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PROMISES AND GRANTS OF BENEFITS UNDER THE NATIONAL LABOR RELATIONS ACT

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It is good, homey, country-lawyer advocacy to argue that a carrot on a stick may have the same effect on a donkey as a club. But a carrot is not a club. Labor is not a donkey. Persuasion is not coercion.

—Judge Wisdom¹

Unlike speech and conduct in the political arena, speech and conduct during the pendency of union representation elections are subject to stringent governmental regulation under the National Labor Relations Act.² This regulation is subdivided into two broad categories: prohibitions against unfair labor practices³ and prohibitions against

¹ NLRB v. Exchange Parts Co., 304 F.2d 368, 376 (5th Cir. 1962), *rev'd*, 375 U.S. 405 (1964).
² 29 U.S.C. §§ 151-169 (1976 & Supp. IV 1980).
³ Employer unfair labor practices are set forth in § 8(a) of the Act, 29 U.S.C. § 158(a)

conduct that disturbs the "laboratory conditions"⁴ under which the National Labor Relations Board seeks to hold representation elections. In political elections the results are final, but that is not necessarily so in representation elections.⁵ If the Board finds that an employer or union has committed unfair labor practices or has disturbed laboratory conditions it will order a new election⁶ or, in certain unfair labor practice cases, issue a bargaining order.⁷

Two general types of unfair labor practices are involved in representation cases: those in which coercion of employees is explicit, and those in which coercion is presumed from facially benign or beneficial conduct, such as promises or grants of benefits. Both explicit and presumed coercion are impermissible because employee choice may not be freely exercised when either occurs. It is thus equally improper for an employer to grant or promise an employee a wage increase during an election campaign as it is to threaten to fire the employee should the union win. Moreover, such conduct constitutes the basis for overturning an election result. New elections are also ordered where less egregious but nevertheless "objectionable" conduct or speech occurs; in such cases, it is not necessary for the infraction to rise to the level of an unfair labor practice.⁸

While numerous Board representation election doctrines may fairly be subject to reexamination, this Article focuses on the law concerning promises and grants of benefits, a set of rules extending to both unfair labor practice and laboratory conditions regulation. The as-

(1976), and union unfair labor practices are set forth in § 8(b), 29 U.S.C. § 158(b) (1976).

⁴ Section 9(c) of the Act provides the Board with its authority to conduct elections and to regulate employer and union conduct during those elections. See 29 U.S.C. § 159(c) (1976). See generally *NLRB v. A.J. Tower Co.*, 329 U.S. 324 (1946) (Board duty to establish procedure for safeguarding employee free choice). In its decision in *General Shoe Corp.*, 77 N.L.R.B. 124, 127 (1948), the Board announced a "laboratory conditions" standard under which conduct not constituting an unfair labor practice but sufficiently egregious to undermine employee free choice could justify overturning an election under § 9(c) of the Act.

⁵ The Board has rejected analogies to voting in political elections. See *Modine Mfg. Co.*, 203 N.L.R.B. 527, 530 (1973), *enforced*, 500 F.2d 914 (8th Cir. 1974); *Sewell Mfg. Co.*, 138 N.L.R.B. 66, 69 (1962); see also *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617-18 (1969).

⁶ See, e.g., *Dal-Tex Optical Co.*, 137 N.L.R.B. 1782, 1787 (1964) (unfair labor practices); *General Shoe Corp.*, 77 N.L.R.B. 124, 126 (1948) (objectionable conduct).

⁷ See *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

⁸ *General Shoe Corp.*, 77 N.L.R.B. 124, 126 (1948); *supra* note 4. Objectionable conduct may involve selective waiver of union initiation fees, see *NLRB v. Savair Mfg. Co.*, 414 U.S. 270 (1973), violations of the Board's rule against campaigning within 24 hours of an election, see *Peerless Plywood Co.*, 107 N.L.R.B. 427 (1953), or electioneering in the proximity of the voting booth, see *Star Expansion Indus. Corp.*, 170 N.L.R.B. 364 (1968); *Michem, Inc.*, 170 N.L.R.B. 362 (1968). In recent years, the Board has vacillated concerning whether misrepresentations of fact will serve as a basis for overturning election results. The Board's present view is that misrepresentations will not, unless the employer uses forged documents to make the misrepresentation. See *Midland Nat'l Life Ins. Co.*, 263 N.L.R.B. No. 24 (1982). See generally *Shopping Kart Food Mkt.*, 228 N.L.R.B. 1311 (1977).

sumptions behind these rules lack empirical support, dispense with the need for litigated proof, and are difficult to defend as a matter of national labor policy. Since the Supreme Court's decision in *NLRB v. Exchange Parts Co.*,⁹ the law in this area has been governed by a metaphor — the “fist inside the velvet glove.” According to the *Exchange Parts* Court, an employer violates section 8(a)(1)¹⁰ of the Act by granting pre-election benefits because

[t]he danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged.¹¹

On this rationale, it is similarly unlawful in many cases for a union to grant benefits or waive union dues: such activity “allows the union to buy endorsements” and subjects employees who do not take advantage of pre-election union beneficence to “a wrathful union regime, should the union win.”¹²

Although scholarly criticism of *Exchange Parts* was immediate,¹³

⁹ 375 U.S. 405 (1964).

¹⁰ 29 U.S.C. § 158(a)(1) (1976). Section 8(a)(1) provides: “(a) It shall be an unfair labor practice for an employer — (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section [7].”

Section 7 of the Act provides:

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 such activities

29 U.S.C. § 157 (1976).

¹¹ 375 U.S. at 409.

¹² *NLRB v. Savair Mfg. Co.*, 414 U.S. 270, 277, 281 (1973). Although *Savair* dealt with objections to an election under § 9(c), and not unfair labor practices, the *Savair* Court based its holding squarely on the rationale of *Exchange Parts*. See *infra* notes 95-106 and accompanying text.

¹³ See Bok, *The Regulation of Campaign Tactics in Representation Elections under the National Labor Relations Act*, 78 HARV. L. REV. 38, 112-16 (1964); see also J. GETMAN, S. GOLDBERG & J. HERMAN, *UNION REPRESENTATION ELECTIONS: LAW AND REALITY* 160 (1976) [hereinafter cited as *LAW AND REALITY*].

Other commentators have criticized the Board's regulation of speech and conduct on both general and specific grounds, and from a variety of perspectives. See, e.g., Hamilton, *NLRB Proscription on Granting of Benefits During Election Campaigns—A Detriment to Employees*, 1981 ARIZ. ST. L.J. 723, 747-48 (arguing that the NLRA unduly emphasizes collective bargaining, that a “no benefits” rule limits employee ability to “choose rationally,” and for the right of “the responsible employer . . . to maintain . . . union-free status”); King, *Pre-Election Conduct—Expanding Employer Rights and Some New and Renewed Perspectives*, 2 INDUS. REL. L.J. 185, 206, 217 (1977) (rejecting the “fashionable conclusion” that the Board should narrow its role in regulating campaign speech and conduct; “scales have tipped substantially in favor of the employer”); Lochman, *Freedom of Speech in Union Representation Elections: Employer Campaigning and Employee Response*, 1982 AM. B. RESEARCH J. 755, 756, 781 (behavioristic argument that low levels of employer coercion usually increase support for the union and that

it unfortunately has had no perceptible impact. The *Exchange Parts* rationale has evolved into a vast body of case law that invalidates elections results¹⁴ and allows courts to find independent unfair labor practices based solely on presumptions rather than litigated proof of coercion. The Board assumes employees are coerced into voting contrary to their wishes by promises or grants of benefits even if the promise is implied or the benefit innocuous. The *reductio ad absurdum* of this approach is that good is now bad; all promises and grants today are indiscriminately equated with compulsive unfair labor practices. Employees are presumed legally incompetent to make their representation choices freely in the presence of an economic promise or grant, even though the representation choice is one in which the employee votes his economic interest.¹⁵ Perhaps the ultimate irony of the *Exchange Parts* approach is that promises and grants appear to have no measurable effect on voting.¹⁶ Thus, the vast body of case law regulating this field is, at best, an anachronism; at worst, employee free choice has become less important than rules formulated to preserve it.

This Article contends that the *Exchange Parts* presumption equating all promises and grants of benefits with compulsive unfair labor practices should be eliminated. Rather, only when a promise or grant of benefit is found by affirmative proof to have coerced employees should a representation election be set aside or an unfair labor practice found. Part I begins with a discussion of the *Exchange Parts* decision and the legal rationales upon which promises and grants of benefits law is based. The response of the Board and lower courts to *Exchange Parts* is also reviewed, illustrating the extreme to which the benefit/threat equation has been carried and the fictions courts employ both to enforce and to avoid it. Part II reexamines the premises upon which the *Exchange Parts* rule is based. Critical to this analysis is the role of

promises and grants of benefits are usually not perceived as coercion by employees, but nevertheless appear to help employers); Matthewman, *NLRB Regulation of Campaign Conduct: Employer Pay and Benefit Increases in the Pre-Election Period*, 33 LAB. L.J. 714 (1982) (arguing that properly motivated grants should be permitted); Perl, *Granting of Benefits During a Representation Election: Validity of NLRB General Rule*, 18 LAB. L.J. 643 (1967) (criticizing Board minimization of properly motivated benefit grants by employer); Samoff, *NLRB Elections: Uncertainty and Certainty*, 117 U. PA. L. REV. 228 (1968) (NLRB Regional Director arguing that the Board should refrain from deciding what campaign tactics are acceptable and that Board rules detract, without benefit, from finality of election results); Bailey, *The Rule Against Employer Grants of Benefits During Union Organizing Campaigns: Outdated and Unnecessary* (May, 1980) (unpublished manuscript, Harvard Law School) (employees do not need NLRB to protect them from unilateral wage increases).

¹⁴ See *infra* text accompanying notes 38-61.

¹⁵ The authors view the employee's choice concerning unionization to be based principally on economic considerations. *But see* Bok, *supra* note 13, at 49-50 (listing conceivable alternative considerations).

¹⁶ LAW AND REALITY, *supra* note 13, at 147, 151. *But see infra* note 241.

employer motive in section 8(a)(1) cases, the legislative concept of coercion under sections 8(a)(1) and 8(c), the inconsistent judicial response in the area, and the bearing of promises and grants on the balance of industrial power envisaged by the NLRA. Part III proposes a test for distinguishing harmless promises and grants from harmful threats, coercion, and other interference. Under this test, coercive conduct — broadly defined as conduct that reasonably threatens existing conditions of employment¹⁷ — remains prohibited. Benefit grants and promises, however, are considered lawful until proven otherwise. To achieve this result, the *Exchange Parts* holding and its *per se* presumptions need only be reanalyzed with a view toward the policies underlying the Act. Finally, the effect of the proposed test on other unfair labor practice and election conduct regulation is considered.

I. THE LEGAL RATIONALE UNDERLYING PROMISES AND GRANTS OF BENEFITS LAW

A. *The Prohibition Against Employer Promises and Grants of Benefits: The Fist Inside the Velvet Glove Revisited*

1. *Exchange Parts*

The Exchange Parts Company was in the auto parts rebuilding business.¹⁸ In November 1959, the Boilermakers Union informed the company that it represented a majority of the work force and requested to begin bargaining for a contract. After the company refused, the union petitioned for a representation election; the Board conducted a hearing in December. During this time, the company was considering allowing employees to take an additional holiday on their birthdays. A "study" was completed early in January 1960, and the company decided to permit the employees to vote their preference for either a birthday holiday or a regularly scheduled floating holiday. A meeting was scheduled for February 25—six days after the Board ordered a representation election held March 18. At the February 25 dinner meeting, the employees voted for a birthday holiday. On March 4, the company sent a campaign letter to its employees detailing benefits granted by the

¹⁷ "Existing conditions of employment" refers to job security, wages, and current levels of fringe benefits. That term and the term "job security" are used interchangeably throughout this Article. "Coercive conduct," as developed below, is meant to refer to any conduct that coerces, restrains, or interferes with an employee's exercise of § 7 rights which § 8(a)(1) prohibits.

¹⁸ The history and facts of the *Exchange Parts* litigation are reviewed in the Supreme Court's opinion, see *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 406-08 (1964), and in Judge Wisdom's appellate court opinion, see *NLRB v. Exchange Parts Co.*, 304 F.2d 368, 369-70 (5th Cir. 1962), *rev'd*, 375 U.S. 405 (1964).

company since 1949. The letter also "announced as a benefit added in 1960 a new method for calculating overtime in the weeks containing a paid holiday"¹⁹ that resulted in a small holiday pay increase for employees, along with a new vacation schedule that allowed employees increased vacation time.²⁰ At no time during the election campaign did the employer fire union proponents or engage in any conduct that threatened existing employment conditions.

After losing the election, the union filed an unfair labor practice charge alleging that the company's benefit grants improperly influenced the outcome of the election. The Board affirmed the trial examiner's findings that the company's announcement and grant of the birthday holiday and the overtime and vacation benefits were intended to sway the employees' votes in the representation election in violation of section 8(a)(1).²¹ As a remedy the Board ordered a new election.

The Fifth Circuit, in an opinion by Judge Wisdom, denied enforcement of the Board's order. Judge Wisdom first rejected the Board's finding concerning the birthday holiday because the holiday had been under consideration before the union requested recognition.²² With respect to the overtime pay and vacation benefits, however, Judge Wisdom accepted the Board's finding that they were granted "with an intent to influence the outcome of the representation election."²³ Nevertheless, these benefit grants were held not to constitute illegal coercion, restraint, or interference. After noting the Board's inconsistent interpretations of section 8(a)(1),²⁴ Judge Wisdom formulated the following test for analyzing promises and grants of benefits: "The proper criterion is whether there is objective evidence of restraint or coercion" ²⁵ For example, if "the increase in benefits was one part of an overall program of interference and restraint by the employer,"²⁶ a sec-

¹⁹ *Id.* at 369. The employer argued that this benefit was actually introduced during July, 1959. *Id.* at 371.

²⁰ See *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 407 (1964).

²¹ *Exchange Parts Co.*, 131 N.L.R.B. 806, 811-12 (1961), *enforcement denied*, 304 F.2d 368 (5th Cir. 1962), *rev'd*, 375 U.S. 405 (1964).

²² See *NLRB v. Exchange Parts Co.*, 304 F.2d 368, 370 (5th Cir. 1962), *rev'd*, 375 U.S. 405 (1964).

²³ *Id.* at 371.

²⁴ *Id.* at 371-72. Judge Wisdom noted that in some cases, the Board and the courts were apparently concerned with whether the benefit was granted "for the purpose of" compromising employee free choice. *Id.* at 371 (quoting *Hudson Hosiery Co.*, 72 N.L.R.B. 1434, 1437 (1947)) (emphasis by the Board). On the other hand, some cases dismissed a motive analysis in favor of the "effect of the timing of the announcement of the benefits." 304 F.2d at 372 (emphasis in original). Judge Wisdom further concluded that appellate court decisions apparently distinguish between unconditional benefit grants unaccompanied by other unfair labor practices (which may be lawful) and conditional grants accompanied by other unlawful conduct. These distinctions are discussed in detail *infra* text accompanying notes 251-57.

²⁵ *NLRB v. Exchange Parts Co.*, 304 F.2d at 372.

²⁶ *Id.*

tion 8(a)(1) violation might be made out. "[T]he whole tenor of the statutory language and decisions interpreting it indicate that the evil to which the statute is directed is the use of force and pressure."²⁷ The instant case differed from many other benefit grants and promises cases in that "the benefits were put into effect unconditionally on a permanent basis, and no one has suggested that . . . the benefits would be withdrawn if the workers voted for the union."²⁸ Although "an increase of benefits . . . may persuade the employees not to vote for the union,"²⁹ this form of noncoercive persuasion was held not prohibited by the Act, and thus the company had not restrained or coerced its employees in violation of section 8(a)(1).³⁰

The Supreme Court granted review in *NLRB v. Exchange Parts Co.*³¹ to decide whether section 8(a)(1) "prohibits the conferral of such benefits, without more, where the employer's *purpose* is to affect the outcome of the election."³² In an opinion by Justice Harlan, the Court reversed. The appellate court "was mistaken in concluding that the conferral of employee benefits while a representation election is pending for the purpose of inducing employees to vote against the union, does not 'interfere with' the protected right to organize."³³ Section 8(a)(1) extends beyond employer conduct that on its face imperils job security, "prohibit[ing] not only intrusive threats and promises but also conduct immediately *favorable* to employees which is undertaken with the express *purpose* of impinging upon their freedom of choice for or against unionization."³⁴ Justice Harlan overcame Judge Wisdom's metaphoric distinction between carrots and sticks³⁵ with his own now-famous metaphor:

The danger inherent in well-timed increases in benefits is *the suggestion of a fist inside the velvet glove*. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may

²⁷ *Id.* at 375.

