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John W. Teeter

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# BETWEEN THE BUTTONS: EMPLOYER DISTRIBUTION OF ANTIUNION INSIGNIA

JOHN W. TEETER, JR.\*

## I. INTRODUCTION

Campaign buttons are a commonplace in American political life. People wear insignia to promote their political allegiances and signify their unity with like-minded spirits. The same is true in labor representation campaigns, where employees commonly use insignia to express their beliefs as to whether the workplace should become unionized.<sup>1</sup>

Numerous cases hold that the National Labor Relations Act<sup>2</sup> (the "Act") protects the right of workers to wear prounion insignia without facing retaliation from their employers.<sup>3</sup> The National Labor Relations Board (the "Board") and courts have recognized exceptions to this rule,<sup>4</sup> but employees are usually free to wear union campaign emblems.<sup>5</sup>

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\* Professor, St. Mary's University School of Law, University of Illinois at Chicago Circle, A.B. 1982; Harvard Law School, J.D. 1985. This article would not have been possible without the support of Cheryl Michiko Kuwada. My colleague Jon C. Dubin also provided invaluable advice and encouragement. I also would like to thank St. Mary's University for its generous research grant and Camille Higgins, David Jones, K.Y. Takamine, and Chris Pittard for their research assistance.

1. For provocative discussions of labor representation elections, see ROBERT E. WILLIAMS, *NLRB REGULATION OF ELECTION CONDUCT* (rev. ed. 1985); Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 MINN. L. REV. 495 (1993); Derek C. Bok, *The Regulation of Campaign Tactics in Representation Elections under the National Labor Relations Act*, 78 HARV. L. REV. 38 (1964); Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization under the NLRA*, 96 HARV. L. REV. 1769 (1983).

2. Pub. L. No. 74-198, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151-169 (1988)).

3. The landmark decision in this field is *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945), where the Supreme Court ruled that the employer had violated the Act by discharging three workers for wearing union steward buttons. The reasoning behind *Republic Aviation* and its progeny is straightforward: Section 7 of the Act provides, in relevant part, that "[e]mployees 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." 29 U.S.C. § 157. For this reason, an employer's interference with a worker's wearing of prounion insignia is often found to violate Section 8(a)(1) of the Act, which provides that it is an unfair labor practice "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed [in Section 7]." 29 U.S.C. § 158(a)(1). Furthermore, Section 8(a)(3) provides, in relevant part, that it is an unfair labor practice for employers "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. § 158(a)(3).

4. As the administrative law judge explained in *Albertson's, Inc.*, 300 N.L.R.B. 1013, 1016 (1990), employers may forbid workers from wearing prounion insignia when "necessary to maintain production and discipline, diffuse employee dissension, insure employee safety, protect machinery and products from damage, assist employee concentration, or project a certain image to the public." (citations omitted). For an argument that this litany of limitations is unjustified, see John W. Teeter, Jr., *Banning the Buttons: Employer Interference with the Right to Wear Union Insignia in the Workplace*, 80 KY. L.J. 377 (1991-92).

5. For example, employers prohibiting prounion insignia were found guilty of violating the Act in *Sirangelo*, 298 N.L.R.B. 924 (1990); *Keystone Lamp Mfg. Corp.*, 284 N.L.R.B. 626 (1987); and *Page Avjet Corp.*, 275 N.L.R.B. 773 (1985).

As a matter of law and principle, workers should also be free to wear antiunion emblems or to wear no insignia at all. Section 7 of the Act encompasses both the right to support unions and the right *not* to support unions,<sup>6</sup> so workers should be entitled to wear campaign insignia regardless of whether it supports or decries unionization. In this manner, workers can openly proclaim their beliefs and seek to influence their peers.

A different issue arises, however, when an employer distributes antiunion insignia to its work force. At this point, the wearing of antiunion emblems may no longer represent the employees' free and unilateral expression of their sentiments. Instead, the employer's intrusion raises the specter of possible coercion. Such coercion—explicit or implied—can occur in at least two ways. First, workers may sense that they are being pressured to wear a "loyalty badge" for the employer and that if they refuse to do so they will be branded as union zealots. As discussed below, many workers may fear employer retaliation under these circumstances.<sup>7</sup> Second, as a consequence of this concern, workers may decide to wear the antiunion insignia even though it contradicts their actual beliefs. This obviously could undermine a worker's self-esteem, offend our commitment to industrial democracy, and permit the employer to paint a misleading picture of support for its antiunion position.

The Board has recognized such problems, but wavered in its response. Far from yielding a clear and consistent resolution, the cases reveal three conflicting lines of authority. The first line, which may be termed the "prohibitory" school, is quick to find coercion when an employer distributes antiunion emblems. In these cases, the Board either finds the employer guilty of an unfair labor practice or orders a new election to give workers another opportunity to vote for the union.<sup>8</sup>

6. As Justice Douglas explained:

Any procedure requiring a "fair" election must honor the rights of those who oppose a union as well as those who favor it. The Act is wholly neutral when it comes to that basic choice. By § 7 of the Act employees have the right not only to "form, join, or assist" unions but also the right "to refrain from any or all of such activities."

N.L.R.B. v. Savair Mfg. Co., 414 U.S. 270, 278 (1973) (quoting § 7 of the Act).

7. See *infra* note 17 and accompanying text.

8. The unfair labor practice charge would be grounded in Section 8(a)(1) of the Act which enjoins employers not "to interfere with, restrain, or coerce employees" in the workers' organizational activity. 29 U.S.C. 158(a)(1). Once a Section 8(a)(1) violation is found, the Board typically vacates the election results and orders a new round of balloting. As the Board explained in *Dal-Tex Optical Co.*, 137 N.L.R.B. 1782, 1786 (1962), "[c]onduct violative of Section 8(a)(1) is, *a fortiori*, conduct which interferes with the exercise of a free and untrammelled choice in an election." The Board abandons this approach only "in cases where it is virtually impossible to conclude that the misconduct could have affected the election results." *Clark Equip. Co.*, 278 N.L.R.B. 498, 505 (1986).

The Board also may invalidate an election even when the employer's conduct does not constitute an unfair labor practice:

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 employees. It is our duty to determine whether they have been fulfilled. When, in the rare extreme case, 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.

*General Shoes Corp.*, 77 N.L.R.B. 124, 127 (1948).

The second line of cases, the "permissive" school, gives employers broad latitude to distribute antiunion emblems. In these cases the Board is loath to find implied coercion and commonly belittles what may amount to express interference with workers' Section 7 rights. The conflict between the prohibitory and permissive schools is obvious, but the Board has done little to resolve this tension.

Third is the "moderate" school, in which the Board permits employers to distribute antiunion insignia under certain conditions. For example, an employer may make antiunion emblems "available" at the workplace, but may not distribute them to employees on an individual basis or record which workers accept or reject them. This school seeks to remove the prophylactic restrictions of the prohibitory cases while avoiding the dangers inherent in the permissive line of authority.

These competing lines of authority create needless confusion and offer inadequate protection of the workers' Section 7 rights. After examining cases reflecting each school of thought, I conclude that the Board should consistently maintain a strict prohibition on employer distribution of antiunion insignia. As explained below,<sup>9</sup> this prohibition would neither interfere with an employer's rights under Section 8(c)<sup>10</sup> nor preclude antiunion employees from waging an effective campaign. To the contrary, a strict prohibition simply would prevent employers from pressuring workers into either wearing emblems that contradict their beliefs or revealing their stance in the campaign through their acceptance or rejection of their employer's proffered insignia.

