the employer had a right to express an opinion; on the contrary, in the majority of cases the Board expressly recognized it but found that due to other circumstances the opinion (if that was all it was) amounted to restraint.[44] The circuit courts had entertained various views on the

[40] (1940) 311 U.S. 72, 78.

[41] (1940) 311 U.S. 584, 598.

[42] Edward G. Budd Mfg. Co. v. N.L.R.B. (C.C.A. 3rd, 1944) 142 F. (2d) 922, 927.

[43] (1941) 314 U.S. 469 (remanded for further finding); (1943) 319 U.S. 533 (Board order affirmed).

[44] *In re* Ford Motor Co. (1939) 14 N.L.R.B. 346, 379; (1940) 23 N.L.R.B. 342, 353; (1940) 23 N.L.R.B. 548, 568; Daykin, *The Employer's Right of Free Speech in Industry under the National Labor Relations Act* (1945) 40 ILL. L. REV. 185, 187.

problem. One approach was represented by *N.L.R.B. v. Ford Motor Co.*[45] where it was held that the employer had a right to express an opinion, and that that right was absolute. Another view was typified by *N.L.R.B. v. Federbush*[46] wherein it was said that in view of the employer-employee relation almost any expression of preference by the employer might be deemed interference. The employer must remain absolutely neutral. As indicated, the leading Supreme Court decision of *Virginia Electric Co. v. N.L.R.B.*[47] has resolved this variance in view to a large degree.

In that case the utterances in question were a bulletin posted by the company and speeches by high company officials. The bulletin stressed the previous happy relationship of the employees and the management, recognized the right of every employee to join any union he might wish, emphasized that employees did not have to join any labor organization, and appealed for individual bargaining. The speeches made later, when organization of some sort seemed probable, explained that in fairness to all employees, bargaining should be done by an organized group, quoted the N.L.R.A. as to the right of self-organization, and asked that employees set up their own organization to facilitate negotiations (implying that it be unaffiliated with existing unions). These utterances were laid in a history of anti-union conduct by the company, warnings of discharge for union activity, quick formation of an Independent, and company activity in helping the Independent. Upon the basis of these findings and the entire record in the case the Board concluded that the company had committed unfair labor practices within the meaning of section 8(1), (2), (3) of the Act. The Board in addition specifically found that the bulletin and speeches themselves interfered with, restrained, and coerced the company's employees in the exercise of their rights guaranteed by section 7 of the Act. The company raised the defense of free speech.

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[45] N.L.R.B. v. Ford Motor Co. (C.C.A. 6th, 1940) 114 F. (2d) 905, 914, *cert. den.*, (1941) 312 U.S. 689. In this case the company had a violent anti-union background and there were other coercive acts besides the temperate but persuasive publications. The court rejected the Board's specific finding that the publications were coercive, holding in effect that the privilege of free speech was an absolute defense and that the employer could only be charged with acts.

[46] N.L.R.B. v. Federbush Co., *supra* note 34, at 957. In this case it was held that as far as the speech disclosed the wishes of the employer it had a force independent of persuasion. "What to an outsider will be no more than the vigorous presentation of a conviction, to an employee may be the manifestation of a determination which it is not safe to thwart. The Board must decide how far the second aspect obliterates the first." Note the opinion of this same Justice, after the Virginia Electric case, in N.L.R.B. v. American Tube Bending Co., *supra* note 38. For the view that the employer must maintain strict neutrality, see Valley Mould and Iron Corp. v. N.L.R.B., *supra* note 16, at 764; and Sunbeam Electric case, *supra* note 21, at 860; *In re* Midland Steel Products Co. (1939) 11 N.L.R.B. 1214, 1218.

[47] *Supra* note 43.

On the first hearing the Supreme Court sustained the defense as far as the bulletin and speeches standing alone were concerned saying: "It is clear that the Board specifically found that those utterances were unfair labor practices and it does not appear that the Board raised them to the stature of coercion by reliance on the surrounding circumstances. If the utterances are thus to be separated from their background, we find it difficult to sustain a finding of coercion with respect to them alone."[48] Thus in this case the Supreme Court laid down the principle that the Act does not enjoin "the employer from expressing its view on labor policies or problems, nor is a penalty imposed upon it because of any utterances which it has made. . . . The employer in this case is as free now as ever to take any side it may choose on this controversial issue."[49] But, it adds that the speeches might be deemed coercive when considered in connection with other acts or circumstances. This the Board could find, but the Court did not believe that it was clear in this case that it had done so. At the second hearing the Board reformed its findings, making clear that it considered the speeches and bulletin as part of a complex of activities constituting coercion. The Board's order then was affirmed, the Supreme Court stating, "While the bulletin of April 26 and the speeches of May 24 are still stressed, they are considered not in isolation but as part of a pattern of events adding up to the conclusion of domination and interference."[50]

