August 2015

The NLRB's Restrictions on the Employer's Right of Free Speech

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I. Introduction

In 1937 the United States Supreme Court upheld the validity of the Wagner Act[1] and declared that the right of workers to organize in labor unions was a "fundamental right."[2] In *NLRB v. Budd Mfg. Co.*,[3] the court said that this "right is protected by the Constitution against *governmental* infringement, as are the fundamental rights of other individuals. . . . Such rights, however (are) not private rights vested in the employees but (are) public rights protected by the power placed by the Act in the National Labor Relations Board."[4] The Court appeared to be indicating that the source of this federally created right was the First Amendment.[5]

The intervening years have seen a significant amendment of the original act in 1947[6] and the enactment of The Labor-Management Reporting and Disclosure Act (Landrum-Griffin Act).[7] Throughout this period, the NLRB has in its administration of the National Labor Relations Act[8] amassed approximately 180 volumes of decisions and orders. The limited purpose of this Comment is to survey the NLRB's attitude toward the First Amendment issues raised in representational proceedings.

In fiscal year 1968 more than a half million employees cast ballots in NLRB-conducted representation elections.[9] Over the years more than twenty-five million employees have cast ballots in NLRB-supervised elections.[10] Consequently, it seems worthwhile to review, in the light of the First Amendment, the NLRB's attempt to regulate the conduct of elections in which employees choose whether to become organized.

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1 49 Stat. 449 (1935).

2 *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

3 169 F.2d 571 (C.C.A. 6th 1948).

4 169 F.2d 571, 577 (C.C.A. 1948).

5 U.S. Const., Amend. 1.

6 The Labor Management Relations Act (Taft-Hartley Act), 61 Stat. 136 (1947).

7 73 Stat. 519 (1959).

8 *Id.*

9 33 NLRB Ann. Rep. 5 (1969).

10 Labor Relations Yearbook 311 (1969).

II. NLRB Regulation of Employer Speech

Concern over the NLRB's treatment of the nature of employer speech to employees developed early in the administration of the Act. In 1940 a U.S. House of Representatives Committee Investigating the National Labor Relations Board reported that the Board had seriously interfered with the Employer's right of freedom of expression.[11] The Committee recommended that the Act be amended so that freedom of expression would be expressly guaranteed, provided that "such expressions of opinion are not accompanied by acts of discrimination, intimidation, or coercion, or threats thereof." [12] Illustrative of the extent to which the Board had gone in limiting the expression of opinions by the Employer is *NLRB v. Union Pacific Stages, Inc.*[13] In that case, the Board had concluded that the statement of an employer's superintendent to an employee that if he had a son, he would advise him not to join the union, was an unfair labor practice. The Sixth Circuit Court of Appeals on review stated with respect to this ruling:

> It is difficult to think that Congress intended to forbid an employer from expressing a general opinion that an employee would find it more to his advantage not to belong to a union. Had Congress attempted so to do, it would be a violation of the First Amendment. . . . The right of workers to organize freely must be conceded. It is a natural right of equal rank with the great right of free speech protected by the Constitution.[14]

The Sixth Circuit in *Midland Steel Products Co. v. NLRB*,[15] stated, "Unless the right of free speech is enjoyed by employers as well as by employees, the guarantee of the First Amendment is futile, for it is fundamental that the basic rights guaranteed by the Constitution belong equally to every person." [16]

The Supreme Court in *NLRB v. Virginia Electric & Power Co.*,[17] overturned the "strict neutrality" doctrine that the Board

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[11] H.R. Rep. No. 3109, Part 1, 76th Cong., 3rd Sess. 90 (1940).

[12] *Id.* at 91-92.

[13] 99 F.2d 153 (1938).

[14] 99 F.2d 153, 179 (1938).

[15] 113 F.2d 800 (1940).

[16] 113 F.2d 800, 804 (1940).