## II. THE PROHIBITORY SCHOOL

The origins of the Board's prohibitory school may be found in its 1944 decision in *Agar Packing & Provision Corp.*<sup>11</sup> Shortly before the election, the employer asked its workers to replace their pronoun caps with ones stating "Victory—100% American—Buy Bonds."<sup>12</sup> The Board found the employer's conduct unlawful, reasoning that it was:

designed to remove from the scene on the eve of an election a very conspicuous union insignia (the union cap) and to identify the respondent's opposition to the Union with 100 percent Americanism. The respondent's conduct in requesting the employees, a day before

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9. See *infra* Part V.

10. 29 U.S.C. § 158(c) provides:

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

For in-depth discussions of Section 8(c), see Herbert Burstein, *Free Speech for Employers*, 1 LAB. L.J. 425 (1950); Thomas G.S. Christensen, *Free Speech, Propaganda and the National Labor Relations Act*, 38 N.Y.U.L. REV. 243 (1963); Archibald Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 HARV. L. REV. 1, 15-20 (1947); Robert F. Koretz, *Employer Interference with Union Organization Versus Employer Free Speech*, 29 GEO. WASH. L. REV. 399 (1960).

11. 58 N.L.R.B. 738 (1944).

12. *Id.* at 742.

the election, to replace the union cap with its own, thereby inducing them to engage in an anti-union demonstration during working hours, was an ill-disguised form of coercion and interference proscribed by Section 8(1) [now 8(a)(1)] of the Act.<sup>13</sup>

*Agar* exemplifies both the virtue and the weakness of the Board's prohibitory approach. The Board reached a defensible result, for surely it is troublesome when an employer "requests" its workers to replace union emblems with antiunion materials. The Board's reasoning was incomplete, however, because it failed to explain precisely *why* the employer's conduct was coercive. Did the employees fear retaliation if they refused their employer's directive? Or, as a prophylactic matter, is it simply prudent to prohibit employers from even offering such insignia? When, if ever, should such distribution be permitted? These questions have yet to receive a thoughtful and consistent response.

The Board's 1945 opinion in *Thompson Products*<sup>14</sup> also condemned an employer's distribution of antiunion emblems. Here the employer was held to have interfered with the election by circulating hats with various proemployer slogans.<sup>15</sup> The Board tersely concluded that the employer "intended to and did bring pressure to bear on its employees publicly to declare themselves for or against the unions on the ballot."<sup>16</sup>

Despite their paucity of analysis, *Agar* and *Thompson* suggest the twin perils of employer distribution of antiunion insignia—the peril of compelled campaigning for management and the peril of coercive interrogation. As *Agar* indicated, it is offensive to coerce workers into demonstrating support for a campaign position that may contradict their true beliefs. Furthermore, *Thompson* suggests that distributing antiunion materials can be used to reveal the workers' union sympathies. Those who refuse to wear antiunion emblems may be identified as union advocates, whereas those who wear them may do so not out of proemployer sentiment but because they fear their employer.<sup>17</sup> In either instance, these are precisely

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13. *Id.* (footnote omitted).

14. 60 N.L.R.B. 1381 (1945).

15. *Id.* at 1385.

16. *Id.* (footnote omitted); see also *G & S Mfg., Inc.*, 123 N.L.R.B. 1602, 1608-10 (1959) (holding that employer violated Section 8(a)(1) by soliciting employees to wear "I am non-union" labels).

17. The fear of an employer is hardly unwarranted. Given the scores of American workers who have been unlawfully discharged or otherwise disciplined for wearing prounion insignia, see Teeter, *supra* note 4, there is valid concern that employees could also face unlawful retaliation for refusing to wear antiunion insignia. More generally, much has been written concerning employers' unlawful actions against union supporters and the inadequacy of the Board's current remedies to deter such misbehavior. Paul Weiler asserts that "the skyrocketing use of coercive and illegal tactics" by employers has been a "major factor" in the decline of American unions and that "[t]he current system of unfair labor practice remedies has proven powerless to contain such intimidation or to undo its effects." Weiler, *supra* note 1, at 1769-70. The extent of such employer lawlessness and its actual impact on unionization have been vigorously debated. See, e.g., Robert J. LaLonde and Brian D. Meltzer, *Hard Times for Unions: Another Look at the Significance of Employer Illegalities*, 58 U. CHI. L. REV. 953 (1991) (criticizing Weiler's "rogue employer thesis"); Paul C. Weiler, *Hard Times for Unions: Challenging Times for Scholars*, 58 U. CHI. L. REV. 1015 (1991) (reasserting

the kinds of pressure the secret ballot election was designed to prevent.<sup>18</sup>

The Board did not offer any further insight regarding antiunion insignia until its 1961 opinion in *Chas. V. Weise Co.*<sup>19</sup> In *Weise*, the employer provided badges stating "Vote on the right side—Vote No"<sup>20</sup> and told employees "I will be wearing this badge . . . these are available for everyone to wear. If you wish, take one as you leave [the meeting]."<sup>21</sup> The Board's regional director held that the employer's conduct interfered with the election (which the union lost) and ordered a new vote.<sup>22</sup> As he explained:

By making available such badges, even if not urging employees to wear them the employer was in effect providing a means by which employees would be placed in a position of making an open declaration of preference. If the employee accepted and wore the badge, it was tantamount to expressing an overt anti-union preference, while, on the other hand, if the employees refused to accept the badge or did not wear it, he [sic] thereby indicated a pro-union sentiment, or, at the least, failed to indicate an anti-union sentiment.<sup>23</sup>

The employer had argued that since unions could distribute pronoun insignia, employers should be permitted to provide antiunion insignia.<sup>24</sup> The Board rebuffed the employer's defense, stating:

We feel, . . . because of the Employer's control over the tenure and the working conditions of the employees involved, that its making of campaign insignia available under the conditions described above

the significant impact unlawful employer activity has on workers' exercise of their rights).

Adjudicating the debate between Weiler and his critics would be beyond the scope of this article. Weiler draws blood, however, when he emphasizes that many American workers believe that their employers would retaliate against them if they openly supported a union. According to Weiler, a Lou Harris poll demonstrates that "fully 43% [of nonunionized workers] believe that their employer would fire, demote, or otherwise make life miserable for union supporters in a representation campaign." Paul C. Weiler, *Milestone or Tombstone: The Wagner Act at Fifty*, 23 HARV. J. ON LEGIS. 1, 11 n.18 (1986) (emphasis in original). More recently, Weiler reports that "[i]n a 1988 Gallup Poll, 69 percent of the respondents agreed (and only 21 percent disagreed) with the proposition that corporations sometimes harass, intimidate, or fire employees who openly speak out in favor of a union." PAUL C. WEILER, *GOVERNING THE WORKPLACE* 117 n.25 (1990).

These findings speak to the heart of the matter. It is the workers' perceptions that must be paramount in deciding whether an election has occurred in a free and secure environment. Considering how many workers honestly believe that their employers would retaliate against union supporters, it is understandable that they could feel trepidation when management invites them to wear antiunion insignia. Under such circumstances, the "choice" to refuse the insignia seems far from free.