²⁸ *Id.*

²⁹ *Id.*

³⁰ In Judge Wisdom's words, [t]he argument that an increase of benefits by the employer may persuade the employees not to vote for the union overlooks the fact that the employer is entitled to try to persuade his employees to vote against a union, provided that he does so by non-coercive means. . . . Although freedom to increase benefits in an effort to make a union seem unnecessary does not follow as a necessary incident of the right to argue against the union, it is scarcely any more coercive.

Id.

³¹ 375 U.S. 405 (1964).

³² *Id.* at 406 (emphasis added).

³³ *Id.* at 409.

³⁴ *Id.* (emphasis added).

³⁵ See *supra* text accompanying note 1.

dry up if it is not obliged. . . .

. . . The beneficence of an employer is likely to be ephemeral if prompted by a threat of unionization which is subsequently removed. Insulating the right of collective organization from *calculated good will* of this sort deprives employees of little that has lasting value.³⁶

Thus, the Supreme Court established the foundational presumption of promises and grants of benefits law: where the employer's motive or purpose is to induce employees to vote against the union, pre-election grants of benefits are prohibited because employees fear their employer's economic power.³⁷ The mere finding of a bad motive behind a conferral or promise of benefit is sufficient to show restraint, interference, or coercion of employee rights in violation of section 8(a)(1).

2. Extension of the Metaphor

Post-1964 developments witnessed the evolution of the *Exchange Parts* holding into a vast body of case law that presumptively prohibits all employer largess, irrespective of whether it is granted unilaterally or promised as a future improvement.³⁸ The rule indiscriminately invalidates "pure" grants³⁹ and promises⁴⁰ (that is, those unaccompanied by

³⁶ 375 U.S. at 409, 410 (footnote omitted) (emphasis added).

³⁷ At the time *Exchange Parts* was decided, one could argue that the Court's central concern was not motive but perceived impact. Motive was assumed in the statement of the issue. The decision was brief and unanimous. It might be argued that the tactic of making last-minute benefit grants was implicitly deemed by the Court to be "inherently destructive" of employee rights, and thus incapable of supporting a benevolent employer purpose. See generally *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967). These observations might carry greater weight if the subsequent case law in promises and grants questions did not seize upon motive as the principal deciding factor in most situations, suggesting that impact is a consequence of good or bad motive. See *infra* text accompanying notes 38-94.

³⁸ Logically, if one accepts the proposition that grants of benefits are coercive—even though they constitute an unconditional improvement in working conditions to the benefit of employees—it follows that promises of benefits, which expressly or impliedly condition receipt upon the union's defeat, would be considered even more coercive. Judge Wisdom and others have used this contingency distinction to suggest that unilateral benefit grants might be acceptable while benefit promises should be held unlawful. See *NLRB v. Exchange Parts Co.*, 304 F.2d 368, 373 (5th Cir. 1962), *rev'd*, 375 U.S. 405 (1964); cf. R. GORMAN, *BASIC TEXT ON LABOR LAW* 164 (1976) (doubting that grants carry the coercive impact of promises). These contentions are discussed *infra* text accompanying notes 251-57.

³⁹ See, e.g., *NLRB v. Styletek, Div. of Pandel-Bradford, Inc.*, 520 F.2d 275 (1st Cir. 1975); *NLRB v. Rexall Chem. Co.*, 418 F.2d 603, 605 (5th Cir. 1969), *cert. denied*, 397 U.S. 1065 (1970); *Owens-Corning Fiberglas Corp. v. NLRB*, 407 F.2d 1357, 1359-62 (4th Cir. 1969); *NLRB v. Tennessee Packers, Inc., Frosty Morn Div.*, 379 F.2d 172, 181 (6th Cir.), *cert. denied*, 389 U.S. 958 (1967); *Crown Tar & Chem. Works, Inc. v. NLRB*, 365 F.2d 588, 590 (10th Cir. 1966); *NLRB v. Frantz & Co.*, 361 F.2d 180 (7th Cir. 1966); *International Harvester Co.*, 179 N.L.R.B. 753, 753-54 (1969) (issuing bargaining order).

⁴⁰ See, e.g., *NLRB v. Polytech, Inc.*, 469 F.2d 1226 (8th Cir. 1972); *NLRB v. Zanes Ewalt Warehouse, Inc.*, 384 F.2d 794 (5th Cir. 1967); *NLRB v. Flomatic Corp.*, 347 F.2d 74 (2d Cir. 1965); cf. *NLRB v. Patent Trader, Inc.*, 415 F.2d 190, 198-99 (2d Cir. 1969) (en banc) (promise

discriminatory discharges or other conduct endangering existing conditions of employment) as well as those where the benefit grant or promise was but one part of a larger campaign of coercion against the employees.⁴¹ Further, the rule makes no exception for employer grants or promises of *de minimis* or innocuous benefits. Turkey dinners,⁴² ten-minute coffee breaks,⁴³ improved work rules,⁴⁴ and three-dollar Christmas bonuses⁴⁵ are deemed sufficiently coercive to justify ordering new representation elections.⁴⁶ In the Board's view, even the provision of a

of benefit violated section 8(a)(1) but grant of benefit did not violate Act), *modified*, 426 F.2d 791 (2d Cir. 1970).

⁴¹ See, e.g., *Hedstrom Co. v. NLRB*, 558 F.2d 1137, 1142-43 (3d Cir. 1977), *cert. denied*, 450 U.S. 996 (1981); *NLRB v. WKRG-TV*, 470 F.2d 1302 (5th Cir. 1973); *NLRB v. Dixisteel Bldgs., Inc.*, 445 F.2d 1260 (8th Cir. 1971); *Sweeney & Co. v. NLRB*, 437 F.2d 1127 (5th Cir. 1971); *NLRB v. J. Taylor Mart, Inc.*, 407 F.2d 644 (7th Cir. 1969); *Macy's Mo.-Kan. Div. v. NLRB*, 389 F.2d 835, 838 (8th Cir. 1968); *International Union, UAW v. NLRB*, 392 F.2d 801 (D.C. Cir. 1967), *cert. denied*, 392 U.S. 906 (1968); *NLRB v. Yokell*, 387 F.2d 751 (2d Cir. 1967); *NLRB v. Welsh Indus., Inc.*, 385 F.2d 538, 540-41 (6th Cir. 1967); *Madison Brass Works, Inc. v. NLRB*, 381 F.2d 854, 857 (7th Cir. 1967).

⁴² See, e.g., *Baker Brush Co.*, 233 N.L.R.B. 561 (1977); see also *NLRB v. Rich's Precision Foundry, Inc.*, 667 F.2d 613, 625-26 (7th Cir. 1981) (improperly motivated \$50 bonus exceeded value of past gifts of fruit, ham, or turkeys). *But see* *Western Sample Book & Printing Co.*, 209 N.L.R.B. 384 (1974) (employer did not violate Act by giving employees three-pound ham and paying for their Christmas party rather than merely providing employees with five-pound ham as employer did in years past); *Conolon Corp.*, 175 N.L.R.B. 27 (1969) (giving employees choice between ham or turkey did not violate Act notwithstanding that in past employer only offered turkey), *modified*, 431 F.2d 324 (9th Cir. 1970), *cert. denied*, 401 U.S. 908 (1971).

⁴³ See *NLRB v. S.E. Nichols Co.*, 380 F.2d 438, 440-41 (2d Cir. 1967). *But see* *Litton Dental Prods. v. NLRB*, 543 F.2d 1085 (4th Cir. 1976); *Guyan Valley Hosp., Inc.*, 198 N.L.R.B. 107 (1972).

⁴⁴ See, e.g., *NLRB v. Tennessee Packers, Inc.*, 379 F.2d 172 (6th Cir.), *cert. denied*, 389 U.S. 958 (1967).

⁴⁵ See *Donovan v. NLRB*, 520 F.2d 1316, 1320 (2d Cir. 1975) (Christmas bonus and more egregious antiunion conduct found to violate the Act), *cert. denied*, 423 U.S. 1053 (1976); see also, e.g., *United Dairy Farmers Coop. Ass'n v. NLRB*, 633 F.2d 1054 (3d Cir. 1980); *Machine Tool & Gear, Inc.*, 237 N.L.R.B. 1109 (1978), *enforced*, 652 F.2d 596 (6th Cir. 1980); *Daniel A. Donovan*, 206 N.L.R.B. 688 (1973), *enforced*, 520 F.2d 1316 (2d Cir. 1975); cf. *NLRB v. Lou Taylor, Inc.*, 564 F.2d 1173 (5th Cir. 1977) (*per curiam*) (employer provided, *inter alia*, Christmas party; held violation). *But cf.* *Wilker Bros. Co.*, 236 N.L.R.B. 1371 (1978) (employer did not violate Act by giving employees Christmas gift certificates), *modified*, 652 F.2d 660 (6th Cir. 1981).

⁴⁶ Numerous other examples may also be noted. See *NLRB v. Garry Mfg. Co.*, 630 F.2d 934 (3d Cir. 1980) (employer financing of family outing for employees held violation); *NLRB v. S.E. Nichols Co.*, 380 F.2d 438, 440-41 (2d Cir. 1967) (employer violated Act by promising, *inter alia*, new smocks and furniture for employees); *Magnesium Casting Co.*, 250 N.L.R.B. 692 (1980) (provision of free legal advice held violation), *enforced*, 668 F.2d 13 (1st Cir. 1981); *Catalina Yachts*, 250 N.L.R.B. 283 (1980) (employer provision of, *inter alia*, free pool table and jukebox for employee use held violation), *enforced*, 679 F.2d 180 (9th Cir. 1982); *Willow Corp.*, 244 N.L.R.B. 303 (1979) (free admission to racetrack and paid time off work held violation), *enforced*, 666 F.2d 1294 (10th Cir. 1981); *Hamilton Avnet Elecs.*, 240 N.L.R.B. 781 (1979) (luncheon where employer gave prizes to employees held violation); *M-W Educ. Corp.*, 223 N.L.R.B. 495 (1976) (free meals and taxi fare held violation); *Dynacor Plastics & Textiles Div. of Medline Indus., Inc.*, 218 N.L.R.B. 1404 (1975) (free lunches held violation but increase in vacation time and piece rate held no violation); *Rennselaer Polytechnic Inst.*, 219 N.L.R.B. 712 (1975) (making high officials more accessible to employees constituted unlawful benefit); cf. *NLRB v. Bradley Lumber Co.*, 128 F.2d 768, 770-71 (8th Cir. 1942) (free whiskey held violation); *Wiker Bros. Co.*, 236 N.L.R.B. 1371 (1978) (reduced vending machine prices), *modified*, 652 F.2d 660 (6th

baseball field and picnic tables is improper if intended to influence employees' votes because such benefits are "tailor-made to meet with employee approval" and are thus "anathema to employee free choice."⁴⁷

Another disturbing extension of the *Exchange Parts* rationale was to situations in which no explicit grant or promise was made. Thus, the post-*Exchange Parts* era marked the rise of the implied-promise-of-benefit case: an employer violates section 8(a)(1) merely by hinting that he may unilaterally grant employment benefits or remedy working conditions that have been complained about.⁴⁸ Even though the employer

Cir. 1981). *But cf.* Labor Servs., Inc., 259 N.L.R.B. No. 127 (1982) (election conditions not disputed where union buys drinks for employees before and after election).

In a number of other cases the Board or the courts found no violation, but the General Counsel thought the situation sufficiently serious to litigate. *See* NLRB v. National Garment Co., 614 F.2d 623 (8th Cir. 1980) (repairing air conditioner not unlawful grant of benefit); R.L. White Co., Inc., 262 N.L.R.B. No. 69 (1982) (employer's distribution of free t-shirts held no violation); Swanson-Nunn Elec. Co., 256 N.L.R.B. 840 (1981) (employer lawfully paid employee's expenses incurred by taking Dale Carnegie course); Mid-East Consolidation Warehouse, 247 N.L.R.B. 552 (1980) (employer lawfully allowed employees to purchase damaged furniture at reduced rates); Hasa Chem., Inc., 235 N.L.R.B. 903 (1978) (employer did not violate Act by providing free beer at meetings); Premiere Corp., 212 N.L.R.B. 382 (1974) (new fans, brooms, dust pans, salt tablets, and dispensers held no violation), *aff'd*, 90 L.R.R.M. (BNA) 3074 (D.C. Cir. 1975); McDonald's Corp., 205 N.L.R.B. 404 (1973) (employer did not violate Act even though it might have provided steak breakfasts, gifts, programs, and contests to employees); Leslie Metal Arts Co., 194 N.L.R.B. 137 (1971) (employer lawfully used profits from plant vending machines to provide free potluck dinner to employees), *modified*, 472 F.2d 584 (6th Cir. 1972). There is some authority for the proposition that a *de minimis* grant of benefits might not violate the Act. *See, e.g.*, NLRB v. Yokell, 387 F.2d 751, 755 (2d Cir. 1967); *id.* at 759 (Friendly, J., dissenting); NLRB v. S.E. Nichols Co., 380 F.2d 438, 440-41 (2d Cir. 1967); NLRB v. Ralph Printing & Lithographing Co., 379 F.2d 687, 691-92 (8th Cir. 1967). Nonetheless, when seemingly innocuous *de minimis* benefits are accompanied by other examples of unlawful conduct, the courts have upheld findings of a separate § 8(a)(1) violation for the grant of a *de minimis* benefit.

⁴⁷ General Merchandise Distribs., Inc., 263 N.L.R.B. No. 126, slip op. at 4, 5 (1982).

⁴⁸ The following scenario, described in *Daisy's Originals, Inc. v. NLRB*, 468 F.2d 493 (5th Cir. 1972), is fairly typical of the unlawful implied-promise-of-benefit cases:

Daisy's work force is primarily Cuban and Spanish speaking. On March 8, Levi called a second all-employee meeting during which he distributed a Spanish language edition of the benefit booklet. At this meeting he made a speech directed to rumors of union misconduct. The trial examiner, with ample support in the record, found the iron fist in the velvet glove manifested itself at this meeting. The situation arose when Levi abandoned his prepared text to extemporaneously answer several questions from the floor. A unit employee asked if he would be able to receive the great non-unit benefits. Levi reportedly told him to make up his own mind and go either way, gesturing with the booklet. When the union steward present at the meeting asked Levi what he meant and what decision the employees had to make, Levi reportedly told her, "Don't vote for the union."