ASSOCIATED ACTS MAKING SPEECH COERCIVE

What is such "pattern of events" which, as pointed out in the introduction, makes speech which is otherwise lawful lose its constitutional protection and become actionable under the Act? One type of condition which might justify a finding of interference when speech is involved is an anti-labor history on the part of the company. The theory is that the employees, already having seen what the company has done, are not in a position to receive an appeal to the intellect. They listen to the arguments with the prior knowledge that the company has fought the union, and so they are half-intimidated already though the speeches themselves may be temperate and in noncoercive terms. The Board has pointed out many times that, "In the light of . . . the entire record, which portrays the systematic employment . . . of unfair labor practices directed against the Union, we find that the respondent, by distributing to its employees 'Viewpoint on Labor,'

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[48] *Ibid.* at 479.

[49] *Ibid.* at 477.

[50] *Ibid.* at 539 (affirming the Board's finding and order).

has interfered with . . ."[51] the exercise of employees' rights guaranteed by the Act.

Another type of pattern which might transform speech into a proscribed verbal act is furnished by the surrounding circumstances or what might be called the setting in which the speech is laid. Much akin in effect to the anti-labor history mentioned above is this anti-labor atmosphere which has been held by the Court to be a governing factor inasmuch as such concurrent acts as discriminatory discharges, lay-offs, or demotions, give to an employer's opinion about unions a potent effect on the minds of listeners.[52] The plant may be new, in which case the employees are especially vulnerable to interference. In this case it has been held by a circuit court that the employer should remain absolutely neutral,[53] the court saying that it is in such a situation as this that the slight suggestion of the employer might have telling effect.[54]

The relation or coincidence of certain events may support a charge of interference. If the result of the relation of otherwise lawful acts one to another is interference, then the speech becomes part of the unlawful conduct. As was pointed out in *N.L.R.B. v. Stone*,[55] "The

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[51] *In re* Ford Motor Co. (1940) 23 N.L.R.B. 343, 353.

[52] *Ibid.* at 548, 567, "In order to determine this question, we must consider not only the bare words of the literature, but also the accompanying events which provide the setting for the statements and reveal their full import . . . . The record as a whole reveals a broad attack by the respondent on union organization. As part of this attack the respondent distributed the literature in question . . . ."; *In re* Anderson Mfg. Co. (1944) 58 N.L.R.B. 1511, 1514; N.L.R.B. v. Arcade-Sunshine Co., *supra* note 31; N.L.R.B. v. Auburn Foundry, *supra* note 21; Continental Box Co. v. N.L.R.B. (C.C.A. 5th, 1940) 113 F. (2d) 93, 97; Montgomery-Ward v. N.L.R.B. (C.C.A. 7th, 1939) 107 F. (2d) 555, 559; Virginia Electric Co. v. N.L.R.B., *supra* note 43.

[53] N.L.R.B. v. Laister-Kauffmann Aircraft Corp. (C.C.A. 8th, 1944) 144 F. (2d) 9, 13.

[54] Elastic Stop Nut Corp. v. N.L.R.B. (C.C.A. 8th, 1944) 142 F. (2d) 371, 375, *cert. den.*, (1944) 323 U. S. 722, "At a time when the rival organizations were still in a formative state, with opinion still divided and no definite decision reached as to which organization should be chosen, the employees were sensitive to weight thrown by their employer in favor of one organization as against another, even though the suggestion of preference be subtle or slight."

[55] (C.C.A. 7th, 1942) 125 F. (2d) 752, 756, *cert. den.*, (1942) 317 U. S. 649. Another good example of this is the case of N.L.R.B. v. Trojan Powder Co., *supra* note 23, where the evidence consisted of three parts: the background of the company, letters to employees, and remarks by supervisory employees. See N.L.R.B. v. Faultless Caster Corp., *supra* note 16; *In re* Wire Rope Corp. of America Inc. (1945) 62 N.L.R.B. 58; *In re* Van Raalte Co., Inc. (1944) 55 N.L.R.B. 146, 151, where the events constituting interference were statements by foreladies (though the company had instructed them to be neutral); notices by company in answer to union charges; and a news item that the company was planning to abandon one of its buildings. The Board said: "We are convinced and we find that in its totality the respondent's conduct, as outlined above was coercive of its employees, and that the notices issued by the respondent to its employees during the Union's organizational campaign were an integral part of this course of conduct."

rapidity with which one event followed another, the manner in which they were timed with reference to each other, as well as the numerous covert suggestions, in themselves, lend persuasive support to the Board's conclusion."