18. Section 9(c) (codified as amended at 29 U.S.C. § 159(c)) provides for "a secret ballot of employees." The reason for electoral anonymity is to insulate workers from the pressures and coercion they would otherwise face. As the Board has explained, "[t]o protect the right of an employee to a free and uncoerced choice in representation elections, the Board and the courts have long and consistently applied the rule that a ballot which reveals the identity of the voter is void." A.G. Parrott Co., 255 N.L.R.B. 259, 259 n.3 (1981), quoted in WILLIAMS, *supra* note 1, at 434. Such emphasis on ballot secrecy becomes a farce if employees are pressured into revealing their preferences before the election.

19. 133 N.L.R.B. 765 (1961).

20. *Id.* at 765.

21. *Id.* at 765-66. The employer also instructed its supervisors to wear these badges and to give them to any workers who asked for them. *Id.* at 766.

22. *Id.* at 766.

23. *Id.*

24. *Id.*

placed the employees in the position of declaring themselves as to union preference just as if they had been interrogated as to such preference, and thereby interfered with the free and untrammelled choice of the employees.<sup>25</sup>

*Weise* is an insightful opinion. An employer's distribution of insignia *does* compel workers to take a public stand on the representation issue, which undermines ballot secrecy. Furthermore, such a distribution is not comparable to a labor organization's provision of insignia. Employer and union are not similarly situated, for only the former has the power to hire, fire, discipline, promote, reassign, and take myriad other steps to affect the quality of a worker's professional life. Given this stark disparity in power, it is reasonable to formulate separate rules for employers and unions.<sup>26</sup>

The only weakness in *Weise* is the analogy the opinion draws between distributing antiunion insignia and interrogating an employee regarding unionization. This analogy is vulnerable on both doctrinal and practical grounds. First, recent Board decisions have given employers broad latitude to interrogate workers without violating the Act. In *Rossmore House*,<sup>27</sup> the Board held that it was not per se unlawful for an employer to question an open and active union supporter concerning his union sympathies. Instead, the test is "whether under all of the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act."<sup>28</sup> The Board extended this approach to employees who are not "open and active" union supporters in *Sunnyvale Medical Clinic*.<sup>29</sup>

This development has not gone uncriticized. In *Sunnyvale*, for example, Board Member Dennis argued in dissent:

Ordinarily, an employer's questioning an employee who is not a self-proclaimed union adherent *does* "tend to restrain, coerce, or interfere" with statutory rights. Because the employee has not chosen

25. *Id.*

26. The Fifth Circuit recognized this disparity of power in *NLRB v. Golden Age Beverage Co.*, 415 F.2d 26, 30 (5th Cir. 1969), where it held that the Board did not abuse its discretion in finding "that a promise of increased or improved benefits by an employer to induce employees to reject a union is objectionable conduct, while similar promises on the part of a union are not." The court explained that "[a]n employer in an unorganized plant, with his almost absolute control over employment, wages, and working conditions, occupies a totally different position in a representation contest than a union, which is merely an outsider seeking entrance to the plant." *Id.*, quoted in Becker, *supra* note 1, at 572. As the Fifth Circuit concluded, "[t]he opportunity for employer domination and misrepresentation is manifest," so the Board was justified in holding employers and unions to different standards. *Golden Age Beverage*, 415 F.2d at 30; see also Christensen, *supra* note 10, at 265 (observing "the known fact that when the boss talks, employees may suspect that he is doing more than talking").

27. 269 N.L.R.B. 1176 (1984), *enforced sub nom.* Hotel Employees and Restaurant Employees Union, Local 11 v. N.L.R.B., 760 F.2d 1006 (9th Cir. 1985).

28. *Rossmore House*, 269 N.L.R.B. at 1177. The Board added that factors to be considered include: "(1) the background; (2) the nature of the information sought; (3) the identity of the questioner; and (4) the place and method of interrogation." *Id.* at 1178 n.20. For an overview of the Board's doctrinal evolution in this area, see WILLIAMS, *supra* note 1, at 200-12.

29. 277 N.L.R.B. 1217 (1985).

voluntarily to disclose his union activities or beliefs, the employer's prying into this sensitive subject necessarily chills the employee's freedom of action.<sup>30</sup>

In light of *Rossmore* and *Sunnyvale*, the *Weise* analogy between interrogation and distribution of antiunion emblems offers insufficient protection to employees. Management could readily claim that its offer of antiunion insignia was not coercive under the circumstances, which could find favor with a Board insensitive to Dennis' concerns regarding interrogation.<sup>31</sup>

Furthermore, inviting workers to wear antiunion emblems can be substantially more intrusive than querying them about their union sympathies. Interrogation can be informal and confidential, whereas the offer of insignia forces the employee to make a public decision to wear or reject the button. In essence, the employee is asked to become an ambulatory campaign poster, and her choice will be easily observed by management and coworkers alike. For these reasons, the *Weise* Board's reliance on the interrogation rationale falls somewhat short of the mark. Offering antiunion insignia is not merely interrogation; it is a particularly intrusive and coercive means of interrogation.

This problem notwithstanding, the Board followed *Weise's* reasoning in its 1962 decision in *Beiser Aviation Corp.*<sup>32</sup> In *Beiser*, the Board held that the employer violated Section 8(a)(1) by distributing antiunion cards for workers to wear.<sup>33</sup> The Board indicated that such distribution is illegal per se, stating:

[W]e regard it as immaterial whether, in the process of distributing the cards, the Respondent accompanied such distribution by independent coercive conduct. It is sufficient in the circumstances of this case that by placing an employee in a position where he must declare himself as either for or against [the union], the Respondent coerced employees in violation of Section 8(a)(1).<sup>34</sup>

The Board's 1967 decision in *Automotive Controls Corp.*<sup>35</sup> is to similar effect. Here, in an opinion affirmed by the Board, the trial examiner

30. *Id.* at 1219 (Dennis, dissenting in part).

31. It should be remembered, however, that *Rossmore* and *Sunnyvale* do not give employers carte blanche to question their employees regarding unionization. In the recent cases of *Structural Composites Indus.*, 304 N.L.R.B. 729 (1991) and *Montgomery Ward & Co.*, 288 N.L.R.B. 126 (1988), remanded on other grounds, 904 F.2d 1156 (7th Cir. 1990), the Board found management's interrogation to be coercive under the circumstances and thus violative of Section 8(a)(1). I believe that distributing antiunion insignia constitutes an *inherently* coercive form of interrogation and should also be held beyond the safe harbors of *Rossmore* and *Sunnyvale*.

32. 135 N.L.R.B. 399 (1962).

33. *Id.* at 400.

34. *Id.* (footnotes omitted); see also *Certain-Teed Prods. Corp.*, 153 N.L.R.B. 495 (1965) (§ 8(a)(1) of the Act transgressed where employer asked employees to display antiunion stickers on their cars); *Ralph Wells & Co.*, 151 N.L.R.B. 1384 (1965) (finding § 8(a)(1) violation where foreman tried to intimidate workers into accepting antiunion stickers); *Lyon, Inc.*, 145 N.L.R.B. 54 (1963) (invalidating election where employer provided "Vote No" signs and plant manager pinned one on a worker's back), enforced per curiam, 341 F.2d 301 (5th Cir. 1965).