Id. at 497-98; *cf.* Etna Equip. & Supply Co., 243 N.L.R.B. 596 (1979) (employer impliedly promised benefit by comparing pensions at its nonunion mines with pension benefits under United Mine Workers' national coal contract; new election ordered). Similar statements by employers implying better wages and benefits without a union are routinely held violative of § 8(a)(1). *See, e.g.*, NLRB v. Cable Vision, Inc., 660 F.2d 1, 6 (1st Cir. 1981); NLRB v. Garry Mfg. Co., 630 F.2d 934 (3d Cir. 1980); NLRB v. Colonial Haven Nursing Home, Inc., 542 F.2d 691, 700 (7th Cir. 1976); NLRB v. Rollins Telecasting, Inc., 494 F.2d 80, 83-84 (2d Cir.), *cert. denied*, 419 U.S. 964 (1974); NLRB v. Scoler's, Inc., 466 F.2d 1289, 1291-92 (2d Cir. 1972); Texaco, Inc. v. NLRB, 436 F.2d 520, 524 (7th Cir. 1971); Conolon Corp. v. NLRB, 431 F.2d 324, 327 (9th Cir. 1970), *cert. denied*, 401 U.S. 908 (1971); NLRB v. United States Ry. Equip. Co., 424 F.2d 86,

has not explicitly made a promise to improve conditions, the Board and courts will search the record to determine whether such a message has been transmitted.⁴⁹ According to this theory, once an implied promise is detected or surmised, employees are presumed to fear employer reprisal.⁵⁰ The vagueness of the promised benefit is not an obstacle to illegality, nor is the uncertainty of its provision.⁵¹

90-91 (7th Cir. 1970); *NLRB v. Varo, Inc.* 425 F.2d 293, 298-99 (5th Cir. 1970); *NLRB v. Zanes Ewalt Warehouse, Inc.*, 384 F.2d 794, 795 (5th Cir. 1967); *NLRB v. Flomatic Corp.*, 347 F.2d 74, 77 (2d Cir. 1965); *Litton Mellonics Sys. Div. of Litton Sys., Inc.*, 258 N.L.R.B. 623 (1981); *Grimes Mfg., Div. of Midland-Ross, Inc.*, 250 N.L.R.B. 254 (1980); *Franklin Parish Broadcasting, Inc.*, 222 N.L.R.B. 1133 (1976). The line separating an unlawful implied promise from a lawful statement of future intention during a pending election is sketchy. The Board, for example, has held lawful an employer's statement to an employee that the employer was trying to acquire second-hand equipment in answer to the employee's grievance, see *Maine Apple Growers, Inc.*, 254 N.L.R.B. 501 (1981), and an employer's statement to an employee who had incurred large medical expenses that the employer was considering a health plan, see *Maxi Mart*, 246 N.L.R.B. 1151 (1979). *Accord* *Madison Kipp Co.*, 240 N.L.R.B. 879 (1979); *Gerry's Cash Mkts.*, 238 N.L.R.B. 1141 (1978), *enforced*, 602 F.2d 1021 (1st Cir. 1979) (implied promise of benefit the day before the election). Can these cases be distinguished from those in which an unlawful implied promise was found?

⁴⁹ See cases cited *supra* note 48. Some courts justify this by distinguishing an employer's promise from a comparable promise from a union. In *NLRB v. Flomatic Corp.*, 347 F.2d 74 (2d Cir. 1965), an employer distributed a letter to its employees stating that the pending union election prohibited the employer from offering any specific benefit improvements but implying that future improvements were being considered and inviting the employees to discuss this with the employer. The court held that the letter contained implied promises of benefits.

The letter was more than a statement of pre-existing policy or reply to the union's circular. *It went beyond a statement of current labor policy, because it carried thinly-veiled promises of benefit that even the most naive employee could easily read as contingent upon the defeat of the union*, and it was only partially justified as a response to the union's campaign promises and the charge that, without a union, wages would be lowered. *Such an argument must take into consideration the fundamental difference between a union's election promises and those of an employer. A union can effectively promise only that it will try to gain certain benefits in bargaining sessions. In contrast, an employer appears as one who can fulfill any pledges he makes which seem to be reasonably within his means. The differing nature of these promises is not likely to be overlooked by the employees in deciding how to cast their ballots.*

Id. at 77 (emphasis added). *But cf.* *NLRB v. Gilmore Indus., Inc.*, 341 F.2d 240 (6th Cir. 1965) (union impeded exercise of employee free choice by promising to waive initiation fees); *NLRB v. Gorbea, Perez & Morell, S. en C.*, 328 F.2d 679 (1st Cir. 1964) (union waiver of initiation fees if employees joined before election constituted illegal inducement but promise to waive fees for all employees regardless of their vote was lawful).

⁵⁰ An example of this reasoning is found in *NLRB v. Varo, Inc.*, 425 F.2d 293 (5th Cir. 1970). During a union election campaign, the plant manager approached a prounion employee, asked him, "What do you people want out there?" and then said, "If money is all you people are concerned with, you don't have to go through all of this trouble to get it." *Id.* at 298. The court held that although this comment alone might not support a § 8(a)(1) violation, the inferred promise of benefit considered with the employee's anti-union campaign "suggested a 'fist inside the velvet glove.'" *Id.* at 299.

⁵¹ See, e.g., *Chromalloy Mining & Minerals Alaska Div., Chromalloy Am. Corp. v. NLRB*, 620 F.2d 1120, 1124-25 (5th Cir. 1980) (employer promised benefit by telling employee that he might be sent to training school); *NLRB v. Drives, Inc.*, 440 F.2d 354, 364 (7th Cir.) (employer promised illegal benefits by sending a survey to employees for suggestions on improving work conditions and indicating that changes would be made if affordable), *cert. denied*, 404 U.S. 912 (1971); *NLRB v. United States Ry. Equip. Co.*, 424 F.2d 86, 90-91 (7th Cir. 1970) (employer's

The most extreme example of the *Exchange Parts* rationale is that of the implied promise/solicitation of grievances cases: during a representation campaign it is now wrong for an employer even to ask employees what is wrong. In *Uarco Inc.*⁵² the employer conducted a series of pre-election meetings with employees at which employees were given the opportunity to discuss employment conditions and to communicate complaints to management officials. The Board found that the prolonged nature of the meetings and the willingness of management to listen and respond to employees indicated that the employer was "implicitly soliciting" complaints and grievances.⁵³ Not surprisingly, the Board concluded that "the solicitation of grievances at pre-election meetings carries with it an inference that an employer is implicitly promising to correct those inequities it discovers as a result of its inquiries."⁵⁴ The problem with asking employees to air their grievances is that the employees "would tend to expect improved conditions of employment which might make union representation unnecessary."⁵⁵ Solicitation of grievances thus "raises an inference that the employer is making a promise, which inference is rebuttable by the employer."⁵⁶

Dissenting Member Jenkins would have gone even further. In his view, the solicitation of grievances, standing alone, should create an irrebuttable presumption of coercion rather than a rebuttable inference. He noted that the employer had made clear that employee complaints "were not going to go unheeded" and that "legitimate employee griev-

indication that it was looking for a better insurance program constituted an illegal promise of benefit); *Beaver Valley Canning Co. v. NLRB*, 332 F.2d 429, 433-34 (8th Cir. 1964) (uncertainty whether wage increase would actually increase take-home pay because of coincident reduction in hours worked); *C. Markus Hardware, Inc.*, 243 N.L.R.B. 903, 910 (1979) (employer promised benefit by saying he would like to "change things" for employees); *Felsenthal Plastics, Inc.*, 224 N.L.R.B. 1312, 1313-15 (1976) (employer promised benefits by telling nonunion employees who joined the "employer team" that they would receive "team benefits"), *enforcement denied*, 96 L.R.R.M. (BNA) 2107 (7th Cir. 1977).

⁵² 216 N.L.R.B. 1 (1974).

⁵³ *Id.* at 1.

⁵⁴ *Id.*

⁵⁵ *Id.* at 2.

⁵⁶ *Id.* (footnote omitted); *accord Cutting, Inc.*, 255 N.L.R.B. 534, 534 (1981). In the *Uarco* case, the Board concluded that the employer successfully rebutted the inference of a promise of benefit. But the *Uarco* test went considerably further than previous court decisions involving grievance solicitation. Prior to *Uarco* the employer violated the Act not by merely promising to correct the problem but by making the correction contingent upon the defeat of the union. As one court explained:

It is plainly not unlawful for an employer to hold a "gripe session" during a union campaign; an organizational drive often comes as a rude shock to an employer, and a simple offer to hear any complaints the employees may have, or to set up machinery to that end, is a natural and non-coercive response. . . . It is only when this is accompanied by an employer's promises of benefits contingent on rejection of the union that it becomes suspect under § 8(a)(1).

NLRB v. Rollins Telecasting, Inc., 494 F.2d 80, 83 (2d Cir.), *cert. denied*, 419 U.S. 964 (1974); *accord NLRB v. Eagle Material Handling, Inc.*, 558 F.2d 160, 164 (3d Cir. 1977).

ances” were going to be “remedied.”⁵⁷ Member Jenkins thus concluded that the employer’s conduct “obviously would cause employees to believe that no purpose could be served by choosing union representation.”⁵⁸ Finally, the evil here was particularly acute because the employer actually remedied employee complaints concerning poor communication by listening to them. “There can hardly have been a more direct or important device to interfere with the employee’s choice.”⁵⁹

While noting that management distributed a letter pledging to do its best to work out legitimate problems, the majority dismissed Member Jenkins’ concerns by observing that the employer in *Uarco* specifically rebutted its presumptive implied promise by its express “no promise” responses to the employees’ complaints.⁶⁰ Other employers have not fared as well. The Board and the courts since *Uarco* have adopted a strong presumption of coercion in solicitation of grievances cases closer to that advocated by Member Jenkins than to that adopted by the *Uarco* majority.⁶¹

Arguably, implied promises should be unlawful if explicit promises are. Having courts search the record for an implied promise, however, so thoroughly attenuates the *Exchange Parts* threat presump-

⁵⁷ 216 N.L.R.B. at 3, 4.

⁵⁸ *Id.* at 4.

⁵⁹ *Id.* at 4-5.

⁶⁰ *Id.* at 2. Such employer statements, however, are not absolute defenses when “surrounding circumstances” warrant finding an illegal promise. *Id.* at 2 n.4.

⁶¹ See, e.g., *NLRB v. Arrow Molded Plastics, Inc.*, 653 F.2d 280 (6th Cir. 1981) (solicitation of grievances in the form of a rhetorical question asking employees what they would do as company president accompanied by an express or implied suggestion that grievance will be resolved violates § 8(a)(1)); *NLRB v. Pilgrim Foods, Inc.*, 591 F.2d 110, 115-16 (1st Cir. 1979) (“regardless of employees’ encouragement,” unlawful for manager to solicit grievances even though manager had no authority to grant them; manager “not merely a passive wailing wall”); *Litton Melonics Sys., Div. of Litton Sys., Inc.*, 258 N.L.R.B. 623, 625, 636 (1981) (unlawful for employer to assure employees that it would be more sensitive and responsive to employee dissatisfaction where there was no established prior practice of seeking out employee complaints and notwithstanding disclaimer of promise); *Cutting, Inc.*, 255 N.L.R.B. 534, 534 (1981) (employer failed to rebut unlawful inference when it remedied grievance pertaining to floor mats); *First Data Resources, Inc.*, 241 N.L.R.B. 713, 722-23 (1979) (management made implied promise to “look into” complaints and later remedied complaints when inaccessible manager was presented to employees to patch up impaired relationship); *Raley’s, Inc.*, 236 N.L.R.B. 971, 972 (1978), *enforced*, 105 L.R.R.M. (BNA) 2304 (9th Cir. 1979) (announcement of “open door” policy for the discussion of employee problems “constitute[d] not merely a promise of an additional benefit, but rather its implementation”); *Ken McKenzie’s, Inc.*, 221 N.L.R.B. 489, 490 (1975) (“mere solicitation of grievances, by itself, is coercive and violates the Act without the necessity of evidentiary proof”); *Hadbar, Div. of Pur O Sil, Inc.*, 211 N.L.R.B. 333, 334 (1974) (where no prior practice of listening to complaints, promise to remedy implied when employer solicits grievances and asks employees to select a representative to meet with management); *Reliance Elec. Co.*, 191 N.L.R.B. 44 (1969) (same), *enforced*, 457 F.2d 503 (1971); *Texaco Inc.*, 178 N.L.R.B. 434 (1969) (bargaining order predicated on an employer’s solicitation and adjustment of grievances), *enforced*, 436 F.2d 520 (7th Cir. 1971); see also King, *supra* note 13, at 202-03 (criticizing rebuttable nature of *Uarco* test as expansion of employers’ rights).

tion that proscription is difficult to justify on that basis. A better, though not sufficient, basis on which to ban implied promises might be a concern for honesty in dealing with employees or to prevent unfairness to the union (in terms of opportunity to respond) during the campaign.⁶² But such a rationale, apart from its own infirmities,⁶³ would fail because the underpinnings of *Exchange Parts* are improper motive and presumed coercive impact, not honest campaigning or fairness to the union.

3. Exceptions to the *Exchange Parts* Rule: Straining Fictions for Result-Oriented Adjudication

Both before and after *Exchange Parts*, the Board, with some exceptions, has taken the position that properly motivated benefit grants or promises do not violate section 8(a)(1). The Board has considered whether the employer would have implemented improvements even in the absence of a union organizational drive.⁶⁴ Judge Wisdom⁶⁵ and others questioned the practicality of this approach.⁶⁶ Employers who

⁶² See Bok, *supra* note 13, at 117-23.

⁶³ See *infra* text accompanying notes 220-35.

⁶⁴ As stated by the Board:

As a general rule, an employer, in deciding whether to grant benefits while a representation election is pending, should decide that question as he would if a union were not in the picture. On the other hand, if an employer's course of action is prompted by the Union's presence, then the employer violates the Act whether he confers benefits or withholds them because of the Union.

Great Atl. & Pac. Tea Co., 166 N.L.R.B. 27, 29 n.1 (1967), *enforced in part*, 409 F.2d 296 (5th Cir. 1969).

⁶⁵ See *NLRB v. Exchange Parts Co.*, 304 F.2d 368, 376 (5th Cir. 1962), *rev'd*, 375 U.S. 405 (1964).

⁶⁶ See *NLRB v. Styletek, Inc.*, 520 F.2d 275, 281 n.5 (1st Cir. 1975). For example, in *NLRB v. Dothan Eagle, Inc.*, 434 F.2d 93 (5th Cir. 1970), the employer granted a wage hike in May, 1966, consistent with its policy of automatically granting wage hikes every six months. A union organization drive began shortly thereafter. The election was to be held in November, when the next wage hike would have normally been granted. The employer did not grant the wage hike, believing that such a hike would violate § 8(a)(1) as interpreted in *Exchange Parts*. The union won the election, and during the subsequent negotiations the employer again did not grant the normally scheduled wage hikes, believing that such hikes would violate § 8(a)(5) as interpreted in *NLRB v. Katz*, 369 U.S. 736 (1962). The Fifth Circuit held that the employer, by not granting the wage hikes, altered an established policy in violation of §§ 8(a)(1) and 8(a)(5). The court reasoned that the employer should have granted the November and subsequent wage hikes notwithstanding the pending union election and collective bargaining negotiations. The difficulty with the court's reasoning is that an employer does not know in advance of the wage hike whether the Board or the courts will consider the hike to be an "established practice." In many cases, employers have given benefit hikes according to regularly scheduled plans only to discover later that the Board and the courts find that the practice was not well established, that the hike was given a month or two off schedule, or that other evidence overcomes the showing of regularity and establishes that the employer gave the benefit for the purpose of defeating the union. See, e.g., *J.C. Penney Co. v. NLRB*, 384 F.2d 479, 484-85 (10th Cir. 1967); *NLRB v. Welsh Indus.*, 385 F.2d 538, 540-41 (6th Cir. 1967). Other decisions admonish employers planning to give a scheduled wage hike notwithstanding a pending union election to defer the wage hike until after the election regardless of the election outcome. See *Sta-Hi Div., Sun Chem. Corp. v. NLRB*, 560 F.2d 470,

oppose a union's organizational efforts are faced with a Hobson's choice. If an employer legitimately desires to grant a pay raise or other benefit to employees either because of competitive pressures or to reward efficiency, he risks violating section 8(a)(1) because the *Exchange Parts* rule presumes benefit grants are attempts to coerce employees. On the other hand, if the employer refuses to grant a previously scheduled or promised benefit because of the intervening effort by a union to organize his employees, he will violate section 8(a)(1) because his refusal is also characterized as an attempt to coerce the employees (and may also violate sections 8(a)(3) and 8(a)(5)).⁶⁷

This dilemma has been recognized by a number of courts,⁶⁸ and, over the years, three general exceptions to the *Exchange Parts* rule have been developed as a way around it.⁶⁹ To one degree or another the exceptions illustrate the problems generated by motive analysis and presumed coercive impact.⁷⁰ The most common exception is the timing defense. In the typical case, the employer argues that the promise or benefit grant was made either before the union began its organizational drive, before the union requested voluntary recognition from the employer, before a certification election was scheduled, or before the em-

474-75 (1st Cir. 1977). However, this advice is impractical not only because it forces an employer to begin bargaining from a higher floor if the union wins the election but also because post-election wage hikes have been almost uniformly held to violate § 8(a)(1) regardless of election outcome. *Compare* *Luxury of N.Y., Div. of Beaunit Corp. v. NLRB*, 447 F.2d 112, 117-19 (2d Cir. 1971) (post-election wage hike signals employer's approval of union's election defeat and thus violates § 8(a)(1)) and *NLRB v. Ralph Printing & Lithographing Co.*, 379 F.2d 687, 692 (8th Cir. 1967) (same) with *General Elec. Co., Battery Prods., Capacitor Dep't v. NLRB*, 400 F.2d 713, 717-19 (5th Cir. 1968) (unilateral post-election wage hike does not violate *Exchange Parts*).