An otherwise lawful speech when connected with an unlawful act (discriminatory discharge) will be evidence of interference. The reason for this is clear. The speech plus the coercive act suggest to the mind of the listener the consequences of disregarding the speech.[56]

The cases conflict sharply on the issue whether an employer may not sometimes need to be absolutely neutral in the sense of not making any real attempt to persuade his employees. The language has been for the most part dicta, but several circuit courts still say that the employer must observe complete neutrality.[57] Almost all, without exception, would refuse to allow the employer to actually campaign either for one certain union or no union at all.[58] The idea is that a campaign is more than an opinion and tends to suggest unfavorable consequences to those who disregard it.

A limitation on this doctrine of surrounding circumstances has been suggested by one of the circuits. This occurred when the Board attempted to base a contempt charge on speech which, though in itself not contemptuous, was found by the Board to be so when considered in conjunction with the previous circumstances which had originally supported the order against interference. The third circuit court, faced with just this situation refused to cite the company for contempt, saying, "The Board having used the company's prior misconduct as the basis for the order which the decree enforces would now have us use the same conduct to give ulterior point to matters occurring since the company's affirmative submission to the decree which matters of themselves are otherwise privileged. If that be permissible then the employer once a decree abating unfair labor practices is entered against him, can never again speak or write in expression of

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[56] Jacksonville Paper Co. v. N.L.R.B. (C.C.A. 5th, 1943) 137 F. (2d) 148, *cert. den.*, (1943) 320 U.S. 722; N.L.R.B. v. Nebel Knitting Co. (C.C.A. 4th, 1939) 103 F. (2d) 594, 595; N.L.R.B. v. Arcade-Sunshine Co., *supra* note 31.

[57] Reliance Mfg. Co. v. N.L.R.B. (C.C.A. 7th, 1944) 143 F. (2d) 761, 763; N.L.R.B. v. Stone, *supra* note 55, at 756; N.L.R.B. v. William Davies Co. (C.C.A. 7th, 1943) 135 F. (2d) 179, 181; N.L.R.B. v. Falk Corp. (C.C.A. 7th, 1939) 102 F. (2d) 383, 389, reversed on another point, (1940) 308 U.S. 453.

[58] N.L.R.B. v. Sunbeam Electric Mfg. Co., *supra* note 21, at 861; Peter J. Schweitzer v. N.L.R.B. (App. D.C. 1944) 144 F. (2d) 520, 524, "We do not hold that this justifies an organized campaign or a protracted distribution of propaganda." See also *In re* Augusta Broadcasting Co. (1944) 58 N.L.R.B. 1493; Montgomery-Ward v. N.L.R.B., *supra* note 52; N.L.R.B. v. Reed and Prince Mfg. Co. (C.C.A. 1st, 1941) 118 F. (2d) 874, *cert. den.*, (1941) 313 U.S. 595.

his views on labor problems without being hailed before the decreeing court for contempt."[59]

CONCLUSION

The question might well be put at this point: what can the employer say to his employees without being guilty of interference? At the outset it must be said, he can be much more vehement if he first explains carefully and honestly to his employees that theirs is a free choice and if his previous and contemporaneous conduct bears out his words.[60] Also, in the words of the Board: "We recognize the right of an employer to answer charges directed against him by a labor organization and, under certain circumstances, to bring to the attention of his employees facts concerning that organization of which he believes the employees should be apprised."[61]

Reference was made previously to varying views held by circuit courts before the *Virginia Electric* case. This leading case settled that conflict to a large degree and it is clear that bulletins laid in an anti-union background such as existed in the *Ford*[62] case would now support a charge of interference. And on the other hand, the cases using the language of total neutrality as being always the duty of the employer, have been repudiated, if by neutrality is meant complete detachment without even an honest attempt at persuasion by speech or publication.[63] The *Virginia Electric* opinion expressly upheld the right of an employer to take "any side it may choose on this controversial issue" if he restricts himself to just that, *i.e.*, to opinion free from threat of consequences, express or implied.[64]

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[59] Edward B. Budd Co. v. N.L.R.B. (C.C.A. 3rd, 1944) 142 F. (2d) 922, 928. The violation charged was the sending of a letter to each employee in which the company described the past years of industrial peace, the wage increases, and assured the employees that the company would not interfere in any way.

[60] N.L.R.B. v. American Tube Bending, *supra* note 38; N.L.R.B. v. Citizen-News Co. (C.C.A. 9th, 1943) 134 F. (2d) 970; *In re* King Ventilating Co. (1945) 60 N.L.R.B. 1, where the Board refused to find interference although the president of the company talked to his employees about union matters. The president had made it clear that employment did not depend on nonmembership; Jefferson Electric Co. v. N.L.R.B. (C.C.A. 7th, 1939) 102 F. (2d) 949, 956.