35. 165 N.L.R.B. 450 (1967), enforced as modified, 406 F.2d 221 (10th Cir. 1969).



ruled that the employer violated Section 8(a)(1) when it distributed antiunion signs in the workplace.<sup>36</sup> The trial examiner reasoned that "employees were thereby impliedly threatened that if they did not accept the signs they would possibly be visited with reprisals. It also constituted a form of interrogation, the purpose of which was to discover the employees' pronoun or antiunion sympathies."<sup>37</sup>

The employer in *Automotive* alleged that it provided the signs pursuant to a request from several employees.<sup>38</sup> Curiously, neither the trial examiner nor the Board discussed whether this could be relevant. One could argue, for example, that when an employer merely honors a worker's request for antiunion insignia it is facilitating the exercise of the worker's Section 7 right *not* to support a union. In this situation, the mutuality argument raised by the employer in *Chas. V. Weise Co.*<sup>39</sup> begins to gather force. Whereas unions have the funds to buy and distribute pronoun insignia, the individual antiunion employee may not be able to afford his own emblems. It may therefore be fair to permit employers to provide antiunion insignia if two safeguards are observed. First, the employer must not initiate the distribution, but must be responding to a specific employee request. Second, the employer must apprise all employees that there will be no rewards or reprisals for either accepting or declining the insignia. In this manner we might enable antiunion employees to campaign on a par with their pronoun colleagues while minimizing the likelihood of implied coercion.

Such reasoning, however, ultimately collapses. The antiunion employee does not need the employer's assistance to campaign against a labor organization. First, the individual can announce his position simply by *refusing* to wear the *union's* insignia. This refusal to wear pronoun emblems could deliver as clear and effective a statement as the donning of antiunion insignia. Second, the individualist could send an equally potent message by defacing pronoun insignia in some manner, such as by drawing a red slash through a button or wearing it upside down. Third, even the most impoverished employee could create antiunion insignia of her own with everyday items such as paper or plastic and felt-tip pens. Even those workers who wanted "store bought" buttons would usually find them quite affordable.<sup>40</sup> In essence, the argument that the indigent employee needs the employer's assistance has virtually no basis in fact.

Furthermore, the two proposed safeguards are unlikely to achieve their purpose. Requiring an employee to ask for antiunion emblems before the employer can supply them is problematic for at least two reasons.

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36. *Automotive Control Corp.*, 165 N.L.R.B. at 453, 456.

37. *Id.* at 456.

38. *Id.* at 453.

39. 133 N.L.R.B. 765 (1961), discussed *supra* at notes 19-26 and accompanying text.

40. The feasibility of these suggestions is demonstrated in *Singer Co.*, 199 N.L.R.B. 1195, 1205-06 (1972), *enforced*, 480 F.2d 269 (10th Cir. 1973), where workers both made their own antiunion badges and purchased others which they then wore and distributed at the plant.

The first problem is that the requirement could be easily circumvented—the employer always could “ask” a trusted worker to “ask” for the insignia. The evidentiary quagmires of such a rule are hardly worth the effort. Moreover, the fact that *one* employee requested antiunion insignia should not justify an employer’s plant-wide distribution of emblems. Those who did *not* request insignia might feel that they were being forced either to support the employer or risk incurring its wrath.

Such fears of reprisal, unfortunately, could not be quashed simply because the employer offers assurances of non-retaliation. This conclusion, albeit bleak, is supported by common sense. If a worker suspects that her employer would discriminate against union supporters, why should she believe its protests to the contrary? If we are honestly committed to the freedom to choose or reject unionization, it is better to forbid employers from providing antiunion emblems even when their workers request them.

Numerous other cases reflect the Board’s prohibitory line of authority.<sup>41</sup> In 1978, the Board reiterated in *Pillowtex Corp.*<sup>42</sup> that such distribution constitutes grounds for vacating an election. The Board reasoned:

When employees are approached by a supervisor and offered [antiunion] buttons . . . they have only two alternatives: accept the buttons

41. See, e.g., *American Mfg. Co.*, 196 N.L.R.B. 248 (1972) (employer’s production and distribution of antiunion badges found violative of the Act); *Macklanburg-Duncan Co.*, 179 N.L.R.B. 848 (1969) (election set aside based on employer’s distribution of antiunion T-shirts and buttons); *Mid States Sportswear, Inc.*, 168 N.L.R.B. 559 (1967) (Section 8(a)(1) of the Act violated where employer pressured workers to wear napkins and pins with antiunion messages), *enforced in relevant part*, 412 F.2d 537 (5th Cir. 1969); *Earle Indus.*, 146 N.L.R.B. 536 (1964) (employer unlawfully requested employees to wear “Vote No” signs and attempted to pin them on employees). *American Mfg.* also raises the delicate issue of whether an emblem is truly antiunion or merely proemployer. In that case the badges stated, “I AM FOR AMERICAN MANUFACTURING CO.” which, if taken literally, does not speak to the representation issue. See *American Mfg.*, 196 N.L.R.B. at 257. These badges were circulated during a heated representation campaign, however, so the trial examiner reasonably treated them as a form of antiunion insignia. *Id.* The trial examiner’s approach has strong intuitive appeal. Employers should be free to distribute procompany buttons to boost morale, foster esprit de corps, and so forth. When such buttons are distributed in response to a union drive, however, they take on the added character of being “antiunion” and should be treated accordingly. The Board seemingly adopted the trial examiner’s stance toward procompany insignia in *Kurz-Kasch, Inc.*, 239 N.L.R.B. 1044 (1978). In finding an employer’s actions unlawful, the Board explained:

It is well established that an employer’s request during an election campaign, that an employee wear a “vote no” button or other proemployer insignia constitutes a form of interrogation because, by agreeing or refusing to wear the button, the employee is forced into an open declaration either for or against the Union.

*Id.* at 1044 (emphasis added) (footnote omitted).

More recently, however, the Board rejected this sensible approach. In *Oklahoma Installation Co.*, 309 N.L.R.B. 776 (1992), the Board held that an employer did not violate the Act by distributing clothing bearing the company’s logo during an election campaign. The Board emphasized that the clothing apparently did not include “any additional writing or insignia indicating an explicit proemployer or antiunion preference in the upcoming election.” *Id.* at 776; see also *Sterling Faucet Co.*, 203 N.L.R.B. 1031, 1037 (1973) (finding no violation where buttons with company insignia were made available to workers during campaign). Such reasoning is facile, for in the context of a representation election it is obvious that “proemployer” materials are fig leaves for antiunion sentiments.

42. 234 N.L.R.B. 560 (1978).

and thereby acknowledge opposition to the Union; or reject them, and thereby indicate their support of the Union. In either case, the fact that the employees must make an observable choice is a form of interrogation. Furthermore, should employees feel compelled to choose a button containing a message opposite to their views, that is coercion and it likewise interferes with the election.<sup>43</sup>

The continuing vitality of the prohibitory strain is demonstrated in the Board's 1991 opinion in *Douglas & Lomason Co.*<sup>44</sup> Here the Board found an unfair labor practice where a supervisor announced the availability of buttons stating "Just Say No to Unions" and checked to see which employees took one. As the administrative law judge explained, the supervisor's conduct constituted "surveillance designed to determine the union or antiunion sympathies of employees, an action which violates Section 8(a)(1) of the Act."<sup>45</sup>

As such cases demonstrate, the Board frequently has sanctioned employers (either by finding them guilty of Section 8(a)(1) violations or by vacating their electoral victories) for distributing antiunion emblems to their workers. Unfortunately, however, the Board has not managed to address this issue in a clear and consistent way. This failure has had its costs. As explained below, the law remains riddled with exceptions of dubious merit.