⁶⁷ See, e.g., *NLRB v. Otis Hospital*, 545 F.2d 252, 254-55 (1st Cir. 1976); *NLRB v. Dothan Eagle, Inc.*, 434 F.2d 93, 96-99 (5th Cir. 1970); *NLRB v. Great Atl. & Pac. Tea Co.*, 409 F.2d 296, 298 (5th Cir. 1969); cf. *Sta-Hi Div., Sun Chem. Corp. v. NLRB*, 560 F.2d 470, 474-75 (1st Cir. 1977) (employer statement that scheduled wage increase would have been granted except for pending unionization election held unlawful); *Sonoco Prods. Co. v. NLRB*, 399 F.2d 835, 837-38 (9th Cir. 1968) (employer misrepresented law by telling employees it could not improve conditions during pending union election; election overturned as laboratory conditions were thus upset). But see *J.J. Newberry Co. v. NLRB*, 442 F.2d 897, 898-90 (2d Cir. 1971); *NLRB v. Dorn's Transp. Co.*, 405 F.2d 706, 714-15 (2d Cir. 1969).

⁶⁸ The dilemma has been aptly described as a "damned if you do, damned if your don't approach," *NLRB v. Dorn's Transp. Co.*, 405 F.2d 706, 715 (2d Cir. 1969), and as placing the employer "between the proverbial 'devil and the deep blue sea,'" *NLRB v. Dothan Eagle, Inc.*, 434 F.2d 93, 98 (5th Cir. 1970). See also *NLRB v. Service Garage, Inc.*, 668 F.2d 247, 248-49 (6th Cir. 1982) ("unfair to penalize employer for not granting wage increase" during union campaign; Board "failed to show sensitivity to the problem faced by an employer."); *Sta-Hi Div., Sun Chem. Corp. v. NLRB*, 560 F.2d 470, 474 (1st Cir. 1977) ("We are not unsympathetic with an employer who, having decided to increase his employees' wages, finds himself trying to navigate a 'perilous' course between the *Scylla* of a violation of the Act for granting a wage increase . . . and the *Charybdis* of a violation of the Act for withholding such an increase . . .") (footnotes omitted).

⁶⁹ See *infra* notes 75-82 and accompanying text.

⁷⁰ The exceptions, for reasons explained *infra* text accompanying notes 114-16 & 135, are not consonant with the usual manner in which § 8(a)(1) is analyzed.

ployer knew of an impending union organizational effort.⁷¹ When the timing defense is raised, the Board and the courts often wrestle with the difficult issue of identifying precisely when the decision to increase benefits was made,⁷² or when the employer became aware of the union's presence among the employees.⁷³ These questions are especially significant when the employer decides to increase wages or other benefits before the union begins its organizational efforts (or before the employer is aware of such efforts) but, for some reason, delays implementing or announcing the benefit until after the organizational effort is underway.⁷⁴

In many cases where the timing of the benefit conferral is at issue, another related but distinct exception to the *Exchange Parts* rule is also raised. This exception is commonly referred to as the business necessity justification.⁷⁵ Typically, the employer will argue that a pre-election benefit grant was conferred on employees to maintain parity with other area employers and thus reduce the likelihood that better benefits elsewhere will lure employees away.⁷⁶ Wage hikes prompted by increases

⁷¹ See, e.g., *NLRB v. Appletree Chevrolet, Inc.*, 608 F.2d 988, 998-99 (4th Cir. 1979); *Kenworth Trucks, Inc. v. NLRB*, 580 F.2d 55, 57 n.2 (3d Cir. 1978); *NLRB v. Montgomery Ward & Co.*, 554 F.2d 996 (10th Cir. 1977); *Lincoln Mfg. Co. v. NLRB*, 382 F.2d 411, 413-14 (7th Cir.), cert. denied, 389 U.S. 972 (1967); *Betts Baking Co. v. NLRB*, 380 F.2d 199, 203 (10th Cir. 1967); *Crown Tar & Chem. Works, Inc. v. NLRB*, 365 F.2d 588 (10th Cir. 1966); *IMCO Container Co. v. NLRB*, 346 F.2d 178, 180-81 (4th Cir. 1965).

⁷² See, e.g., *NLRB v. Tommy's Spanish Foods, Inc.*, 463 F.2d 116, 119 (9th Cir. 1972); *NLRB v. Newman-Green, Inc.*, 401 F.2d 1, 3 (7th Cir. 1968); *NLRB v. Laars Eng'rs, Inc.*, 332 F.2d 664, 667 (9th Cir.), cert. denied, 379 U.S. 930 (1964); *General Battery Corp.*, 261 N.L.R.B. No. 43 (1982); *Edgcomb Metals Co.*, 254 N.L.R.B. 1085 (1981); *Peavey Co.*, 249 N.L.R.B. 853 (1980), enforced in part, 648 F.2d 460 (7th Cir. 1981); *C & T Mfg. Co.*, 233 N.L.R.B. 1430 (1977); cf. *McGraw-Edison Co. v. NLRB*, 419 F.2d 67, 72-74 (8th Cir. 1969) (timing issue concerning when employees received wage hikes).

⁷³ See *NLRB v. WKRG-TV*, 470 F.2d 1302, 1307 (5th Cir. 1973); *NLRB v. Rexall Chem. Co.*, 418 F.2d 603 (5th Cir. 1969), cert. denied, 397 U.S. 1065 (1970); *Hamilton Avnet Elec.*, 240 N.L.R.B. 781, 789 (1979).

⁷⁴ See *NLRB v. Arrow Elastic Corp.*, 573 F.2d 702 (1st Cir. 1978); *Crown Tar & Chem. Works, Inc. v. NLRB*, 365 F.2d 588 (10th Cir. 1966); *Garay & Co.*, 261 N.L.R.B. No. 74 (1982); *Pearl Recycle Center*, 237 N.L.R.B. 491 (1978); *Murcel Mfg. Corp.*, 231 N.L.R.B. 623 (1977); *Aircraft Hydro-Forming, Inc.*, 221 N.L.R.B. 581 (1975).

⁷⁵ See *Delchamps, Inc. v. NLRB*, 588 F.2d 476, 478-81 (5th Cir. 1979); *Monroe v. NLRB*, 460 F.2d 121, 124-25 (4th Cir. 1972); *NLRB v. Gotham Indus.*, 406 F.2d 1306, 1310-14 (1st Cir. 1969).

⁷⁶ See, e.g., *MGM Grand Hotel-Reno, Inc. v. NLRB*, 653 F.2d 1322, 1326-27 (9th Cir. 1981); *NLRB v. Circo Resorts, Inc.*, 646 F.2d 403 (9th Cir. 1981); *NLRB v. Gruber's Super Mkt., Inc.*, 501 F.2d 697, 701-03 (7th Cir. 1974); *NLRB v. Gotham Indus.*, 406 F.2d 1306, 1311-12 (1st Cir. 1969); *NLRB v. Newton Co.*, 236 F.2d 438, 446 (5th Cir. 1956) (wage hike in response to competitors); *NLRB v. Cleveland Trust Co.*, 214 F.2d 95, 98-100 (6th Cir. 1954) (raise in response to prevailing economic conditions); *NLRB v. W.T. Grant Co.*, 208 F.2d 710, 712 (4th Cir. 1953) (raises found to have been granted in response to wage increases at a competing department store); *Havatampa Cigar*, 174 N.L.R.B. 736 (1969) (pension plan announced as matter of routine); *Jewell Smokeless Coal Corp.*, 163 N.L.R.B. 651 (1967) (wage increases granted to attract laborers in a tight labor market).

Other common business justifications for pay and benefit increases during a pending union election include satisfaction of expressed employee unhappiness regarding working conditions, see,

in the minimum wage also fall within this category.⁷⁷ The showing of a business justification for granting a benefit overcomes the presumption that the grant was improperly motivated.

A third category of cases involves the pattern or practice defense, which is closely linked to both the timing and business necessity defenses but is nevertheless conceptually different. In many cases, the employer attempts to explain the timing of a benefit grant by citing a past pattern or practice of similar benefit grants conferred either at regular intervals or at approximately the same time each year.⁷⁸ When a benefit grant is provided at regular intervals, the courts and the Board reason that the employees will expect to receive the grant at that time and thus, even though a union election is pending, the regular nature of the grant dissipates any adverse effect on the employees' free will and legitimates the employer's motive.⁷⁹ In applying this exception, the Board and the courts have been mired in complicated factual disputes to establish whether a pattern or practice existed,⁸⁰ whether the benefit was actually conferred at the expected regular interval,⁸¹ and whether the benefit was the same or similar to the past benefit.⁸²

e.g., *NLRB v. Sandy's Stores, Inc.*, 398 F.2d 268, 270-71 (1st Cir. 1968) (justification rejected by the Board and court because of employer's anti-union motive), application of the benefit to all corporate employees and not just to those involved in the impending election, *see, e.g.*, *Southern Found., Div. of Kellwood Co. v. NLRB*, 406 F.2d 1063 (6th Cir. 1969); *American Sunroof Corp.*, 248 N.L.R.B. 748 (1980), *modified*, 667 F.2d 20 (6th Cir. 1981), and present availability of funds to finance the benefit, *see, e.g.*, *NLRB v. Appletree Chevrolet, Inc.*, 608 F.2d 988, 999 (4th Cir. 1979).

⁷⁷ *See, e.g.*, *NLRB v. Orleans Mfg. Co.*, 412 F.2d 94, 96-97 (2d Cir. 1969); *Lebanon, Apparel Corp.*, 243 N.L.R.B. 1024 (1979); *Western Drug*, 231 N.L.R.B. 890 (1977), *enforced in part*, 600 F.2d 1324 (9th Cir. 1979); *Renton Village Cinema*, 228 N.L.R.B. 377 (1977); *cf. J.P. Stevens & Co.*, 244 N.L.R.B. 407, 418-19 (1979) (attempt to justify change in benefits by pointing to changes in state unemployment compensation law), *enforced*, 668 F.2d 767 (4th Cir. 1982); *Central Buying Serv.*, 223 N.L.R.B. 542 (1976) (wage increase pursuant to Department of Labor directive interpreting overtime regulations held lawful); *Pilot Freight Carriers, Inc.*, 223 N.L.R.B. 286 (1976) (wage increase resulting from surcharge for freight handling authorized by ICC held lawful).

⁷⁸ *See, e.g.*, *NLRB v. Hertz Corp.*, 449 F.2d 711, 712-13 (5th Cir. 1971); *St. Louis Car Div., Gen. Steel Indus. Inc. v. NLRB*, 439 F.2d 1145, 1149 (8th Cir. 1971); *Merchants Truck Line, Inc.*, 232 N.L.R.B. 676 (1977), *enforced*, 577 F.2d 1011 (5th Cir. 1978); *Jimmy Dean Meat Co.*, 227 N.L.R.B. 1012 (1977).

⁷⁹ *See Pedro's, Inc. v. NLRB*, 652 F.2d 1005 (D.C. Cir. 1981); *NLRB v. Anchorage Times Publishing Co.*, 637 F.2d 1359, 1367-68 (9th Cir.), *cert. denied*, 102 S. Ct. 137 (1981).

⁸⁰ *See, e.g.*, *J.P. Stevens & Co. v. NLRB*, 461 F.2d 490, 492-94 (4th Cir. 1972); *Madison Brass Works, Inc. v. NLRB*, 381 F.2d 854, 857 (7th Cir. 1967); *Waterbury Community Antenna, Inc.*, 233 N.L.R.B. 1312 (1977), *enforced in part*, 587 F.2d 90 (2d Cir. 1978); *Merchants Truck Line, Inc.*, 232 N.L.R.B. 676 (1977), *enforced*, 577 F.2d 1011 (5th Cir. 1978).

⁸¹ *See, e.g.*, *NLRB v. Anchorage Times Publishing Co.*, 637 F.2d 1359 (9th Cir.), *cert. denied*, 102 S. Ct. 137 (1981); *NLRB v. Welsh Indus., Inc.*, 385 F.2d 538, 540 (6th Cir. 1967).

⁸² *See, e.g.*, *NLRB v. Rich's Precision Foundry, Inc.*, 667 F.2d 613, 625-26 (7th Cir. 1981) (improperly motivated \$50 bonus exceeded value of past gifts of fruit, ham, or turkeys); *J.P. Stevens & Co. v. NLRB*, 461 F.2d 490, 492-94 (4th Cir. 1972); *Conolon Corp. v. NLRB*, 431 F.2d 324, 327-28 (9th Cir. 1970), *cert. denied*, 401 U.S. 908 (1971); *Alco Venetian Blind Co.*, 253 N.L.R.B. 1216 (1981); *Chester Valley, Inc.*, 251 N.L.R.B. 1435 (1980), *enforced as modified*,

Thus, faced with the harsh results dictated by the *Exchange Parts* holding, the Board and the courts have developed a complex set of exceptions to the *Exchange Parts* rule. In so doing, one presumption, or, as we contend, fiction, is replaced with another. Under the *Exchange Parts* rule, an improperly motivated grant of benefits is presumed to coerce employees; yet when a court finds a benefit grant is properly motivated, the grant is presumed *not* to coerce.

The Ninth Circuit's recent decision in *MGM Grand Hotel-Reno, Inc. v. NLRB*⁸³ provides a good illustration of this battle of fictions. During the pendency of a union organizational campaign, an employer committed various unfair labor practices by threatening and interrogating employees regarding union activities, maintaining invalid no-solicitation rules, and granting a "substantial" wage increase to employees four days before the election.⁸⁴ The court upheld the Board's findings except those relating to the wage increase. The court held that the employer's "decision to increase the wages was necessitated by economic factors, the most notable being the intense competition for qualified employees in the competitive Reno labor market."⁸⁵ The court minimized the results of a wage survey distributed by the employer during the union campaign to show that the employer's wages were already approximately the same as its competitors. The survey was criticized as not being "comprehensive," and the court thought the record failed to indicate "that the Hotel's wages were sufficiently high to attract qualified employees from [competing] establishments."⁸⁶ Another basis for the court's holding, one might guess, is the obvious proposition that the wage increase did not threaten, but rather benefitted, employees. To overcome the *Exchange Parts* presumptions, however, the court found it necessary to discern an acceptable employer motive to validate the benefit grant.⁸⁷

In the recent decision in *Simpson Electric Co. v. NLRB*,⁸⁸ the battle of fictions again raged as the Seventh Circuit attempted to sidestep *Exchange Parts*. But the court, at least cryptically, recognized that the

652 F.2d 263 (2d Cir. 1981); *San Lorenzo Lumber Co.*, 238 N.L.R.B. 1421 (1978).

⁸³ 653 F.2d 1322 (9th Cir. 1981).

⁸⁴ *Id.* at 1325-26.

⁸⁵ *Id.* at 1326.

⁸⁶ *Id.* at 1327.

⁸⁷ To this effect, the court noted:

Such corporate-wide increases have been held to indicate that the employer's conduct was not calculated to influence the impending election. Here the wage increase affected 1200 employees, only 49 of whom were in the bargaining unit in question. The increase resulted from a corporate-wide decision which was implemented in a normal business fashion.

Id.