[17] 314 U.S. 469 (1941).

had applied from the beginning. Under this doctrine the employer's superior economic position was deemed to create in his employees a mortal fear of economic reprisal; hence any union-related comment on his part was considered inherently coercive.[18] *Virginia Electric* ushered in the "totality of conduct" doctrine, which held sway from 1941-47. In this case, while holding that the Employer was protected by the First Amendment when speaking out against a union organizing campaign, the court instructed the Board to examine the speech or writing in the context of the totality of the employer's conduct, taking into account all surrounding circumstances, such as discriminatory discharges, acts of hostility, and general overall employer opposition to union organization. In this manner a determination could be made as to whether the speech or writing was "coercive." [19]

In its eleventh Annual Report the Board provided a test to be applied in evaluating campaign utterances. This test appears to be constitutionally vague, imprecise, and difficult for employers and unions to use. The test reads as follows:

> . . . (T)he Board does not consider the statement in isolation, but appraises it in the light of the employer's [and Union's] entire course of conduct. Thus an otherwise privileged statement may acquire a coercive character when accompanied by other unfair labor practices or when found to be an inseparable and integral part of a course of anti-union conduct, which in its "totality" amounts to coercion within the meaning of the Act.[20]

At least one writer[21] is of the opinion that Congress, in 1947, enacted subsection 8(c) to the original Wagner Act because it believed that the decisions of the Board were too restrictive of the employer's right to express his views on labor matters to his employees. This subsection declares:

> 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

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18 J. PoKempner, *Employer Free Speech Under the National Labor Relations Act*, 25 Md. L. Rev. 111 (1965); Note, *Representation Elections*, 2 Ga. L. Rev. 433 (1968).

19 PoKempner, *supra* note 18, at 113.

20 11 NLRB Ann. Rep. 34 (1946).

21 R. Koretz, *Employer Interference With Union Organization Versus Employer Free Speech*, 29 Geo. Wash. L. Rev. 399, 404 (1960).

this Act, if such expression contains no threat of reprisal or force or promise of benefits.[22]

With the documented background of the Board's restrictive notions of the First Amendment's applicability to employer statements concerning union organization, and with the Congressional concern over this application of the Act, § 8(c) could have signaled a return to a Constitutionally protective approach to speech which did not contain an explicit threat of reprisal or force or promise of benefit. However, the Board did not react in this way. Instead, in *General Shoe Corp.*[23] the Board held that § 8(c) was inapplicable to election cases and that the Congressional protection extended only to unfair labor practice cases. This view survives today, as evidenced by the following recent comment of the Board: "We do not regard that section (§ 8 (c)) as determinative of questions involving election interference." [24]

The General Shoe Corp. case is also significant because it established the Board's philosophical and constitutional judgment with respect to its role in the representation election process. Quoting from the opinion:

> In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees. It is *our duty* to establish those conditions; it is our duty *to determine* whether they have been fulfilled. When, in the rare extreme cases, the standard drops too low, because of our fault or that of others, the requisite laboratory conditions are not present and the experiment must be conducted over again.[25] (Emphasis added)

While § 1 of the Act declares the policy of the United States to be that of encouraging the "practice and procedure of collective bargaining," § 7 enumerates the rights of employees and specifically provides for "the right to refrain from any or all of such activities." This is perfectly consistent with the "majority rule" principles of § 9. But the statute makes no mention of any grant of authority to establish a "laboratory experiment" or to scrupulously supervise its operation according to the personal

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[22] 29 U.S.C. 158(c) (1958).

[23] 77 NLRB 124 (1948).

[24] *Eagle-Picher Indus. Inc., Electronics Division, Precision Products Dept.*, 171 NLRB No. 44 (1968).

[25] *Supra*, note 23, at 127.

reactions of the Board members (five presidential appointees) to various forms of communication.

The Supreme Court has entrusted to the Board "a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees." [26] The Seventh Circuit Court of Appeals has commented that this "wide discretion" lies in the initial promulgation of rules and regulations by the Board.[27] However, the Courts of Appeals may review the record as a whole in order to determine whether the Board's findings and conclusions conform to the policies and rules.[28] One wonders whether the "substantial evidence" form of Court review may not unduly insulate Board policies that restrict First Amendment guarantees.

In *Dal-Tex Optical Company Inc.*,[29] the Board reaffirmed its position that it would continue to fulfill "the statutory policy of encouraging the practice and procedure of collective bargaining by protecting the full freedom of employees to select representatives of their own choosing." [30] The guiding standard established by the Board for setting aside an election in that case was the following: "When the employer's conduct has resulted in substantial interference with the election, regardless of the form in which the statement was made," [31] a new election will be ordered by the Board.

It seems noteworthy that the only discussion of the First Amendment in the course of the Board's *Dal-Tex* decision appears in a footnote wherein the Board observes, "The strictures of the First Amendment, to be sure, must be considered in all cases." [32]

Board Member Fanning recently commented on the "totality of conduct" theory and its First Amendment implications. He said:

> It is a very difficult area to administer because of the conflicting interpretations which may be given to the meaning and effect of Employer's letters and speeches. The richness and protean quality of the English language may be a boon to the poet and punster, but to an attorney latent am-

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[26] *NLRB v. A. J. Tower Co.*, 329 U.S. 324, 330 (1946).