### III. THE PERMISSIVE SCHOOL

Despite the prevalence of prohibitory cases, a number of Board decisions have condoned employer distribution of antiunion emblems. Although such cases are "outnumbered" by the prohibitory body of precedent, they are nonetheless disturbing. Instead of transmitting a clear doctrinal picture, the Board projects a distorted image indicating that employer distribution is *usually* objectionable but there *appear* to be rather cloudy and ill-reasoned exceptions. As a consequence, it becomes increasingly

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43. *Id.* at 560 (footnote omitted); see also *Cook Family Foods, Ltd.*, 311 N.L.R.B. No. 178 (Aug. 20, 1993) (unlawfully pressuring employees to wear antiunion T-shirts); *Lott's Elec. Co.*, 293 N.L.R.B. 297 (1989) (unlawfully distributing antiunion buttons), *enforced*, 891 F.2d 281 (3d Cir. 1989); *Seville Flexpack Corp.*, 288 N.L.R.B. 518 (1988) (unlawfully requesting workers to wear antiunion buttons); *National Medical Hosp. of Compton*, 287 N.L.R.B. 149 (1987) (unlawfully coercing employee to wear antiunion button), *enforced*, 907 F.2d 905 (9th Cir. 1990); *Nissen Foods (USA) Co.*, 272 N.L.R.B. 371 (1984) (unlawfully soliciting employees to wear antiunion buttons, interrogating them for not doing so, and applying dress code in discriminatory fashion); *R.L. White Co.*, 262 N.L.R.B. 575 (1982) (unlawfully encouraging employees to wear procompany T-shirts); *Great Western Coca Cola Bottling Co.*, 256 N.L.R.B. 520 (1981) (unlawfully polling employees by repeatedly offering them antiunion buttons); *Tappan Co.*, 254 N.L.R.B. 656 (1981) (offering antiunion T-shirts to workers interfered with election); *Reeves Rubber, Inc.*, 252 N.L.R.B. 134 (1980) (unlawfully urging employees to wear items with antiunion slogans); *Great Dane Trailers Indiana, Inc.*, 252 N.L.R.B. 67 (1980) (unlawfully soliciting employees to wear antiunion stickers); *Catalina Yachts*, 250 N.L.R.B. 283 (1980) (unlawfully distributing antiunion buttons and T-shirts), *enforced per curiam*, 679 F.2d 180 (9th Cir. 1982).

44. 304 N.L.R.B. 322 (1991).

45. *Id.* at 328. The judge also found that a supervisor violated Section 8(a)(1) of the Act by telling an employee that she should wear an antiunion button if she wanted to keep her job. *Id.* The Board affirmed the judge's opinion in its entirety. *Id.* at 322.

difficult for parties to assess the Board's decision in any given case.<sup>46</sup> Indeed, the struggle between the Board's prohibitory and permissive schools resembles a match between anemic wrestlers too dispirited to win the match.

The Board's 1966 opinion in *Murray Ohio Manufacturing Co.*<sup>47</sup> indicates the Board's lack of consistency and resolve. In an opinion adopted by the Board, the trial examiner held that the employer violated Section 8(a)(1) by encouraging its workers to wear antiunion cards.<sup>48</sup> No violation was found, however, where a foreman pinned an antiunion card on a worker's clothing but then promptly removed it.<sup>49</sup> This decision is counterintuitive; even though the foreman removed the button, he already had sent a rather coercive antiunion message by first pinning it on the worker. *Murray Ohio* is not particularly disturbing, because there were sufficient additional grounds for finding a violation of Section 8(a)(1) of the Act. Nonetheless, the decision raises the concern that the Board might be too willing to overlook "minor" instances of coercion or to dismiss them as *de minimus*.

Indeed, the Board exhibited a rather cavalier approach in its 1974 decision in *Acute Systems, Ltd.*<sup>50</sup> Here the Board did not find a violation even though the company's president pinned an antiunion button on an employee.<sup>51</sup> The administrative law judge characterized this incident as a "playful gesture" rather than "a means of determining the employee's views."<sup>52</sup> The minimization of what occurred is hardly persuasive. As Board Member Jenkins argued in dissent, the president's action could "only lead the employees to believe that they are being required to demonstrate their allegiance to management" and was "inherently de-

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46. The convoluted and self-contradictory nature of Board doctrine is deleterious both in principle and in practice. First, the Board's inconsistency can undermine the public's perception of its administrative rationality, competence, and legitimacy. As Jerry Mashaw has warned, "[i]f the substantive outputs of administration seem contradictory, or explicable only in terms of the undisclosed propensities of different deciders, then we become, as Kafka's K, the objects of the personal caprice of state officials." JERRY L. MASHAW, *DUE PROCESS IN THE ADMINISTRATIVE STATE* 202 (1985). Indeed, the Board's performance adds resonance to Christopher Edley's cynical conclusion that "politics is lurking in almost every agency decision and in every corner of administrative law." CHRISTOPHER F. EDLEY, JR., *ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY* 170 (1990).

Second, the Board's interminable flip-flopping can only increase litigation, as the parties' efforts to settle before trial are frustrated by their inability to predict how the Board might rule. As one commentator has observed, "[e]ven experienced labor lawyers are having great difficulty advising clients on how to obey the law." John S. Irving, Jr., *The Crisis at the NLRB: A Call for Reordering Priorities*, 7 *EMPLOYEE REL. L.J.* 47, 47 (1981). And as Irving concludes, "[t]he Board . . . has contributed to its case load by refusing to reconcile inconsistent results in similar cases." *Id.* at 64. On the relationship between legal uncertainty and litigation, see generally RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 511 (3d ed. 1986); George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 *J. LEGAL STUD.* 1 (1984).

47. 156 N.L.R.B. 840 (1966).

48. *Id.* at 843, 851-52.

49. *Id.* at 851-52 & n.37.

50. 214 N.L.R.B. 879 (1974).

51. *Id.* at 881-83.