⁸⁸ 654 F.2d 15 (7th Cir. 1981).

real problem was that the Board had not proven that employee free choice was impaired by the employer's conduct. In *Simpson*, the employer announced various benefit increases shortly after the union lost a representation election. The Board held that the employer was aware at the time of the announcement that a rerun election would be held (although the Board had not yet established a date for this election) and, therefore, should have known its announcement would impinge upon employee choice in the rerun election. Thus, the employer had violated section 8(a)(1).⁸⁹ The employer countered by invoking the exceptions of timing, business necessity, and past practice. Refusing enforcement, the court, in language reminiscent of Judge Wisdom, noted that the evidence did not indicate that "Simpson's employees felt overwhelmed by any unexpected shower of largesse."⁹⁰ The court was also bothered by the apparent Hobson's choice faced by the employer.⁹¹ But with an obvious eye on *Exchange Parts*, the court relied primarily on the pattern and practice defense — with an inflation twist. After taking "judicial notice that inflation was raging on the pertinent dates . . . and employees expected wage and benefit adjustments at least annually merely to stay where they were,"⁹² the court held that the wage hike

⁸⁹ *Id.* at 16. An interesting body of law has also developed in cases like *Simpson* in which the employer's promise or grant of benefit occurs *after* the representation election. Such post-election benefits may violate § 8(a)(1) because they are most often granted in an effort to affect the outcome in a rerun election. See, e.g., *NLRB v. Eagle Material Handling, Inc.*, 558 F.2d 160, 165-66 (3d Cir. 1977); *NLRB v. Gruber's Super Mkt., Inc.*, 501 F.2d 697, 701-03 (7th Cir. 1974); *Luxuray of N.Y., Div. of Benunit Corp. v. NLRB*, 447 F.2d 112, 117-19 (2d Cir. 1971); *NLRB v. Ralph Printing & Lithographing Co.*, 379 F.2d 687, 691-92 (8th Cir. 1967); cf. *General Elec. Co., Battery Prods. Capacitor Dept. v. NLRB*, 400 F.2d 713, 717-19 (5th Cir. 1968) (post-election benefit after union loses does not necessarily influence potential rerun election; but post-election benefit granted after union wins election and before certification violates § 8(a)(1) if intended to undermine union strength), *cert. denied*, 394 U.S. 904 (1969). But see *NLRB v. Genithes*, 463 F.2d 557, 559-60 (3d Cir. 1972); *NLRB v. Ambox, Inc.*, 357 F.2d 138, 141 (5th Cir. 1966). As noted by Judge Waterman in his dissent in *Luxuray of N.Y., Div. of Beaunit Corp. v. NLRB*, 447 F.2d 112, 120 (2d Cir. 1971), construing *Exchange Parts* to force an employer to refrain from granting benefits not only before an election but also until all post-election objections are settled "twists the *Exchange Parts* doctrine into an instrument to punish employees for union organization."

More disturbing, however, are numerous recent decisions, primarily from the Board, that hold post-election promises or grants of benefits unlawful not necessarily because of an impact on a rerun election but because such benefits indicate the employer's desire to "reward" his employees for rejecting union representation. See, e.g., *Tipton Elec. Co. v. NLRB*, 621 F.2d 890 (8th Cir. 1980); *Marcus J. Lawrence Memorial Hosp.*, 249 N.L.R.B. 608 (1980), *enforced in part*, 108 L.R.R.M. (BNA) 176 (9th Cir. 1981); *Murcel Mfg. Corp.*, 231 N.L.R.B. 623 (1977) (employer illegally rewarded employees by providing free lunch after election). But cf. *St. Anne's Home*, 221 N.L.R.B. 839 (1975) (victory party with free hot dogs and punch after election held lawful). Post-election grants or promises of benefits should be held to violate § 8(a)(1) only when they constitute interference, coercion, or restraint of the exercise of § 7 rights; the employer's motive, even if it is to "reward" the employees, is irrelevant.

⁹⁰ 654 F.2d at 16.

⁹¹ See *supra* notes 64-68 and accompanying text.

⁹² 654 F.2d at 16.

was within the current inflation rate and thus did not violate section 8(a)(1). The court explained:

During the continuance of the current inflation it would appear probable that the grant of an increase, at least within the rate of inflation, would have a minimal emotional impact upon the employees, unless the employer's propaganda invited employees' attention to its alleged bearing on the Union drive rather expressly. . . . Accordingly, we believe that a grant of benefits, according to a regular time pattern, not exceeding the rate of inflation, and without special propaganda, should be viewed as a neutral act, regardless of any mere time relation to an organizing campaign, as long as inflation continues.⁹³

Regardless of whether these judicial refinements actually reflect the impact of benefit grants on employees, the exceptions and defenses to *Exchange Parts* have developed into almost mandatory elements of any employer's attempt to rebut a section 8(a)(1) allegation. Indeed, this *per se* quality of the *Exchange Parts* rule is evident in decisions where the courts and Board were willing to find a section 8(a)(1) violation if the employer failed to justify a benefit grant coincident with a representation drive.⁹⁴ Because the *Exchange Parts* rule has developed into a *per se* presumption that even innocuous promises and grants coerce employees, employers and courts have developed *Exchange Parts* exceptions. These developments increase not only the incentive to litigate the *Exchange Parts* rule and its exceptions, but also fight fiction with fiction.

⁹³ *Id.* at 17-18; see also *Marines' Memorial Ass'n*, 261 N.L.R.B. No. 185 (1982) ("substantial" wage increase permissible where employer relies on improved economic circumstances).

⁹⁴ The Board has long required employers to justify the timing of benefits conferred while an election is actually pending. Justifying the timing is different from merely justifying the benefits generally. Wage increases and associated benefits may be well warranted for business reasons; still the Board is under no duty to permit them to be husbanded until right before an election and sprung on the employees in a manner calculated to influence the employees' choice. . . . Granting benefits during the pendency of a representation election has been treated as making out a *prima facie* case of intentional interference with employees' section 7 rights.

NLRB v. Styletek, Div. of Pandel-Bradford, Inc., 520 F.2d 275, 280 (1st Cir. 1975) (citations omitted); cf. *NLRB v. Gotham Indus., Inc.*, 406 F.2d 1306, 1309 n.5 (1st Cir. 1969) (once the Board has shown a harmful effect, the employer has the burden of coming forward with a substantial and legitimate business justification). As shown by the quote from *Styletek*, the Board establishes its *prima facie* case merely by demonstrating that a benefit was promised or granted during a pending election. The employer, although not carrying the ultimate burden of persuasion, still faces the difficult task of justifying its actions, often necessitating the production of extensive documentary and testimonial evidence to prove that the employer's motives were blind to the union's presence. See *infra* notes 246-50 and accompanying text for a suggested resolution of the burden of proof problem.

B. *The Prohibition Against Union Grants of Benefits: Bribes from a Wrathful Union Regime*

In *NLRB v. Savair Manufacturing Co.*⁹⁵ the Supreme Court, in an opinion by Justice Douglas, held that the *Exchange Parts* rationale rendered objectionable under section 9(c) of the Act a union offer to waive initiation fees for employees who signed union authorization cards before the election.⁹⁶ Rejecting the Board's position,⁹⁷ the Court held that the statutory policy of fair elections prohibited the union from "buy[ing] endorsements and paint[ing] a false portrait of employee support during its election campaign."⁹⁸ Although it did not fault unions that drop initiation fees for employees who join either before or after the election,⁹⁹ the Court argued that the Board's sanction of pre-election fee waivers ignored the "realities of the situation" because of the possibility that unions might retaliate against employees who fail to

⁹⁵ 414 U.S. 270 (1973).

⁹⁶ The Court did not reach the issue whether the pre-election waiver rose to the level of an unfair labor practice. See *id.* at 279. It is an unfair labor practice under § 8(b)(1)(A) of the Act, 29 U.S.C. § 158(b)(1)(A) (1976), for a union to "restrain or coerce" employees in the exercise of protected rights. Most challenges to union waivers or reductions of dues and initiation fees are made by employers attempting to defend their refusal to bargain with a union on the grounds that the union interfered with employee free choice. See, e.g., *Savair*, 414 U.S. 270 (1973); *NLRB v. L.D. McFarland Co.*, 572 F.2d 256 (9th Cir.), *cert. denied*, 439 U.S. 911 (1978); *NLRB v. Gafner Automotive & Mach., Inc.*, 400 F.2d 10 (6th Cir. 1968); *NLRB v. Gilmore Indus., Inc.*, 341 F.2d 240 (6th Cir. 1965). The Board appears to be reluctant, at least recently, to issue many complaints under § 8(b)(1)(A) against unions for offers to reduce or waive fees. This reluctance may be partially attributable to the proviso in that section preserving the union's right "to prescribe its own rules with respect to the acquisition or retention of membership" in the union.

⁹⁷ In *Lobue Bros.*, 109 N.L.R.B. 1182 (1954), the Board had held that it would set aside a representation election where the union's offer to waive initiation fees was contingent upon the union's success in the election. That decision was subsequently strictly limited by the Board to its facts, i.e., waiver of fees conditioned on union success in the election, see, e.g., *General Elec. Co.*, 120 N.L.R.B. 1035, 1036-37 (1958), and eventually overruled in *DIT-MCO, Inc.*, 163 N.L.R.B. 1019 (1967). The Board reasoned in *DIT-MCO* that no compulsion is present when a union offers to waive initiation fees conditioned upon the union's success in the election because, under the facts of the case, employees would not be required to pay fees regardless of whether the union won or lost the election. See 163 N.L.R.B. at 1021. The same logic would also apply to an employer's benefit grant that is not conditioned upon the election outcome because the employees will receive the benefit whether the union wins or loses the election. For accounts of the Board's changing positions on this issue in the pre-*Savair* period and the positions taken by the courts of appeals, see 41 BROOKLYN L. REV. 153 (1974); 6 ST. MARY'S L.J. 250 (1974); 10 WAKE FOREST L. REV. 278 (1974).

⁹⁸ 414 U.S. at 277. Support for this proposition was found in *NLRB v. Tower Co.*, 329 U.S. 324, 330 (1946), in which the Court stated it was the duty of the Board to establish "the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees."

⁹⁹ See 414 U.S. at 272-74 & n.4 (dicta). Unconditional offers to waive initiation fees, which remain open after the date of the election and are available to all employees no matter how they vote, have been held lawful under *Savair* on the theory that the union is simply dropping self-imposed barriers to membership. See, e.g., *NLRB v. Whitney Museum of Am. Art.*, 636 F.2d 19 (2d Cir. 1980); *Warner Press, Inc. v. NLRB*, 525 F.2d 190 (7th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976); *Endless Mold, Inc.*, 210 N.L.R.B. 159 (1974); see also *NLRB v. Gorbea, Perez & Morell, S. en C.*, 328 F.2d 679 (1st Cir. 1964).

sign with the union in the pre-election period.¹⁰⁰ Justice White, joined by Justices Brennan and Blackmun, argued in dissent that the union's waiver of initiation fees was simply a form of economic inducement that might influence employees to vote for the union, but did not otherwise carry the indicia of coercion.¹⁰¹

In support of its position, the majority cited with approval a number of lower court decisions invalidating dues waivers that were not made on an across-the-board basis,¹⁰² as well as others that held various other kinds of union benefit grants invalid.¹⁰³ While in none of these cases did the union's conduct rise to the level of unfair labor practices like the employer's grant in *Exchange Parts*, the *Savair* Court's holding has made the rule against benefit grants a bilateral prohibition¹⁰⁴ that continues to invalidate election results today. Thus, unconditional grants of economic benefits by a union to prospective members,

¹⁰⁰ 414 U.S. at 277, 280-81.

¹⁰¹ 414 U.S. at 283-85 (White, J., dissenting). *Exchange Parts* was inapplicable because the inducement was small and the "fist" was wholly lacking because the union would have no benefit to take away if it lost the election. *Id.* at 284-85. The dissent accused the majority of engaging in "rather speculative counter-rational psychological assumptions" concerning the connection between the decision to sign a card and the decision to vote for the union. *Id.* at 288.

¹⁰² See 414 U.S. at 279 n.6 (citing *Amalgamated Clothing Workers v. NLRB*, 345 F.2d 264, 268-69 (2d Cir. 1965) (Friendly, J., concurring) (improper to waive fees for those joining union immediately while indicating that this is foreclosed to those joining later); *NLRB v. Gilmore Indus., Inc.*, 341 F.2d 240, 242 (6th Cir. 1965); *NLRB v. Gorbea, Perez & Morell, S. en C.*, 328 F.2d 679, 681-82 & nn.6-7 (1st Cir. 1964) (promise to waive initiation fee for those joining union prior to election, but not after, may substantially influence election)).

¹⁰³ See 414 U.S. at 279 n.6 (citing *NLRB v. Commercial Letter, Inc.*, 455 F.2d 109 (8th Cir. 1972) (disproportionate payments to employees attending union "hearings" prior to representation election); *Collins & Aikman Corp. v. NLRB*, 383 F.2d 722, 728-29 (4th Cir. 1967) (union's paying employee seven dollars to be an observer at the election is an "unreasonable and excessive economic inducement" that potentially influences other employees and is grounds to set aside the election); *General Cable Corp.*, 170 N.L.R.B. 1682 (1968) (five-dollar gift to employees by union before election, even when not conditioned on outcome of election, was coercive inducement to cast ballots favorable to union); *Wagner Elec. Corp.*, 167 N.L.R.B. 532, 533 (1967) (grant of life insurance policy to those who signed with union before the representation election "subjects the donees to a constraint to vote for the donor union"); *Teletype Corp.*, 122 N.L.R.B. 1594 (1959) (payment of money by rival unions to employees attending pre-election meetings)); see also *NLRB v. Gorbea, Perez & Morell, S. en C.*, 328 F.2d 679, 681 (1st Cir. 1964) (early post-*Exchange Parts* decision stating that union "bribes" are no more "septic" than employer bribes).

Justice White's dissent suggested that, unlike initiation fees waivers, these kinds of union benefit grants create a "psychological connective" that will coerce employees to vote for the union because the employee has "incurred a moral obligation" to do so. 414 U.S. at 288 n.7 (White, J., dissenting). This distinction is difficult to understand and is subject to challenge on several grounds. First, the employee is in the best position to evaluate the benefit grant. Indeed, the employee may conclude that a lawful initiation fee waiver, for example, is more influential to him than other union benefit grants. Second, it is conjecture at best to believe that employees will assume they have an irrevocable obligation to vote for the union because it has done something for them. A pre-election union benefit grant is better understood as simply one more factor the employee weighs in deciding how to cast his vote.

¹⁰⁴ The Court stated that "[t]he Board in its supervision of union elections may not sanction procedures that cast their weight for the choice of a union and against a nonunion shop or for a nonunion shop and against a union." 414 U.S. at 280.

unconnected with the terms and conditions of union membership, are considered to have "no purpose other than to pervert the employee's free choice."¹⁰⁵ Union promises to obtain better employment conditions are not proscribed, however, because the union, unlike the employer, has no power to confer the benefit of higher wages to any employee.¹⁰⁶

C. Summary: The Policies Promoted by the Exchange Parts Rule

Promises and grants of benefits during representation elections are effectively prohibited by a rule that *per se* assumes employees interpret them as threats and that elections cannot freely be conducted in their presence. This rule is maintained to "protect" employees from the superior economic power of employers and unions and to ensure that the representation choice is made in an atmosphere free of coercion. The *Exchange Parts* rule results in less explicit, and perhaps unintended, anomalies as well. It promotes the theory that certain economic considerations should not enter into the choice for or against unionization, at least not when those considerations surface during the election campaign. The full extent of economic benefits resulting from the unionization decision are not laid out in the open. Employers are prohibited from rectifying job-related difficulties during election campaigns and may not even inquire concerning them for fear that a willingness to listen will be interpreted as a solicitation of a grievance and an implied offer to remedy the problem. Unions are barred from demonstrating concretely their willingness to work for employees through benefit grants to employees. *Exchange Parts* also has the unintended result of encouraging campaign gamesmanship. Subtle techniques of persuasion

¹⁰⁵ NLRB v. Whitney Museum of Am. Art, 636 F.2d 19, 21, 22 (2d Cir. 1980); *cf.* NLRB v. Polyflex M Co., 622 F.2d 128 (5th Cir. 1980) (*per curiam*) (case remanded for consideration whether union offered to waive initiation fees for employees who joined before election); NLRB v. Bristol Spring Mfg. Co., 579 F.2d 704 (2d Cir. 1978) (hearing needed to determine whether nature and funding of pre-election payments by union of \$25 unduly influenced election); NLRB v. Madisonville Concrete Co., 552 F.2d 168 (6th Cir. 1977) (election set aside because union paid parking ticket for bargaining unit employee); Tio Pepe, Inc., 263 N.L.R.B. No. 170 (1982) (new election ordered, under *Savair*, where restaurant captains offered to reduce their own share of tips in favor of waiters and busboys; gesture represented "an offer of financial benefit for union support and would have significantly impaired the fairness of the election"); Easco Tools, Inc., 248 N.L.R.B. 700 (1980) (payment by union of \$40 to its election observers unlawful).