[27] *Celanese Corp. v. NLRB*, 291 F.2d 224 (7th Cir. 1961).

[28] *Id.*

[29] 137 NLRB 1782 (1962).

[30] *Id.* at 1787.

[31] *Id.*

[32] 137 NLRB 1782, 1787 at note 11.

> biguities in language give more pain than pleasure. Because of the time-honored sanctity of freedom of speech, and the many pitfalls and snares for the unwary, the Board is very careful in its approach. This is not to say we are always right; on the contrary, we are quite well aware that we may be wrong, but we cannot plead the difficulty of the decision as an excuse for not making it.[33]

The Board's determination to uphold the integrity and quality of its elections is not doubted, and this is a commendable objective. However, when First Amendment issues are involved in this area, even the Supreme Court has considerable difficulty reaching just, consistent, and readily understandable decisions. It is not surprising that the Board has experienced difficulty in articulating the controlling standards and criteria for its decisions.[34]

III. Commentary on NLRB Actions and Policies

In recent months two Regional Directors of the Board have authored pieces for legal periodicals in which they have taken exception to the current Board standards for considering election conduct. Director Cuneo suggests that the Board establish a meaningful standard of preelection conduct and abandon its subjective consideration of objections. Cuneo emphasizes that in the area of letters, speeches, and other forms of communication the Board should not set aside any election in which it can be shown that the other party has had an adequate opportunity to reply.[35] Objections of this type are time-consuming to investigate and report upon and leave the outcome of the election shrouded in uncertainty. Cuneo observes that absent threats or promises of benefits, the employee of today is "generally able to evaluate the statements made by unions and companies, and . . . the parties might well be left alone to determine their campaign tactics as they see fit, as in the political arena." [36]

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[33] J. Fanning, *The Broad View: A Question of Balance,* 15 Loyola L. Rev. 1, 5 (1969).

[34] These difficulties are alluded to by the following authorities: D. Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Board,* 78 Harv. L. Rev. 38 (1964); J. Cuneo, *NLRB's Totality of Conduct Theory in Representation Elections and Problems Involved in Its Application,* 7 Duquesne L. Rev. 229 (1969); Note, *Restrictions on the Employer's Right of Free Speech During Organizing Campaigns and Collective Bargaining,* 63 Nw. U. L. Rev. 40 (1968).

[35] Cuneo, *supra,* note 34, at 243.

[36] *Id.*

Director Samoff makes essentially the same argument in a recent article appearing in the Pennsylvania Law Review.[37] He states that an average 90% voter turnout in NLRB elections suggests strong membership interest and that interested workers "are more likely to know the issues and less likely to be susceptible to propaganda than apathetic voters." [38] Samoff believes that direct employee involvement, familiarity with the issues, appraisal of the propaganda, and maximum turnout are more than adequate to counteract electioneering exaggeration and misrepresentations. If the views of these two professional administrators are correct—that the good sense of the employee-voter can be relied upon to properly interpret and evaluate an organizational campaign—then there seems to be no tenable justification for the Board's continued practice of post-election censorship of electioneering letters, speeches, etc. If this is true, then the Board's actions, which unnecessarily impede the parties' appeals to the voter, would appear to violate the First Amendment.

Director Samoff states in conclusion that in his judgment, the evidence available "casts doubts on the NLRB's capacity to develop a balanced, enforceable set of regulations, and implement them without an unreasonable expenditure of time and money. . . . It is not sound policy to attempt to control the uncontrollable." [39]

Another writer[40] supports Samoff's position by pointing out that in political elections the proper remedy for emotional and argumentative speech is found in the strength and rebuttals of the opposition. In the area of racial prejudice, the Board attempts to eliminate from the campaign any speech appealing to such bigotry. No thoughtful citizen suggests that elections should be decided on such a factor, but the Board cannot realistically expect, through regulation, to prevent this from happening under any and all circumstances. Certainly when the Board has the power to determine all of the factors upon which employees can rely in making their individual decisions, we will have seen the passing of the First Amendment as a relevant force in this area of the law.

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[37] B. Samoff, *NLRB Elections: Uncertainty and Certainty,* 117 U. Penn. L. Rev. 228 (1968).

[38] *Id.* at 246.

[39] *Id.* at 247.