52. *Id.* at 882-83.

structive of employee rights."<sup>53</sup> Furthermore, the president's "playful" attitude was irrelevant because the Board repeatedly has held that "[i]t is no defense that a violation is committed in a friendly or joking manner."<sup>54</sup>

The Board nonetheless continued its permissive approach in its 1976 *McIndustries, Inc.*<sup>55</sup> decision. Here too, a company president distributed antiunion cards and allegedly pinned them on several employees. The Board did not find this objectionable, however, because there was "no evidence that any card was pinned on any employee against the employee's wishes."<sup>56</sup>

Such reasoning is shallow and deceptive. It is disingenuous to argue that no workers protested because they may have been too intimidated to argue with such an aggressive company president. Furthermore, even if those particular employees were not offended, other workers observing the president could have felt pressured to wear the insignia. *McIndustries* thus turns a blind eye to employees most in need of the Board's protection—those who may feel too vulnerable to speak out on their own. Indeed, the likelihood of coercion was heightened significantly by the employer's other actions of unlawfully prohibiting the workers from distributing union handbills or wearing union insignia at work.<sup>57</sup> Given this lawless disregard for the workers' Section 7 rights, no excuse existed for the employer's abusive distribution of antiunion emblems.<sup>58</sup>

Other Board opinions have condoned similar misconduct. For example, the Board's 1983 opinion in *Daniel Construction Co.*<sup>59</sup> found no violation even though, in the course of a representation campaign, supervisors told workers procompany jackets were available and offered to take the names and sizes of interested workers to the employer. In an opinion affirmed by the Board, the administrative law judge stated:

It is clear that Respondent's purpose and intent in soliciting purchases of the jackets was to aid it in its campaign against the Union, but it is equally clear that Respondent did not intend, or attempt to carry out, the sales of jackets as a method to ferret out union

53. *Id.* at 879 n.1 (Jenkins, dissenting).

54. *Conagra, Inc.*, 248 N.L.R.B. 609, 609 (1980). The Board also has emphasized:

It has long been recognized that the test of interference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on a respondent's motive, courtesy, or gentleness, or on whether the coercion succeeded or failed . . . . Rather, the test is whether the supervisor's conduct reasonably tended to interfere with the free exercise of the employee's rights under the Act.

*Florida Steel Corp.*, 224 N.L.R.B. 45, 45 (1976); *see also Ethyl Corp.*, 231 N.L.R.B. 431, 434 (1977) (explaining that "the coercive and unlawful effect of a statement is not blunted merely because interrogations of, warnings to, or disparaging statements about union adherents are accompanied by laughter or made in an offhand humorous way") (footnote omitted).

55. 224 N.L.R.B. 1298 (1976).

56. *Id.* at 1298 n.1.

57. *Id.* at 1298, 1301-02.

58. *See also Wm. T. Burnett & Co.*, 273 N.L.R.B. 1084, 1092-93 (1984) (finding no violation where supervisor tossed antiunion button toward table where employees were sitting).

59. 266 N.L.R.B. 1090, 1099-1100 (1983).

sentiments. Use by the Union of the identical campaign tactic—wearing of jackets with logos on them—is indicative of the methods of the campaigners.<sup>60</sup>

The judge's argument cannot stand. It is irrelevant that union supporters wore pronoun jackets because the union did not have the power to hire, fire, and otherwise dictate the nature of the workers' employment. Furthermore, the provision of antiunion materials in *Daniel* is particularly problematic because the supervisors offered to record the names of interested workers and provide them to management.<sup>61</sup> Those actions naturally could have suggested that the employer was keeping a list of "loyal" and "disloyal" workers.<sup>62</sup>

Despite these flaws, in 1989 the Board followed suit in *Phillips Industries*.<sup>63</sup> In *Phillips*, the administrative law judge concluded that the employer did not violate the Act when its production superintendent distributed company T-shirts to workers who requested them.<sup>64</sup> The judge concluded that such distribution was acceptable because the employer "took no action to restrain or coerce employees in the exercise of their Section 7 rights by forcing them to choose T-shirts or not."<sup>65</sup>

*Phillips* is difficult to evaluate because the judge related few of the circumstances and the Board affirmed this aspect of the decision without any discussion.<sup>66</sup> Nonetheless, one can criticize the judge for ignoring the active supervisory role in distributing the T-shirts and for assuming that the workers did not have to choose whether to accept them. Given that a supervisor provided them *upon request*, one could agree with the judge that the matter was entirely voluntary. At the very least, however, the employer should have assured the workers that their acceptance or rejection of the T-shirts would have no bearing on their future prospects with the company. Furthermore, it seems short-sighted to say that workers do not have to "choose" when they see coworkers—who may be competitors for promotions and other job-related benefits—receiving the T-shirts. *Phillips* exemplifies the Board's penchant for ignoring the implied coercion of everyday work life in favor of a superficial analysis of the cases.<sup>67</sup>

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60. *Id.* at 1100.

61. *Id.*

62. Although the employer's witnesses testified that they did not actually keep a list of who purchased a jacket, *id.*, that fact is of little force. What matters is that employees reasonably could have believed that supervisors were recording names for purposes of determining their loyalty.

63. 295 N.L.R.B. 717 (1989).

64. *Id.* at 733.

65. *Id.*

66. *Id.* at 717-19, 733.

67. Numerous scholars have commented upon the prevalence of alienation and coercion in the workplace. See, e.g., ROBERT BLAUNER, *ALIENATION AND FREEDOM* 183 (1964) (asserting that "alienation remains a widespread phenomenon in the factory today"); ERICH FROMM, *ESCAPE FROM FREEDOM* 139 (1941) (describing the employer-employee relationship as a coldly instrumental arrangement in which "the owner of capital employs another human being as he 'employs' a machine"); ROBERTO MANGABEIRA UNGER, *FALSE NECESSITY: ANTI-NECESSITARIAN SOCIAL THEORY IN THE SERVICE OF RADICAL DEMOCRACY* 274 (1987) (concluding that "[w]orkers continue to suffer strongly felt

The 1991 *Vemco*<sup>68</sup> decision offers the most recent example of the Board's permissive school. In *Vemco*, the Board concluded that supervisors had not violated Section 8(a)(1) by offering employees antiunion buttons in exchange for their prounion emblems.<sup>69</sup> The Board argued that no unlawful interrogation had transpired because the employees were wearing prounion insignia and so their viewpoints were already known.<sup>70</sup> Furthermore, "the offers were not accompanied by any threats or coercion."<sup>71</sup>

Neither of these reasons is persuasive. That the employees wore prounion insignia merely *increases* the supervisors' culpability, for it should have been obvious that the employees did not want antiunion emblems. Moreover, there may have been no need for explicit "threats or coercion" because the employer already had violated the workers' Section 7 rights in a host of other ways.<sup>72</sup>

*Vemco* thus culminates a line of cases where the Board has condoned employer distribution of antiunion insignia. The common thread in these opinions is that the Board has failed to appreciate the likelihood of implied coercion whenever management "invites" workers to wear antiunion emblems. In the heat of a representation campaign, workers reasonably may fear that the choice is hardly a free one. This sense of coercion can only be deepened where, as has often been the case, the employer has violated Section 7 in other ways or has failed to assure employees that their careers will not be affected by their response to the insignia.

#### IV. THE MODERATE SCHOOL

Yet a third vein of Board authority seeks to strike a balance between the prohibitory and permissive schools. This moderate school—which *appears* to represent the predominant view—permits employers to provide antiunion insignia if there is no individualized distribution. Notwithstanding this school's ascendancy, it places style over substance and fails to shield workers from possible coercion.

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experiences of powerlessness and humiliation").

This realization that the economically dependent may be exploited is hardly limited to twentieth-century theorists. Indeed, one need look no further than the Federalist Papers to find the observation that "[i]n the general course of human nature, a power over a man's subsistence amounts to a power over his will." THE FEDERALIST No. 79, at 400 (Alexander Hamilton) (Garry Wills ed., 1982). This is *not* to suggest that employers are inherently "evil" or inexorably bent on controlling the minds of their workers. To the contrary, it is simply a plea for the Board to recognize the economic vulnerability of employees and to appreciate the ever-present *possibilities* for coercion. As Archibald Cox has observed, "[a]ny argument which discloses the speaker's strong wishes is not wholly an appeal to reason if the listener is in the speaker's power." ARCHIBALD COX ET AL., CASES AND MATERIALS ON LABOR LAW 143 (11th ed. 1991).