¹⁰⁶ See NLRB v. Golden Age Beverage Co., 415 F.2d 26, 30 (5th Cir. 1969); see also Crown Cork & Seal Co. v. NLRB, 108 L.R.R.M. 2224 (10th Cir. 1981); NLRB v. Allen's I.G.A. Foodliner, 652 F.2d 594 (6th Cir. 1980); NLRB v. Claxton Mfg. Co., 613 F.2d 1364, 1372 (5th Cir. 1980); Wilson Athletic Goods Mfg. Co. v. NLRB, 164 F.2d 637 (7th Cir. 1947). See generally R. GORMAN, *supra* note 38, at 170. Interestingly, there has been little if any discussion concerning union defenses to improper union grants of benefits. Presumably, the same defenses would be available to the union as to the employer, i.e., that benefits conferred were part of the union's pattern of organizing, or that reasonable unions may properly bestow benefits because inflation makes it difficult for employees to join them otherwise.

are encouraged in place of free and open disclosure of what proponents may be willing to do for employees. Finally, employees are limited to a choice of present conditions or unionization. They are not permitted to choose between the employer's and the union's promises of improvement.

Struggling with the peculiar results dictated by *Exchange Parts*, courts have carved out exceptions to the rule against promises and grants of benefits by responding to the *Exchange Parts* threat and improper motive fictions with new fictions. When the employer can point to competitive conditions, the consumer price index, or his history of benefit improvement as a motive for a benefit grant, the implied threat is somehow vitiated, permitting employees to make rational, uncoerced representation choices after all. In an attempt to reach just results in individual cases while struggling to remain faithful to the dictates of *Exchange Parts*, the Board and the courts too often reach unprincipled decisions, producing results that do not square with industrial reality or the policies of the Act. The difficulty is that *Exchange Parts* itself cannot be justified under either.

II. ANOTHER LOOK AT THE BENEFITS/THREATS EQUATION: THE ELEMENTS OF MOTIVE, COERCION, FREE SPEECH, AND INDUSTRIAL POWER

Although courts relying on *NLRB v. Exchange Parts Co.*¹⁰⁷ and its progeny have had little difficulty finding unlawful campaign conduct once grants or promises are identified, they have engaged in little, if any, discussion of why promises or grants must necessarily violate the Act. Such a discussion should center on the role of motive (found significant by the *Exchange Parts* Court) in section 8(a)(1) cases, the necessity of coercion as an element of a section 8(a)(1) violation, the impact of section 8(c)'s free speech guarantee, and the policy concern that unregulated benefit grants and promises will upset the balance of industrial power between unions and employers envisioned by the NLRA. An examination of these issues graphically demonstrates the weakness of both the policy and the legal underpinnings of *Exchange Parts* and indicates the foundations of a properly formulated promises and grants of benefits rule.

A. Section 8(a)(1), Hostile Motive, and Exchange Parts

The role of motive in unfair labor practice cases has been debated

¹⁰⁷ 375 U.S. 405 (1964).

extensively in the Supreme Court and by commentators,¹⁰⁸ but the issue today is sufficiently settled in some respects to allow one safely to state several principles of general application. First, any discussion of motive begins with section 8(a)(3), where it is generally agreed that motive has a role in determining whether the employer has committed a violation. Second, it is now generally agreed that the Supreme Court, with the exception of *Exchange Parts*, does not consider motive to be an element of a section 8(a)(1) offense. Finally, both 8(a)(1) and (3) assume conduct injurious or at least adverse to the statutory interests of employees.

Section 8(a)(3) is violated when the employer's legitimate business interests promoted by the questioned conduct do not outweigh the resulting infringement of the employees' interests in engaging in protected activities.¹⁰⁹ In the process of balancing these competing interests, the Court has recognized that if the employer's anti-union motivation is manifested in a discriminatory act, then it is unlikely that the employer can suggest a legitimate business motive for his conduct.¹¹⁰ The relevance of motive in this balancing logically follows from the language of section 8(a)(3), which states that an employer may not "by *discrimination . . . encourage or discourage* membership in any labor organization."¹¹¹ An employer may rebut suggestions that conduct adverse to

¹⁰⁸ See, e.g., *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967); *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300 (1965); *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263 (1965); *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21 (1964); Christensen & Svanoe, *Motive and Intent in the Commission of Unfair Labor Practices: The Supreme Court and the Fictive Formality*, 77 YALE L.J. 1269 (1968) (criticizing the use of motive and intent in all unfair labor practice cases and arguing for balancing of interests approach); Janofsky, *New Concepts in Interference and Discrimination Under the NLRA: The Legacy of American Ship Building and Great Dane Trailers*, 70 COLUM. L. REV. 81 (1970); Oberer, *The Scierter Factor in Sections 8(a)(1) and (3) of the Labor Act: Of Balancing, Hostile Motive, Dogs and Tails*, 52 CORNELL L. REV. 491 (1967).

¹⁰⁹ *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 228-29 (1963).

¹¹⁰ See *NLRB v. Brown*, 380 U.S. 278, 286-87 (1965); *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 311 (1965); *Local 357, Teamsters v. NLRB*, 325 U.S. 667, 675 (1961); *Radio Officers' Union v. NLRB*, 347 U.S. 17, 44 (1954); *NLRB v. Southern Plasma Corp.*, 626 F.2d 1287, 1293 (5th Cir. 1980); *B.G. Costich & Sons, Inc. v. NLRB*, 613 F.2d 450, 454-55 (2d Cir. 1980); see also Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 HARV. L. REV. 1, 20-21 (1947).

The Supreme Court did not explicitly employ a motive analysis in § 8(a)(3) cases until 1954. Compare, e.g., *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945) (no explicit motive analysis in § 8(a)(3) discharge claim) with *Radio Officers' Union v. NLRB*, 347 U.S. 17 (1954) (motive to some degree an element of § 8(a)(3)) and *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263 (1965) (same) and *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33 (1967) (same). See generally Christensen & Svanoe, *supra* note 108, at 1273-82, 1315-25.

¹¹¹ 29 U.S.C. § 158(a)(3) (1976) (emphasis added). The courts (and even some commentators) tend to use the terms "intent," "motive," and "purpose" interchangeably, thus confusing the scierter requirement in unfair labor practice cases. Professor Oberer notes that in the unfair labor practice setting, the proper focus is upon discriminatory purpose or motive — a concept distinct from intent. An employer can "intend" to perform certain acts; "motive," on the other hand, explains why the act is performed. Oberer, *supra* note 108, at 504-06. This distinction is best

employees was discriminatorily motivated by presenting evidence of a legitimate business reason for the questioned act. At that point, the General Counsel must prove that the employer's stated reason is a pretext or that the asserted business justification is outweighed by the employer's invasion of employees' protected rights.¹¹² The only exception to this analysis is when the employer's conduct is inherently destructive of employee rights under section 7 of the Act. In such cases, the courts do not require affirmative evidence of discriminatory purpose because the unavoidable consequences of such conduct sufficiently indicate the underlying motive.¹¹³

In section 8(a)(1) cases, on the other hand, the Supreme Court has held that "nothing in the statutory language prescrib[es] *scienter* as an element of [an] unfair labor practice[]." ¹¹⁴ The language of section 8(a)(1)—that an employer may not "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7"¹¹⁵—practically compels such a interpretation, especially when compared to the "discrimination . . . to encourage or discourage" language of section 8(a)(3). Thus, section 8(a)(1), unlike section 8(a)(3), prohibits conduct that reasonably tends to interfere with employee exercise of section 7 rights irrespective of motive or *scienter*.¹¹⁶ Once it is deter-

illustrated by Oberer's phrase "hostile motive." "Discrimination," at least in the election campaign context, means that some employees are denied benefits for participating in union activities while others receive them for refraining. See *infra* note 142. In other contexts, it has been argued that "discrimination" does not refer to different treatment accorded to union members vis-à-vis nonunion members. See *Kansas City Power & Light Co. v. NLRB*, 641 F.2d 553, 556-57 (8th Cir. 1981). Rather, discrimination simply refers to an employer's acting differently to discourage (or encourage) unionization.

¹¹² See *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33-34 (1967); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 228-29 (1963); Janofsky, *supra* note 108, at 91-94; cf. *NLRB v. Styletek, Div. of Pandel-Bradford, Inc.*, 520 F.2d 275, 280 (1st Cir. 1975) (*Great Dane* burden of proof analysis applied in § 8(a)(1) case); *NLRB v. Gotham Indus., Inc.*, 406 F.2d 1306, 1309 (1st Cir. 1969) (same).

¹¹³ See *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33-34 (1967). In *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 228-29 (1963), Justice White candidly acknowledged that the real basis of the decision may be a weighing of conflicting interests rather than elusive concepts of motive.

¹¹⁴ *International Ladies' Garment Workers Union v. NLRB*, 366 U.S. 731, 739 (1961); *accord* *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263, 269 (1965); *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21, 22-23 (1964); *NLRB v. Southern Plasma Corp.*, 626 F.2d 1287, 1293 (5th Cir. 1980); *Time-O-Matic, Inc. v. NLRB*, 264 F.2d 96, 99 (7th Cir. 1959); *NLRB v. Illinois Tool Works*, 153 F.2d 811, 814 (7th Cir. 1946); *American Freightways Co.*, 124 N.L.R.B. 146, 147 (1959). See generally Gorman & Finkin, *The Individual and the Requirement of "Concert" Under the National Labor Relations Act*, 130 U. PA. L. REV. 286, 353 (1981) (expressing "the long-established doctrine (exemplified by *Burnup & Sims* itself) that the key to a violation of [§ 8(a)(1)] is not the employee's illicit motive but rather the coercive effect upon the exercise of section 7 rights.") (footnote omitted).

¹¹⁵ 29 U.S.C. § 158(a)(1) (1976).

¹¹⁶ See *NLRB v. Express Publishing Co.*, 312 U.S. 426 (1941). Section 8(a)(1)'s legislative history buttresses this interpretation. See Oberer, *supra* note 108, at 496. Senator Wagner explained that § 8(a)(1) (then § 8(1)) was intended as a "general declaration" proscribing employer

mined that interference with employee rights has taken place, the final step to finding a section 8(a)(1) violation is to show that the employees' right involved outweighs any interest the employer may possess.¹¹⁷

Motive analysis becomes more complicated when conduct is challenged under both sections 8(a)(1) and (3). In these cases the Supreme Court has often used either a dichotomous approach that analyzes conduct independently under each section¹¹⁸ or a selective approach that focuses on one or the other section.¹¹⁹ Yet in several cases charging violations under both sections 8(a)(1) and (3) the Court failed to indicate whether its motive analysis encompassed both sections or applied only to the 8(a)(3) charge.¹²⁰ In other cases of overlap, the Court ana-

interference, restraint, and coercion of employees in the exercise of their § 7 rights. *Hearings on H.R. 6288 Before the House Comm. on Labor*, 74th Cong., 1st Sess. 13 (1935), reprinted in 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT OF 1935, at 2487 (1949) [hereinafter cited as NLRA HISTORY]. Because "courts and administrative agencies have difficulties in enforcing these general declarations of right," Senator Wagner noted that more detailed provisions (now §§ 8(a)(2)-(5)) were created in the Act to guarantee that employers could not utilize those practices that had proved "the most fertile sources for evading or obstructing the purpose of the law." *Id.* These specific provisions were not intended to limit in any way the general guarantees of § 8(a)(1). See H.R. REP. NO. 969, 74th Cong., 1st Sess. 15 (1935), reprinted in 2 NLRA HISTORY, *supra*, at 2924; S. REP. NO. 573, 74th Cong., 1st Sess. 9 (1935), reprinted in 2 NLRA HISTORY, *supra*, at 2309; Memorandum of Mar. 11, 1935, prepared for Sen. Comm. on Educ. and Labor, 74th Cong., 1st Sess. 26-27 (Comm. Print 1935), reprinted in 1 NLRA HISTORY, *supra*, at 1351-52.

Moreover, Senator Wagner specifically analogized § 8(1) to other, generalized blanketing provisions found in contemporaneous statutes. See *Hearings on H.R. 6288 Before the House Comm. on Labor*, *supra*, at 13. Among the statutes referred to were § 2 of the Railway Labor Act of 1926, ch. 347, §2, 44 Stat. 577 (current version at 45 U.S.C. § 152 (1976)); § 2 of the Norris-LaGuardia Act, 29 U.S.C. § 102 (1976); the Bankruptcy Act Amendments of 1933, ch. 204, § 77(p)-(q), 47 Stat. 1467, 1481 (repealed 1935), § 7(a) of the National Industrial Recovery Act, ch. 90, § 7, 48 Stat. 195 (1933) (held unconstitutional as amended, *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935)). The question of motive or purpose has been addressed only under the Railway Labor Act, with the courts relying on precedent interpreting the NLRA. See, e.g., *Adams v. Federal Express Corp.*, 470 F. Supp. 1356 (W.D. Tenn. 1979), *aff'd*, 654 F.2d 452 (6th Cir. 1981) (court used motive analysis in discharge cases and relied on *Exchange Parts* in deciding benefit grants issue under Railway Labor Act). Thus, one cannot find any support for the interpretation (or, for that matter, support for a contrary interpretation) of § 8(a)(1) from the analogous statutes relied upon by Senator Wagner in drafting § 8(a)(1).

¹¹⁷ See, e.g., *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956); *NLRB v. Stowe Spinning Co.*, 336 U.S. 226, 230-33 (1949); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945). This balancing-of-interests analysis applies where identifiable employer property rights exist, such as the right to control access to property or to direct the work force. Thus, "[e]ven conduct which interferes with, restrains or coerces employees in the exercise of their section 7 rights may be held lawful if it advances a substantial and legitimate company interest in plant safety, efficiency or discipline." R. GORMAN, *supra* note 38, at 133.

¹¹⁸ See, e.g., *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300 (1965); *NLRB v. Brown*, 380 U.S. 278 (1965); *NLRB v. Truck Drivers Local Union No. 449, Teamsters (Buffalo Linen)*, 353 U.S. 87 (1957); see also *NLRB v. Southern Plasma Corp.*, 626 F.2d 1287, 1294-95 (5th Cir. 1980).

¹¹⁹ See, e.g., *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967); *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263 (1965); *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21 (1964).

¹²⁰ See, e.g., *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963); see also *Local 155, Molders & Allied Workers Union v. NLRB*, 442

lyzed the section 8(a)(1) claim similarly to the section 8(a)(3) claim.¹²¹ Professor Oberer aptly referred to these cases as examples of a section 8(a)(3) "dog" wagging the section 8(a)(1) "tail."¹²² In many situations, the Board tacks a section 8(a)(1) allegation onto a section 8(a)(3) charge.¹²³ Because section 8(a)(1) prohibits at least the same conduct as the more particularized section 8(a)(3), the addition of section 8(a)(1) adds nothing to the 8(a)(3) analysis. If the conduct is not proscribed by section 8(a)(3), section 8(a)(1) controls. When the Court ostensibly considers a case under both sections but applies a motive analysis, it only indicates that the more particularized section 8(a)(3) controls the disposition of that case—section 8(a)(1) is merely a "tail." Several lower courts have been confused by this treatment of sections 8(a)(1) and 8(a)(3).¹²⁴ Commentators criticized this approach extensively.¹²⁵ But the most significant point is that the Supreme Court has never engrafted a motive requirement in any case in which the source of the prohibition is section 8(a)(1) *alone*, except in *Exchange Parts*.¹²⁶

F.2d 742, 746-47 (D.C. Cir. 1971).

¹²¹ In *NLRB v. Brown*, 380 U.S. 278, 286 (1965), the Court, after noting that the employer's conduct was neither "destructive of employees rights" nor "devoid of [a] significant . . . legitimate business end," concluded that "in the absence of . . . hostile motive," § 8(a)(1) was not violated. Similarly, in *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 308-09 (1965), decided the same day as *Brown*, the Court, in its analysis under § 8(a)(1), found no evidence "that the employer was hostile to its employees' banding together for collective bargaining." Both *Brown* and *American Ship* involved lockouts by employers during the course of bargaining over a new contract with recognized unions. See also *Crown Cent. Petroleum Corp. v. NLRB*, 430 F.2d 724, 728 (5th Cir. 1970).