[40] Note, *Restrictions on the Employer's Right of Free Speech During Organized Campaigns and Collective Bargaining,* 63 Nw. U. L. Rev. 40, 54 (1968).

The "laboratory condition" standard places wide discretion in the Board, to begin with, and the standard is rendered even more uncertain by the continuing turnover in Board membership.[41] President Nixon will appoint three Board members between 1969 and 1971,[42] and this may mean that the agency attitude toward these First Amendment matters will be modified. Query: Should these fundamental freedoms be dependent for their expansion or contraction upon the political philosophy of Presidential appointees who serve for a five year term?

An influential article concerning the First Amendment implications of the Board's regulation of preelection campaign activities is that of Professor Derek Bok.[43] Bok's premise is that speech is restrained when the Board overturns an election because of improper campaign communications. He contends that the Supreme Court has accepted the principle that the First Amendment is applicable to speeches in representation campaigns[44] and that these elections are "closely akin to political contests." [45]

While coercive speech by an employer is not protected by the First Amendment, the only possible justification for this exception is the danger that the Employer will utilize his economic power to harm the employee for his union loyalty. Bok asserts that a preoccupation with this danger is improper and does not advance the free expression of views that the Constitution seeks to encourage. However, when an employer's speech moves away from economics and engenders emotions and prejudices, he is merely doing precisely what candidates for political office have been doing for a long period of time.[46] Few persons seriously recommend direct governmental intervention and censorship in the conduct of political elections, and one finds it difficult to justify the Board's activity in the arena of union elections.

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[41] C. Barbash, *Employer "Free Speech" and Employee Rights,* 14 Lab. L. J. 313, 314 (1963).

[42] 1969 B.N.A. Lab. Rel. Exped. 9061.

[43] D. Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act,* 78 Harv. L. Rev. 38 (1964).

[44] *NLRB v. Virginia Electric & Power Co.,* 314 U.S. 469 (1941).

[45] Bok, *supra,* note 43, at 68. This is also the determination made by Regional Director Samoff. See note 37, *supra.*

[46] Bok, *supra,* note 43, at 69-70. See *NLRB vs. Gissel Packing Company,* 395 U.S. 575 (1969) where the Supreme Court adopted a balancing test, weighing the employer's right of free speech against the employees' right of association.

The Supreme Court has stated:

> . . . a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech . . . is . . . protected against censorship or punishment. . . . There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups.[47]

IV. Available Options

It would seem fairly clear that the Board has failed to take steps over the years to conform its practice of regulating campaign materials within the confines of the above-quoted Supreme Court comments and caveats on the First Amendment. Bearing this in mind, one may reasonably ask, what alternatives to the Board's past and present policies are available? One writer suggests that since it is the stated policy of the NLRA to encourage the collective bargaining process, unions have legitimate interests (including survival) separate and distinct from those of the individual employees and that certain industrial conflicts should therefore be resolved in the union's favor at the expense of the other parties.[48] An objection to this position rests in the fact that the NLRA, in § 7, recites the guaranteed rights of employees,[49] and fails to specify any corresponding rights of unions or employers. The existence of the latter rights has been inferred by the Board from other sections of the Act. Moreover, the underlying purpose of the Act is the protection of individual employee rights through the medium of collective bargaining. If the union begins to subvert individual interests to those of the union as an institution, the result may be that the individual employee will be no better off under the NLRA than he was during the pre-

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[47] *Terminiello v. Chicago,* 337 U.S. 1, 4-5 (1948).

[48] Levit, *National Labor Relations Policy: Attuning It to Unions Within Reasonable Limits,* 4 U. Rich. L. Rev. 92, 92-94 (1969).

[49] "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities."

1930's. This may be overstating the danger, but the point cannot be ignored. The Supreme Court in *NLRB v. Allis Chalmers Mfg. Co.*[50] (upholding the union's action in fining those of its members who crossed a picket line during a legal strike) and *Scofield v. NLRB*[51] (upholding the union's right to fine members for exceeding production ceilings set in collective bargaining) has taken large steps in restricting the rights of the individual employee to refrain from "concerted activities" at the expense of the union as a whole. This matter presents a policy question which now must be decided by the Congress. If Congress fails to act, individual employee rights may disappear altogether.