68. *Vemco, Inc.*, 304 N.L.R.B. 911 (1991).

69. *Id.* at 913.

70. *Id.*

71. *Id.*

72. The Board found that the employer had violated the Act by, inter alia, laying off sixty employees to discourage support for the union. *Id.* Such a massive, illegal discharge of the employees' peers clearly could have added a coercive flavor to the supervisors' proposed trade.

The Board initiated the moderate approach with its 1973 decision in *Farah Manufacturing Co.*<sup>73</sup> In *Farah*, the employer placed antiunion buttons in a box available to workers.<sup>74</sup> In an opinion affirmed by the Board, the administrative law judge found the employer's conduct unobjectionable. The judge stressed that the employer merely made the emblems *available* to employees; the employees were not pressured to accept the buttons (with one exception) and apparently no explicit effort was made to observe who wore them. Under these circumstances, the judge concluded that the distribution was lawful.<sup>75</sup>

The judge provided little reasoning, but he was unwilling to conclude that it is objectionable merely to provide employees with antiunion insignia. The weakness inherent in this moderate approach is that it opens the door to subtle abuse. Even the least sophisticated employer would find it convenient to place antiunion emblems at the workplace and later observe who wore them. Moreover, workers might still have a reasonable sense of coercion, especially since the employer in *Farah* never advised them that there would be no reprisals for declining to wear the antiunion insignia.

The Board's 1978 decision in *Black Dot, Inc.*<sup>76</sup> may constitute the most carefully reasoned defense of the moderate position. In *Black Dot*, the employer placed its buttons in the workers' cafeteria with a large red arrow pointing toward them.<sup>77</sup> The employer told its supervisory personnel not to discuss the buttons with the employees, but a number of the supervisors wore them at work.<sup>78</sup> When the union complained that the employer was "trying to intimidate union supporters and get them to 'tip their hand,'" <sup>79</sup> the employer assured the work force that "wearing (or not wearing) a button is a strictly personal and voluntary act which in no way will favorably [sic] or adversely affect any Black Dot employee."<sup>80</sup>

Based on these facts, the Board overruled the regional director and held that the employer had not interfered with the election. The Board distinguished *Chas. V. Weise Co.*<sup>81</sup> and its progeny on the grounds that *Black Dot's* supervisors did not help distribute the buttons.<sup>82</sup> The Board reasoned:

Here, the supervisors were completely absent from the distribution process, which was unaccompanied by any coercive conduct. Super-

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73. 204 N.L.R.B. 173 (1973).

74. *Id.* at 175.

75. The judge found an isolated violation of Section 8(a)(1) of the Act, however, where a supervisor pressured an employee to accept an antiunion button. *Id.*

76. 239 N.L.R.B. 929 (1978).

77. *Id.* at 929.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Chas. V. Weise Co.*, 133 N.L.R.B. 765 (1961), discussed *supra* notes 19-26 and accompanying text.

82. *Black Dot*, 239 N.L.R.B. at 929.



visors did not pressure employees to make an open choice between the Company and the Union. The Employer merely provided a supply of buttons at a central location . . . . [T]he Employer's assurances [against reprisals] further support the conclusion that the mere availability of buttons in these circumstances would not reasonably tend to interfere with the employees' free choice . . . .

We therefore conclude that the Employer's conduct in merely making buttons available to employees on a voluntary basis, in the absence of supervisory involvement in the distribution process and unaccompanied by independent coercive conduct, does not require that the election be set aside.<sup>83</sup>

The Board's logic may appear sound, especially because the employer emphasized that wearing the buttons was optional. When pushed, however, the Board's line of defense crumbles. It is naive to emphasize the lack of supervisory involvement when some of them wore the insignia and the buttons were placed in a conspicuous place with the employer's "large red paper arrow" pointing to them.<sup>84</sup> The employees did not need to be psychologists to discern that the employer wanted them to wear the insignia. Furthermore, the employer's assurances against reprisal were given too late—they were given only after the union complained and could reasonably be viewed as an expedient fig leaf for the Board hearing that was sure to follow. Finally, the Board ignored the fact that employees would still be put to the choice—at the employer's initiative—of either wearing the antiunion buttons or risk being regarded as union advocates. For these reasons, the regional director was justified in concluding that the election had been fatally tainted.

The Board's moderate school thus draws a bright line between cases where an employer simply makes antiunion insignia available and situations where it individually distributes such insignia. In *Maremont Corp.*,<sup>85</sup> for example, the administrative law judge concluded that the employer violated Section 8(a)(1) of the Act by distributing procompany buttons and hats to the workers. The judge explained:

An employer may lawfully, and in a nondiscriminatory manner, make proemployer buttons available at a neutral location where the employees are not under the surveillance of management. However, the Board has held that it is *per se* unlawful for a supervisor to engage in the distribution of such buttons.<sup>86</sup>

This dichotomy is far too simplistic because it assumes that employees are not under "surveillance" as long as they receive the insignia in a

83. *Id.* (citations omitted).

84. *Id.*

85. 251 N.L.R.B. 1617, 1623 (1980), *enforcement denied*, 666 F.2d 1037 (6th Cir. 1981).

86. *Id.* at 1623. This aspect of the judge's decision apparently was adopted by the Board but was not discussed in its opinion. *Id.* at 1617. The Sixth Circuit refused to enforce the Board's ruling, simply stating in a one-paragraph order that it "is not supported by sufficient evidence and is clearly erroneous." *Maremont Corp. v. NLRB*, 666 F.2d 1037, 1037 (6th Cir. 1981). The court's cryptic order obviously fails to identify where the Board may have erred in its reasoning or how such issues should properly be resolved.

“neutral location” and not directly from supervisors. Such reasoning is facile because the emblems obviously *originate* with the employer regardless of how they are distributed. Furthermore, employers easily can identify who wears the emblems regardless of whether they are handed out by the president or plucked from a box. Opinions such as *Black Dot* and *Maremont* elevate style over substance by placing meaningless and artificial restrictions on the distribution of insignia.

Despite its artificial nature, the moderate school has been reinforced by two recent Board decisions. These cases held that the employer violated the Act, but the Board took pains to note that employers may provide antiunion insignia if certain limitations are observed. The Board’s 1991 decision in *Horwath & Co.*<sup>87</sup> demonstrates the dominance of the moderate school. In *Horwath*, a supervisor approached ten employees and offered them antiunion stickers.<sup>88</sup> In a lengthy, well-developed opinion, the administrative law judge held that this action violated Section 8(a)(1).<sup>89</sup> He explained:

[A] central statutory vice in an employer’s soliciting of employees to wear a procompany campaign emblem is that, like more direct forms of union-related “interrogation,” it puts pressure on employees openly to declare that which they have a right to withhold from their employer (and from their fellow employees)—their feelings about union representation.<sup>90</sup>

The judge acknowledged, however, that “*it is neither per se a violation of Section 8(a)(1), nor does it require a rerun election, for an employer ‘merely’ to make procompany emblems ‘available’ to employees.*”<sup>91</sup> *Horwath* thus purports to protect employee rights, but makes it woefully easy for management to continue its distribution.