¹²² Oberer, *supra* note 108, at 498-503.

¹²³ See generally Gorman & Finkin, *supra* note 114, at 302 n.48.

¹²⁴ Compare *National Cash Register Co. v. NLRB*, 466 F.2d 945, 962-63 (6th Cir. 1972) (applying motive in § 8(a)(1) case as relevant to business justification), *cert. denied*, 410 U.S. 966 (1973), and *Lane v. NLRB*, 418 F.2d 1208, 1210-11 (D.C. Cir. 1969) (ascertaining two categories of cases in which §§ 8(a)(1) and 8(a)(3) are treated similarly and do not require proof of motive) with *NLRB v. Otis Hospital*, 545 F.2d 252, 254-55 & n.3 (1st Cir. 1976) (distinguishing motive analysis of § 8(a)(3) from § 8(a)(1)) and *Crown Cent. Petroleum Corp. v. NLRB*, 430 F.2d 724 (5th Cir. 1970) (same).

Another interesting group of cases involves conduct that is usually analyzed under § 8(a)(3) (e.g., discharge) but, because no union or labor organization is present, is brought under § 8(a)(1), which applies to any concerted activities in the exercise of § 7 rights. Again, confusion is evident: motive is held irrelevant in some cases, see, e.g., *NLRB v. Southern Plasma Corp.*, 626 F.2d 1287, 1293-94 (5th Cir. 1980); *Fall River Savings Bank*, 247 N.L.R.B. 631, 631 n.3 (1980), while in other cases motive is found to be a crucial element of the § 8(a)(1) charge, see, e.g., *NLRB v. Lloyd A. Fry Roofing Co.*, 651 F.2d 442, 446 (6th Cir. 1981).

¹²⁵ See Christensen & Svanoe, *supra* note 108, at 1322-32; Oberer, *supra* note 108, at 494-503.

¹²⁶ Some commentators disagree with this approach. Professor Oberer argues that an employer's motive should be considered in some cases alleging only a 8(a)(1) violation. For example, an otherwise valid no-solicitation rule should nonetheless violate § 8(a)(1), according to Oberer, if the employer established the rule with an antiunion purpose. See Oberer, *supra* note 108, at 510-11. Professor Oberer did not, however, cite any significant case authority for this proposition. Moreover, using a motive analysis to invalidate employer conduct that does not reasonably tend to interfere, restrain, or coerce employees stands § 8(a)(1) on its head by potentially invalidating any arguably non-neutral employer actions undertaken during a representation campaign — a result

In *Exchange Parts* the Court examined motive even though only section 8(a)(1) was involved. The employer's grant of pre-election benefits, Justice Harlan declared, was unlawful because it was "undertaken with the express purpose of impinging upon [the employees'] freedom of choice . . . and is reasonably calculated to have that effect."¹²⁷ Motive determined whether a grant or promise violated section 8(a)(1); the grant was presumed to have a coercive impact on employees.¹²⁸

In *NLRB v. Burnup & Sims*,¹²⁹ a case decided only ten months after *Exchange Parts*, Justice Douglas, writing for the Court, declined to engage in motive analysis under section 8(a)(1). The employer had discharged two union organizers under the mistaken belief that they would dynamite the plant if the union drive faltered. The majority refused to consider the conduct under section 8(a)(3) because "in the context of this record § 8(a)(1) was plainly violated, whatever the employer's motive."¹³⁰ In a partial dissent, Justice Harlan maintained that motive was necessary to the analysis: "I do not believe that this case presents the rare situation in which the Board can ignore motive."¹³¹ Although he did not specify whether motive was relevant be-

inconsistent with both the Act and Supreme Court precedents. See *infra* notes 139-42 and accompanying text.

¹²⁷ 375 U.S. at 409 (emphasis added).

¹²⁸ See *supra* text accompanying notes 32-38. Justice Harlan apparently based his § 8(a)(1) analysis in part on the Court's 1945 decision in *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945). In *Republic Aviation*, the employers enforced various no-solicitation, no-distribution rules restricting the ability of employees to campaign for the union on their own time on company property, as well as a rule prohibiting employees from wearing union shop steward buttons. The Court upheld the Board's finding that the employers' conduct violated §§ 8(1) and 8(3) (now 8(a)(1) and 8(a)(3)). Even though the record did not indicate any antinotion motivation or other special circumstances, the Court nonetheless found violations of both sections of the Act because the effect of these rules was the unnecessary infringement of protected rights. See *id.* at 800-05 & n.8. *Republic Aviation* thus provides questionable support for the proposition that motive is relevant under § 8(a)(1).

Justice Harlan also cited *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678 (1944), as establishing the principles applicable in *Exchange Parts*. See *Exchange Parts*, 375 U.S. at 409. The *Medo Photo* Court, finding a § 8(1) violation in the employer's grant of wage hikes to individual employees to induce them to leave the recognized union, did not indicate at any point that the employer's motive was an element considered by the Court. To the contrary, the Court noted that such conduct was an obvious example of interferences with employees' § 7 rights. See 321 U.S. at 686; *infra* text accompanying notes 180-83. The *Medo Photo* analysis is thus consistent with the "objective" interpretation of § 8(a)(1) that prohibits employer conduct that tends to interfere with organizational rights regardless of motive. See, e.g., *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21, 22-23 (1964); *NLRB v. W.C. McQuaide, Inc.*, 552 F.2d 519, 533 (3d Cir. 1977); *NLRB v. Nabors*, 196 F.2d 272, 275 (5th Cir.), *cert. denied*, 344 U.S. 865 (1952).

¹²⁹ 379 U.S. 21 (1964).

¹³⁰ *Id.* at 22 (footnote omitted). Justice Douglas concluded that notwithstanding the employer's good but mistaken motive, the discharges could not be tolerated because of the coercive and chilling effect the discharges had upon the discharged employees' exercise of statutorily protected rights.

¹³¹ *Id.* at 25 (footnote omitted).

cause the charge was made under both sections 8(a)(1) and 8(a)(3),¹³² one can at least note the inconsistency of that generalized statement with Justice Harlan's subsequent opinion in *Textile Workers Union v. Darlington Manufacturing Co.*,¹³³ in which he carefully separated motive from section 8(a)(1) and returned it to section 8(a)(3).

In *Darlington*, shortly after the union won a close election, the corporate owner of the plant closed down operations. The Board found that the employer's shutdown decision was motivated by antiunion concerns and violated sections 8(a)(1) and 8(a)(3). Writing for a unanimous Court, Justice Harlan concluded that section 8(a)(3) of the Act was violated¹³⁴ but held section 8(a)(1) inapplicable because, in the balancing of interests, a significant management right was involved.¹³⁵ Implicitly retreating from motive analysis, Justice Harlan announced that a "violation of § 8(a)(1) alone therefore presupposes an act which is unlawful even absent a discriminatory motive."¹³⁶ Thus, motive was not considered by the Supreme Court to be an element of section 8(a)(1) analysis before *Exchange Parts* nor slightly more than one year after *Exchange Parts* was decided. The very Justice who had found motive indispensable in *Exchange Parts* rejected its use in other section 8(a)(1) contexts. The *Exchange Parts* focus on motive, rather than on objective evidence of interference with employee rights, should therefore be viewed as a departure from the Court's "no motive" standard in section 8(a)(1) cases. The Board and the lower courts, in many instances, uncritically accept motive as an element of a promise or grant allegation,¹³⁷ although exceptions evidencing the confusion of applying

¹³² Justice Harlan referred to his concurring opinion in *Local 357, Teamsters v. NLRB*, 365 U.S. 667, 677 (1961) (Harlan, J., concurring), in a footnote accompanying his statement regarding motive. See 379 U.S. at 25 n.2 (Harlan, J., dissenting in part). In his *Local 357* concurrence, Harlan disagreed with the majority's *per se* approach invalidating a hiring hall arrangement under §§ 8(a)(1), 8(a)(3), and 8(b)(2). Harlan confined his analysis in that concurrence to §§ 8(a)(3) and 8(b)(2), arguing that a *per se* approach ignores the relevance of motive and does not allow an employer to present evidence of a legitimate business justification to rebut an inference of impermissible motive.

¹³³ 380 U.S. 263, 269 (1965).

¹³⁴ *Id.* at 273-76.

¹³⁵ *Id.* at 268-69. In determining whether a legitimate management interest is involved, anti-union motive is relevant to show that the proffered management interest lacks legitimacy. See *supra* note 117. Hence, motive may be said to play a role, albeit limited, in § 8(a)(1) cases. This point is well taken so far as it goes, but is misleading in at least one major respect. The legitimacy of the employer's actions or motive only becomes important once it is determined that employee interests are violated. *Exchange Parts* analysis confuses the issue by looking to motive in the initial determination of whether employee interests are violated. As the text above demonstrates, except for *Exchange Parts*, the Supreme Court does not consider employer motive to decide if employee interests are impeded. Cf. *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956) (indicating that an employer's discriminatory application of a no-solicitation rule against nonemployee union organizers vitiates any legitimate business justification for the rule).

¹³⁶ 380 U.S. at 269 (emphasis added).

¹³⁷ See, e.g., *NLRB v. Hasbro Indus., Inc.*, 672 F.2d 978 (1st Cir. 1982); *NLRB v.*

motive in these section 8(a)(1) cases is also evident.¹³⁸

Steinerfilm, Inc., 669 F.2d 845 (1st Cir. 1982); J.J. Newberry Co. v. NLRB, 645 F.2d 148 (2d Cir. 1981); NLRB v. Arrow Elastic, 573 F.2d 702, 704-05 (1st Cir. 1978); Allied Indus. Workers, Local Union No. 289 v. NLRB, 476 F.2d 868, 877-78 & n.18 (D.C. Cir. 1973); Louisburg Sportswear Co. v. NLRB, 462 F.2d 380, 384 (4th Cir. 1972); J.P. Steven & Co. v. NLRB, 461 F.2d 490, 492 (4th Cir. 1972); NLRB v. Gotham Indus., Inc., 406 F.2d 1306, 1309 (1st Cir. 1969). *But see* NLRB v. Otis Hospital, 545 F.2d 252, 254 n.3 (1st Cir. 1976). *See generally* NLRB v. WKRG-TV, Inc., 470 F.2d 1302, 1307-08 (5th Cir. 1973); Jervis Corp., Bolivar Div. v. NLRB, 387 F.2d 107, 110, 113 (6th Cir. 1967); NLRB v. Yokell, 387 F.2d 751, 757 (2d Cir. 1967). This result is not surprising given that the commentators considering motive under §§ 8(a)(1) and 8(a)(3) completely ignored the *Exchange Parts* case. *But cf. Oberer, supra* note 108, at 514 & n.80 (arguing that promises and grants cases could fit within 8(a)(1)/8(a)(3) overlap cases and thus utilize "motive" analysis).

Most cases reveal that the courts and the Board have little difficulty finding such a purpose whenever the employer openly opposes the union. *See, e.g.*, MPC Restaurant Corp. v. NLRB, 481 F.2d 75, 77 (2d Cir. 1973); NLRB v. Miller Redwood Co., 407 F.2d 1366, 1368 (9th Cir. 1969); NLRB v. J. Taylor Mart, Inc., 407 F.2d 644, 646 (7th Cir. 1969); Broadmoor Lumber Co., 227 N.L.R.B. 1123 (1977); Stride Rite Corp., 228 N.L.R.B. 224 (1977); Scotts IGA Foodliner, 223 N.L.R.B. 394 (1976).

These cases are consistent with the essentially *per se* nature of the *Exchange Parts* rule that infers a bad motive whenever a grant or promise is made pending a union election. There are some cases, wholly separate from the exceptions cases, in which the courts and the Board have struggled with the evidence in search of an underlying motive for a benefit promise or grant. *See, e.g.*, Allied Indus. Workers, Local Union No. 289 v. NLRB, 476 F.2d 868, 877-78 (D.C. Cir. 1973); Montgomery Ward & Co., 234 N.L.R.B. 13 (1978); Arrow Elastic Corp., 230 N.L.R.B. 110 (1977); John Deere Plow Co., 82 N.L.R.B. 69 (1949); Regal Knitware Co., 49 N.L.R.B. 560 (1943).

¹³⁸ Accustomed to the objective no-motive standard employed in all other cases alleging violations of § 8(a)(1), the Board and its administrative law judges did not uniformly utilize a motive analysis in benefit grants and promises cases before *Exchange Parts*, and motive has been held not to be an element in some benefits cases even after *Exchange Parts*. The Board and the courts did typically examine motive in benefit grants and promises cases during the 1940's and 1950's. *See, e.g.*, Indiana Metal Prods. Corp. v. NLRB, 202 F.2d 613, 619-20 (7th Cir. 1953); Grove Regulator Co., 66 N.L.R.B. 1102 (1946). The Board departed from this position in 1959, however, when it held that motive is not the correct test in a benefits grant case but rather that the traditional § 8(a)(1) analysis—whether the employer engaged in conduct that might reasonably tend to interfere with the exercise of protected rights—was applicable. *See American Freightways Co.*, 124 N.L.R.B. 146, 147 (1959). Even though the *Exchange Parts* decision applying a motive test was rendered in 1964, the Board continued to apply the *American Freightways* test until 1969. *See generally* Hermann Equip. Mfg. Co., 156 N.L.R.B. 716, 718 n.3 (1966). In that year, the Board issued its decision and opinion in *Tonkawa Ref. Co.*, 175 N.L.R.B. 619 (1969), *enforced*, 434 F.2d 1041 (10th Cir. 1970) (*per curiam*), repudiating *American Freightways* as applied to benefits grants and promises cases under § 8(a)(1) and adopting the *Exchange Parts* motive test.

Although the *Tonkawa* holding is now generally used by the Board and its ALJs, *see, e.g.*, Honolulu Sporting Goods Co., 239 N.L.R.B. 1277, 1280 (1979), *enforced*, 105 L.R.R.M. (BNA) 2896 (9th Cir. 1980); Delchamps, Inc., 234 N.L.R.B. 262, 270 (1978), *enforcement denied*, 588 F.2d 476 (5th Cir. 1979), there are some noticeable and irreconcilable exceptions. In *Freightmaster, Div. of Halliburton Serv.*, 186 N.L.R.B. 3, 12 & n.25 (1970) an administrative law judge (ALJ) cited both *American Freightways* and *Exchange Parts* in holding that motive was irrelevant in a benefits case under § 8(a)(1). Similarly, another ALJ, in *Sears, Roebuck & Co.*, 182 N.L.R.B. 491, 497 (1970), *enforcement denied*, 450 F.2d 56 (6th Cir. 1971), cited *American Freightways* for the proposition that motive was irrelevant in a case charging the employer with illegally soliciting and adjusting a grievance under § 8(a)(1). The ALJ's subsequent analysis in that case, however, evinces that motive was indeed relevant in the disposition, *see id.* at 498-99, even though at the end of the analysis the ALJ reiterated the irrelevancy of motive. *See id.* at 500. Finally, the Board itself recently held in a solicitation and adjustment of grievances case under § 8(a)(1) that motive is not a critical element. *See Litton Dental Prods., Div. of Litton Indus. Prods.*, 221 N.L.R.B. 700, 700 n.2 (1975). This holding is difficult to understand because in the year preceding the *Litton* decision, the Board found motive to be a crucial element in a charge of

This confusion is largely without purpose not only because the Supreme Court generally does not analyze motive in an 8(a)(1) case, but also because motive analysis in promises and grants cases cannot be reconciled with the employer's statutory right lawfully to resist unionization by persuading employees to vote "no" on election day. Almost *anything* the employer does in its election campaign is motivated by the employer's desire to prevent the union from gaining representational status among its employees. There is no other way to explain why employers engage in extensive and often highly sophisticated anti-union election campaigns.¹³⁹ But these campaigns are unquestionably lawful under the Act.¹⁴⁰ Pretending that nonunionized employers should have a benevolent attitude toward labor unions may satisfy the literal requirements of *Exchange Parts*, but it ignores industrial reality. One need not be a genius to understand "that most nonunion employers give raises for one or both of two reasons: to keep employees, old and new, in the plant, and to keep unions out."¹⁴¹

soliciting and adjusting grievances under § 8(a)(1). See *Uarco Inc.*, 216 N.L.R.B. 1 (1974).