Another writer[52] argues for the abolition of the Board (because of its disappointing performance over the years), and the establishment of a Labor Court. Such an action, however, seems inappropriate. We do not need a saw here, but rather, a scalpel. It is submitted that a better approach would be for Congress to clearly and forthrightly make specific provision for First Amendment guarantees to be applied to the representation process. In this manner the Board would be given guidance in this area. More specifically, § 8(c) of the Act might be amended to include the language italicized below:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall neither constitute or *evidence* an unfair labor practice under any of the provisions of this Act, *nor be relied upon to set aside any election conducted under any of the provisions of this act unless* such expression contains threat of reprisal or force or promise of benefit. *The Board as a matter of policy shall afford all parties before it the fullest freedom of speech consistent with the dictates of this section.*

If such an amendment were adopted, much of the criticism directed against the Board would be countered without destroying the usefulness of the agency.

It has been proposed that a "dead week" of campaigning be recognized, in which supervised debates would be held under the aegis of the Board.[53] While this recommendation may at first

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[50] 388 U.S. 175 (1967).

[51] 394 U.S. 423 (1969).

[52] R. Petro, *Expertise, the NLRB, and the Constitution,* 14 Wayne L. Rev. 1126 (1968).

[53] Note, *The Right of Free Speech in Representation Elections,* 2 Ga. L. Rev. 433, 460 (1968).

seem attractive, Board supervision of any debate might be arranged in a manner that would favor one of the parties. This might be done deliberately or inadvertently, but in either case the Board's image of neutrality would be impaired. In addition, the "dead week" of no campaigning would probably be unpopular with many employers and employees. Normally none of the parties is receptive to any delay in the election process. The pressures and preoccupation of the election tend to wear on everybody's nerves, and any proposal involving a delay in the campaigning merely aggravates the situation.

Director Samoff offers a proposal consisting essentially of hearty electioneering, within a framework of three procedural standards:

1. Adequate opportunity to reply[54]
2. Availability of names and addresses of employees for unions[55]
3. Provision of informational notices posted throughout the plant and containing a summary of employee rights under the Act.

In addition Samoff would have the Board utilize its rule-making authority to provide for joint debates, question and answer periods, in-plant bulletin board space for the union, and joint party leaflets.[56] Samoff's suggestions appear to merit further consideration by the Board.

Under the approach suggested by Director Cuneo if the objecting party had sufficient opportunity to answer the campaign charges and statements of the other side, the disputed statements would not be deemed sufficient to warrant setting aside the election.[57] In his view this arrangement would serve to expand the flow of communication between the parties and at the same time give them a clear rule upon which to base their conduct.

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[54] See *Hollywood Ceramics*, 140 NLRB 221 (1962). This case held that even if there has been a material and substantial misrepresentation by one of the parties, the provision of an opportunity to reply is the crucial consideration.

[55] The rule of *Excelsior Underwear Inc.*, 156 NLRB 1236 (1966) requiring employer to furnish a list of the names and addresses of all the eligible employees in the unit within seven days of an election agreement or order was modified to provide that the Board may direct the employer to furnish the list. *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969).

[56] Samoff, *supra*, note 37, at 249-250.

[57] Cuneo, *supra*, note 34, at 242-244. This position is consistent with the Board's holding in *Hollywood Ceramics*, 140 NLRB 221 (1962).

V. Conclusion

The above-described views of Samoff and Cuneo seem to be intelligent, practical approaches which would allow the Board to expand the scope of First Amendment freedoms in the area of representation elections. This would be a progressive step for the Board to take, and it would disarm many of the Board's critics. The public of today is better educated, more sophisticated, and better informed of its civil rights than it has been at any time in the history of the agency. Such a public would surely recognize that the changes recommended by Directors Samoff and Cuneo are in the best interests of everyone served by the Board. The statutory amendment[58] proposed above would, if adopted, place Congress clearly on record as supporting the fullest measure of First Amendment freedoms for all participants in representation elections. The Board's record in this area has certainly not been exemplary, and the time has come for a new approach in its administration of the Act.

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[58] The judiciary's tendency to avoid constitutional questions by resorting to an interpretation of the statute has been referred to as "construction to protect constitutional values." "It preserves the values protected by the Constitution but leaves the legislature free to overrule the decision." Blumrosen, *The Worker and Three Phases of Unionism: Administrative and Judicial Control of the Worker-Union Relationship*, 61 Mich. L. Rev. 1435, 1446 (1963). In view of this policy, it is unlikely that any solution to the problem under discussion will be forthcoming from the judiciary.

* Although the writer is an employee of the National Labor Relations Board, the views expressed in this Comment do not represent the official position of the NLRB.