The Board’s 1992 opinion in *House of Raeford Farms, Inc.*<sup>92</sup> represents its most recent reaffirmation of the moderate position. In *Raeford Farms*, the employer ordered one thousand antiunion T-shirts that employees could obtain at the company supply room. Employees had to sign a list when receiving a shirt (a standard practice for receiving any inventory) and the employer refused to give shirts to workers wearing pronoun insignia.<sup>93</sup> The Board found this unlawful, stating:

[T]he Respondent’s practice of recording the names of employees who accepted the antiunion apparel reasonably tended to interfere with

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87. 304 N.L.R.B. 805 (1991).

88. *Id.* at 805.

89. *Id.* at 816.

90. *Id.* at 815. The judge concluded that the employer had transgressed the Act because its supervisor’s actions “would tend to be seen as ‘pressure’ from management to ‘join the campaign’” against the union. *Id.* at 816. The Board agreed that the Act had been violated and also ordered a new election. *Id.* at 805-06.

91. *Id.* at 815 (emphasis added).

92. 308 N.L.R.B. 568 (1992).

93. *Id.* at 570.

employee free choice in the election. As noted, *the Respondent did not simply provide a supply of T-shirts at a central location, unaccompanied by any coercive conduct.* Rather, while the availability of the T-shirts purported to be on a voluntary basis, to receive the T-shirts, employees were required to refrain from displaying support for the Union and sign a list acknowledging receipt of the T-shirt. Such employer recordkeeping of the employee's antiunion sentiments enables the Respondent to discern the leanings of employees, and to direct pressure at particular employees in its campaign efforts. Given the circumstances of this case, it would be reasonable for the employees to conclude that the recording of employees' names as they received the antiunion T-shirts was done for purposes other than merely monitoring supplies. We accordingly find that the Respondent's recording of names of those accepting the T-shirts reasonably tended to interfere with the employees' free choice of a collective-bargaining representative, and violated Section 8(a)(1) of the Act.<sup>94</sup>

The Board's decision was prudent because the employer's actions reasonably could have suggested that employees were under surveillance. It is unfortunate, however, that the Board did not clarify and restructure the law. Instead, *Raeferd Farms* repeats the moderate fallacy by implying that employers may lawfully provide antiunion insignia at a central location if they do not engage in overtly coercive behavior.<sup>95</sup> This approach fails to protect employees from anything but the most obvious forms of managerial interference.

## V. A PROPOSAL TO END THE CONFLICT

The befuddled state of the law cries out for correction. For both normative and practical reasons the status quo must not continue. From a normative perspective, employees should not have to endure the prospect of having an employer "offer" them antiunion insignia. Such distribution forces the worker either to identify her union sentiments or to serve as the boss's poster child in possible conflict with her actual beliefs. As a practical matter, the indeterminacy in the doctrine has bred little except confusion and litigation.<sup>96</sup>

We can eliminate these problems with the use of a simple prophylactic rule: employers should be forbidden from offering antiunion insignia to

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94. *Id.* (citations omitted) (emphasis added).

95. *Id.*

96. One possible explanation for the naive and self-contradictory nature of the Board's decisions is that the Board literally does not know what it is talking about. Christopher Edley explains:

The National Labor Relations Board is an especially easy target for skeptics of agency expertise, consistency and neutrality. From its inception, the controversial nature of the NLRB's business has subjected it to attack, and not without reason. With respect to expertise, it has been observed that courts routinely incant that the board is expert in industrial relations, so that it can evaluate the effects of suspect management actions on workers; yet the board does no empirical work, nor does its staff include experts in social science, industrial relations, or business administration who might ably address such questions.

EDLEY, *supra* note 46, at 51 (footnote omitted).

their workers.<sup>97</sup> Such a prohibition would not transgress Section 8(c) of the Act<sup>98</sup> because employers and their supervisory personnel would still be free to wear insignia,<sup>99</sup> make speeches, and engage in other forms of legitimate antiunion campaigning.<sup>100</sup> Management would thus retain its freedom of *self* expression; it simply would be forbidden from using its employees as political puppets.<sup>101</sup>

The workers' Section 7 rights would also be safeguarded because employees would remain free to buy or create their own antiunion insignia.<sup>102</sup> In short, we could protect the right of workers to debate, campaign, and vote on unionization with no harm to legitimate needs for self expression. Moreover, the clear and simple nature of the prohibition should put a merciful end to much of the litigation in this field.

The choice, therefore, seems clear. We can continue to dwell in a doctrinal quagmire with confusion, conflict, and coercion or we can protect the workers' Section 7 rights by prohibiting employer distribution of antiunion insignia. Adopting the second alternative would do nothing to prevent employers and employees from campaigning robustly in representation elections. To the contrary, prohibiting employer distribution of antiunion insignia would merely help assure that workers are treated with the dignity they deserve. Workers can speak and act for themselves; they do not need management to stand between the buttons and freedom of choice.

97. To provide maximum deterrence, employer distribution of antiunion insignia should be considered a violation of Section 8(a)(1) of the Act as well as a breach of laboratory conditions.

98. 29 U.S.C. § 158(c) (1988), *quoted supra* at note 10.

99. *See, e.g.,* Kawneer Co., 164 N.L.R.B. 983, 994-95 (1967), *enforced in relevant part*, 413 F.2d 191 (6th Cir. 1969), where the Board condoned a supervisor's manufacture of antiunion buttons on the employer's time and with the employer's materials. The Board did find a violation, however, when several supervisors distributed such emblems among the workers. *Id.*

100. It bears emphasis that management has many effective campaign tactics at its disposal, including the right to campaign among the employees during the workday, the ability to hold "captive audience" speeches, and the power (with rare exceptions) to exclude non-employee union organizers from company premises. For an insightful critique of these advantages, see Becker, *supra* note 1.

101. This conviction that people should not be compelled to bear messages they may find objectionable is obviously not limited to the workplace. In *Wooley v. Maynard*, 430 U.S. 705 (1977), for example, the Supreme Court ruled that a state could not force motorists to display a motto on their license plates that the motorists found morally and religiously offensive. As the Court concluded, "[t]he First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster . . . an idea they find morally objectionable." *Id.* at 715; *see also* *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (invalidating state law that all students salute the flag on the grounds that "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein").

This is not to argue, of course, that the First Amendment forbids employers from pressuring employees to wear antiunion insignia. The First Amendment applies only to speech regulated by the government and is therefore inapposite to private employers. Nonetheless, we should protect this freedom of conscience regardless of whether the compulsion emanates from a tyrannical government or a tyrannical boss. Indeed, it has been argued that "[t]he exercise of . . . managerial authority is closer, more regular, and often more salient to the worker than is the exercise of government authority." PAUL C. WEILER, *GOVERNING THE WORKPLACE* 143 (1990). For this reason, employees should not have to face either explicit or implied pressure to accept antiunion insignia.

102. *See, e.g.,* *Singer Co.*, 199 N.L.R.B. 1195, 1205-06 (1972), *enforced*, 480 F.2d 269 (10th Cir. 1973), discussed *supra* at note 40.