[61] *In re* Agar Packing & Provision Corp., *supra* note 33, at 745. See also, N.L.R.B. v. Brown-Brockmeyer Co. (C.C.A. 6th, 1944) 143 F. (2d) 537, 541, where an employer with no anti-union history cautioned foremen repeatedly to keep "hands off the labor situation" and posted a bulletin assuring employees they were free to organize if they wished. In a letter the employer stated that the C.I.O. was responsible for rescission of a permit for women to work overtime. *Held*: there was no evidence of coercion and "the respondent's letter dealt with the facts of the controversy and therefore fell 'within that area of free discussion that is guaranteed by the Constitution'."

[62] *Supra* note 45.

[63] Virginia Electric Co. v. N.L.R.B., *supra* note 43.

[64] In the opinion of one circuit the Virginia Electric case has had two different interpretations. The conflict is explained by Judge Briggs in M. E. Blatt Co. v. N.L.R.B.

This much is certain: anti-union speech by the employer which is not threatening, which is not laid in a background of anti-union conduct, and which is not otherwise part of a pattern of coercive activity, is privileged by the First Amendment.[65] The employer has the right to express an opinion and even a preference to his employees as long as the reasonable effect of his words is not an interference or restraint on the free will of his employees. The interference may come from the words themselves or it may come from the setting in which the words are laid, but the thing interdicted is interference.[66]

Other questions still remain. When if at all may the standard of neutrality be exacted from an employer?[67] If a campaign is to be dis-

(C.C.A. 3rd, 1944) 143 F. (2d) 268, 274, *cert. den.*, (1944) 323 U.S. 774, ". . . the Court of Appeals for the Second Circuit [American Tube Bending, *supra* note 38] distinguished between communications made by an employer to his employees expressing the employer's own views in regard to the employees' selection of a bargaining agency, communications which might indicate that the employees might join a labor organization of their own choosing without fear of reprisal by the employer, and other communications by the employer to his employees which might indicate the contrary. But referring to the Virginia Electric case Judge Learned Hand pointed out that the employer had specifically claimed the privilege of freedom of speech guaranteed by the First Amendment. He concluded, therefore, that the Supreme Court in the Virginia Electric case had sustained that privilege as absolute.

"We do not so construe the Supreme Court's decision. We are of the opinion that the Supreme Court intended to indicate and did indicate that communications from the employer to the employee might amount to coercion, but that it was not clear that the Board had found the existence of coercion on sufficient evidence in the cited case. The guaranty of freedom of speech contained in the First Amendment does not guarantee him who speaks immunity from the legal consequences of his verbal actions." Certiorari was denied in both of these cases.

But whether this is a valid interpretation of Judge Hand's position is questionable. If it is his opinion it would not appear to be the opinion of the second circuit now. In a recent case before this circuit, N.L.R.B. v. American Laundry Machinery Co. (C.C.A. 2d, 1945) 152 F. (2d) 400, 401, it was held that speech in the light of employer's anti-union conduct could be inferred by the Board to be coercive and unless the "inference is wholly unreasonable there was no infringement by the Board of the employer's freedom of speech." This seems to be in accord with the Blatt interpretation of the Virginia Electric case.

[65] N.L.R.B. v. Citizen-News Co., *supra* note 60; N.L.R.B. v. Brown-Brockmeyer Co., *supra* note 61, at 543, "An employer has the right of freedom of speech and may express his hostility to a union and his views on labor problems or policy, providing he does not threaten or coerce his employees."

[66] N.L.R.B. v. William Davies Co., *supra* note 57; N.L.R.B. v. New Era Die Co., *supra* note 18; N.L.R.B. v. Chicago Apparatus Co. (C.C.A. 7th, 1940) 116 F. (2d) 753, 757; N.L.R.B. v. Superior Tanning Co. (C.C.A. 7th, 1940) 117 F. (2d) 881, 890, *cert. den.*, (1941) 313 U.S. 559; Press Co. v. N.L.R.B. (App. D.C. 1940) 118 F. (2d) 937, 942, *cert. den.*, (1941) 313 U.S. 595.

[67] See cases cited *supra* note 57. It may be argued that the concept of neutrality cannot be discounted entirely, because circumstances completely beyond the control of the employer might impose that duty upon him. At least one circuit court has so suggested where, in the case of a new plant, the men had no way of knowing the employer's intentions and were, therefore, open to subtle suggestion. In would seem that there is still room for question on this detailed point, in view of the fact that the issue was clouded in this case by the company's prompt recognition of an independent union and a too hurried signing of a contract. Elastic Stop Nut Corp. v. N.L.R.B., *supra* note 54.