¹³⁹ The point has been recognized by trade union proponents and has been the subject of a trade union report on the extensive, sophisticated methods used by some employers and their consultants to resist unionization. See CENTER TO PROTECT WORKERS' RIGHTS, FROM BRASS KNUCKLES TO BRIEFCASES: THE CHANGING ART OF UNION-BUSTING IN AMERICA 8 (report submitted to Subcommittee on Labor-Management Relations of the House Committee on Education and Labor on October 17, 1979, by Robert Georgine, President of the Building and Construction Trades Department of the AFL-CIO, estimating that "[u]nion-busting is now a major American industry with annual sales well over \$½ billion"); REPORT OF THE SUBCOMM. ON LABOR-MANAGEMENT RELATIONS OF THE HOUSE COMM. ON EDUCATION AND LABOR, PRESSURES IN TODAY'S WORKPLACE, 96th Cong., 2d Sess. 25-50 (1980) (views of certain Democratic members of subcommittee summarizing testimony of Robert Georgine and "staggering increase in the number of practicing labor consultants"); see also *Labor Strikes Back at Consultants That Help Firms Keep Unions Out*, Wall St. J., Apr. 2, 1981, at 24, col. 4 ("outside labor-relations advisers gross more than \$500 million a year"); *A New Breed — Professional Union Breakers*, FORBES, June 25, 1979, at 29 (discussing "new breed of management consultant spreading a love-thy-worker gospel that obviates the need for 'third party' (meaning union) interference"). Materials used by employers and consultants include books, see, e.g., A. DEMARIA, HOW MANAGEMENT WINS UNION ORGANIZING CAMPAIGNS (1980); F. FOULKES, PERSONNEL POLICIES IN LARGE NONUNION COMPANIES (1980); R. LEWIS & L. JACKSON, WINNING NLRB ELECTIONS (1972), films, see, e.g., *Working Without Unions* (BYMG 1981); *We Voted 'No'* (BYMG 1981), and seminars, see, e.g., *Making Unions Unnecessary & How to Maintain Non-Union Status* (DeMaria & Hughes, Executive Enterprises, Inc., 1982).

¹⁴⁰ See 29 U.S.C. § 158(c) (1976) (preserving right of free speech for employees and unions); *infra* text accompanying notes 198-218; see also U.S. CONST. amend. I; *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 616-17 (1969); *NLRB v. Mueller Brass Co.*, 509 F.2d 704, 709 (5th Cir. 1975); *William L. Bonnell Co. v. NLRB*, 405 F.2d 593, 594 (5th Cir. 1969); *Fort Smith Broadcasting Co. v. NLRB*, 341 F.2d 874, 878 (8th Cir. 1965); *NLRB v. Avondale Mills*, 242 F.2d 669, 671 (5th Cir. 1957), *aff'd*, 357 U.S. 357 (1958) (employer's opposition to unionization alone not enough to demonstrate unlawful purpose under Act). Compare *St. Francis Hosp. and Modern Mgt., Inc.*, 263 N.L.R.B. No. 109 (1982) (approving employer's right to seek advice to oppose unionization and holding that labor relations consultants who control and conduct anti-union campaigns do not violate § 8(a)(1) even though hospital guilty of massive unfair labor practices) with *National Lime and Stone Co.*, 62 N.L.R.B. 282 (1945) (labor consultants violate Act by committing unfair labor practices against employees).

¹⁴¹ *NLRB v. Gotham Indus., Inc.*, 406 F.2d 1306, 1310 (1st Cir. 1969); see T. KOCHAN,

Section 7 and section 8(a)(1) do not require the employer gladly to embrace a union; rather, these provisions prohibit the employer from interfering with or coercing employees in their right to engage in or refrain from concerted activity. Whether the employer loves or hates labor unions is irrelevant; the issue, instead, is whether employees are being *harmed* by what the employer does or says. The employer only violates section 8(a)(1) when his actions or speech constitutes unlawful *restraint, coercion, or interference*, that is, conduct injurious to the statutory rights of employees. This approach is the only way to reconcile industrial reality, the respective rights of parties to organizing activity, and the protections of section 7.¹⁴² The critical issue, then, is the mean-

COLLECTIVE BARGAINING AND INDUSTRIAL RELATIONS 182-83 (1980) ("[t]he dominant policy of U.S. employers has historically and currently been strongly to oppose efforts to unionize a heretofore unorganized company or work force"); L. REYNOLDS, LABOR ECONOMICS AND LABOR RELATIONS 400 (7th ed. 1978).

Professor Bok suggested this view of the employer's purposes:

Wage increases on the eve of an election do not normally suggest retribution, nor are they given with this intent. The employer's motive is much less devious. In granting benefits, he is simply attempting to win favor among the employees and to persuade them that they will receive satisfactory wages and conditions without the assistance of the union.

Bok, *supra* note 13, at 113.

¹⁴² The foregoing discussion suggests that the distinctions between motive in §§ 8(a)(1) and 8(a)(3) are significant only so long as one insists upon analyzing benefit grants and promises under § 8(a)(1) alone. Professor Oberer has suggested that benefit grants may actually fit within the §§ 8(a)(1) and 8(a)(3) "overlap" cases and thus could be analyzed under a motive standard. See Oberer, *supra* note 108, at 514 & n.80. According to Oberer, the appropriateness of considering benefit grants and promises cases under § 8(a)(3) "depends upon whether 'discrimination' may be said to be involved." *Id.* at 514 n.80. We agree that this issue turns on the meaning of "discrimination" under § 8(a)(3), but disagree with the contention that promises and grants cases should be categorized with the "overlap" cases. Granting benefits to persuade employees to vote against the union would satisfy the "encouragement" requirement of § 8(a)(3). For a violation to be made out, however, the conduct must also be "discriminatory." Professor Oberer argues that discrimination is present whenever the employer treats employees differently *because of their union activity*. Under this interpretation it might be argued that promises and grants made because of union organizing violate § 8(a)(3). Such a theory is unacceptable for several reasons.

First, as Professor Getman notes, such an interpretation equates "discrimination" with "discouragement" of concerted activities—another essential element of a § 8(a)(3) violation—thus effectively reading the latter out of the statute. See Getman, *Section 8(a)(3) of the NLRA and the Effort to Insulate Free Employee Choice*, 32 U. CHI. L. REV. 735, 737 (1965); see also Oberer, *supra* note 108, at 514 n.80. Although Professor Getman further argues that discrimination means something other than a distinction between employees, the better view is one that limits the discrimination requirement of § 8(a)(3) to disparate treatment—for example, when some employees are denied employment benefits on the basis of union activity while others receive benefits. Thus, under the analysis suggested here, only if benefit grants are made to selected employees to renounce union membership would a § 8(a)(3) violation be made out. See *Indian Head Lubricants, Inc.*, 261 N.L.R.B. No. 3 (1982) (bribe of \$600 offered to one employee); *Gauley Indus., Inc.*, 260 N.L.R.B. No. 181 (1982) (same). Any fear that this view of discrimination reduces the protections of § 8(a)(3) is unfounded. To the extent the requirements of § 8(a)(3) are not met, employees retain the general, broad protections of § 8(a)(1). *But see Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 795 (1945) (early § 8(a)(3) no-solicitation rule case suggesting the Getman view); *Kansas City Power & Light Co. v. NLRB*, 641 F.2d 553, 556-57 (8th Cir. 1981) (discrimination existed when employer treated all employees differently based upon engagement in concerted activity); *NLRB v. Borden, Inc.*, 600 F.2d 313, 320-31 (1st Cir. 1979); *NLRB v. Jemco, Inc.*, 465

ing of restraint, coercion, and interference, and the nature of conduct or speech that is statutorily injurious to employees.

B. *Defining Coercion in Promises or Grants of Benefits Cases: The Historical Context*

Presumed coercive impact is at the heart of the rule against promises and grants of benefits. But "coercion" is not a self-defining concept. To ascertain its meaning, an analysis of the historical context of section 8(a)(1)'s enactment is necessary. This analysis reveals that promises and grants were to be prohibited, generally, on two grounds. First, they were proscribed insofar as they imperiled employee job security, that is, where they placed employees in the position of choosing between exercising statutory rights and retaining their jobs or employment benefits. Second, and relatedly, if the benefit was coupled with some other action that offended an independent statutory policy, it was considered unlawful.

F.2d 1148, 1152 (6th Cir. 1972), *cert. denied*, 409 U.S. 1109 (1973).

Second, it appears that the Board and the courts have never analyzed promises and grants cases under § 8(a)(3). *Exchange Parts* limited its discussion to § 8(a)(1) and did not intimate that § 8(a)(3) might apply. It has been suggested that this may be because § 8(a)(3) is generally, but not exclusively, considered to apply to employer conduct *after* the bargaining relationship is established or a union is on the scene; in such cases, the employer may not discriminate against employees on account of union activities. Section 8(a)(1), on the other hand, protects employees *before* either the bargaining relationship is established, i.e., during the representation campaign period, or an organizing union arrives on the scene. See *Oberer*, *supra* note 108, at 498-500. The more likely reason the Board and the courts have never utilized § 8(a)(3) to decide promises and grants questions is their implicit recognition that, if Professor Oberer's definition of discrimination is accepted, all employer campaign conduct would be rendered unlawful because it is always undertaken to discourage unionization. Such an approach is impossible to reconcile with the free speech provision of § 8(c). Thus, whether or not Oberer's view of "discrimination" is proper in other § 8(a)(3) contexts, it cannot be utilized in the representation election context.

Finally, "discrimination," as applied by the courts, is demonstrated only when the treatment accorded employees produces significant harm, i.e., the employer has taken something from the employees or refused to provide them with something given to others after they engaged in concerted activity. *Cf.* S. REP. NO. 573, 74th Cong., 1st Sess. 17 (1935) (§ 8(3) intended to prohibit discriminatory treatment of employees); H.R. REP. NO. 969, 74th Cong., 1st Sess. 11 (1935) (same). On the other hand, a promise or grant of benefit does not take something away from the employees, but rather provides them with an *increased benefit*. This distinction does not turn "discrimination" on its head, as § 8(a)(3) is designed to prevent harm, and not largess, from befalling the employee engaged in concerted actions. To hold otherwise suggests that any employer *change*, whether harmful or unarmful, is suspect—a result that the framers of the Act and its amendments did not intend. Section 8(a)(3)'s prohibition of labor union encouragement, as well as discouragement, does not conflict with this view because encouragement is likewise unlawful only insofar as it is perceived to be contrary to nonunion employee interests and, thus, harmful. See *Rust Eng'g Co. v. NLRB*, 445 F.2d 172 (6th Cir. 1971); *NLRB v. Richards*, 265 F.2d 855 (3d Cir. 1959).

1. Legislative Intent and Section 8(a)(1): Restraint, Interference, and Coercion

Unlike many statutes, the enactment of section 8(1) (now section 8(a)(1)) of the NLRA was accompanied by extensive debate and comment in Congress. Analysis of this legislative history begins with the genesis of section 8(a)(1), which is found in several contemporaneous labor relations statutes of the 1920's and 1930's. The Railway Labor Act of 1926, the first federal statute designed to protect collective bargaining, provided that "[r]epresentatives . . . shall be designated . . . without interference, *influence* or coercion."¹⁴³ This provision, however, did not prevent employers from promoting dominated "company unions"¹⁴⁴ and thus frustrated the Act's purpose of guaranteeing employees the freedom to associate with labor unions of their choice.¹⁴⁵ In response, Congress amended the RLA in 1934 to prevent employers from using funds to "maintain[] or assist[] or contribut[e] to" a union "or to influence or coerce employees" in joining or not joining a union.¹⁴⁶

Concern over the spread of company-dominated unions also contributed to the enactment of the National Industrial Recovery Act of 1933,¹⁴⁷ a law that attempted to apply the principles of the RLA on a national scale. Section 7(a) of the NIRA provided that employees "shall be free from the interference, restraint or coercion of employers of labor" in joining unions and bargaining collectively.¹⁴⁸ But the NIRA did

¹⁴³ Ch. 347, § 2, 44 Stat. 577, 578 (emphasis added) (current version at 45 U.S.C. § 152 (1976)); cf. 67 CONG. REC. 4503 (1926) (statement of Rep. Cooper) (RLA enacted to protect job security and livelihood of railroad employees). See generally H. WOLF, *THE RAILROAD LABOR BOARD* 407-16 (1927). The Court upheld the constitutionality of the RLA in 1930, declaring that employers had no right to interfere with employees in the selection of collective bargaining representatives. See *Texas & N.O.R.R. v. Brotherhood of Ry. & S.S. Clerks*, 281 U.S. 548, 568, 570-571 (1930) (interpreting interference, coercion, and "influence" to mean unfair pressure).

¹⁴⁴ See Garrison, *The National Railroad Adjustment Board: A Unique Administrative Agency*, 46 YALE L.J. 567, 575 (1937). Although the terms are often used interchangeably, "company unions" are conceptually distinct from "inside unions." The "company union" typically receives financial and other support from management and is often subservient to it. On the other hand, the "inside union" is formed by employees of one employer (or at one plant) and does not affiliate with an outside labor organization. An inside union may or may not be dominated by the employer.

¹⁴⁵ See 45 U.S.C. § 151a (1976).

¹⁴⁶ Act of June 21, 1934, ch. 691, § 2, 48 Stat. 1186 (current version at 45 U.S.C. § 152 (1976)).

¹⁴⁷ Ch. 90, 48 Stat. 195 (1933) (held unconstitutional as amended, *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935)).

¹⁴⁸ *Id.* § 7(a). The NIRA was enacted principally to combat the sweatshop and indecent wages with the policy of collective bargaining. See *National Industrial Recovery: Hearings on H.R. 5664 Before the House Comm. on Ways and Means*, 73d Cong., 1st Sess. 92, 118-19 (1933); *National Industrial Recovery: Hearings on S. 1712 and H.R. 5755 Before the Senate Comm. on Finance*, 73d Cong., 1st Sess. 2 (1933). "The proponents of the bill apparently assumed that employers would never voluntarily offer the benefits the workers wanted, and consid-

not explicitly prohibit employers from installing company-dominated unions in their plants.¹⁴⁹ In response to these and other inadequacies, Senator Wagner introduced a bill in 1934 that prohibited an employer's "unfair labor practices" and created an administrative agency with power to enforce the NIRA's statutory provisions.¹⁵⁰ "[M]odeled upon the successful experience of the Railway Labor Act,"¹⁵¹ section 5(1) of the Wagner bill made it an unfair labor practice for an employer to "attempt by interference, *influence*, restraint, *favor*, coercion, or lockout, or by any other means, to impair the right of employees guaranteed in section 4."¹⁵² Other sections of the bill augmented section 5(1) by detailing specific practices that would also be treated as unfair labor practices.

During subsequent committee hearings on the Wagner bill, many witnesses objected to the broad sweep of section 5(1). In particular, the prohibition of "influence" was frequently and bitterly attacked.¹⁵³ As a

ered collective bargaining to be the only solution. They focused on employer actions like discharge, or threats of discharge, which scared employees into voting against an outside union." Bailey, *supra* note 13, at 6.

As originally submitted to Congress, § 7(a) of the NIRA did not include a provision to guarantee freedom from interference, restraint, or coercion. See H.R. 5664, 73d Cong., 1st Sess., § 7(a)(1) (1933). At least one witness urged Congress to borrow the language from § 2 of the Norris-LaGuardia Act, 29 U.S.C. § 102 (1976), which set forth the policy of the United States that workers "shall be free from the interference, restraint or coercion of employees of labor." See *National Industrial Recovery: Hearings on H.R. 5664 Before the House Comm. on Ways and Means, supra*, at 122 (statement of William Green, Pres., AFL). Section 7(a) of the NIRA, as enacted, thus contained language regarding coercion similar to that found in both the RLA and the Norris-LaGuardia Act.

¹⁴⁹ See S. REP. NO. 573, *supra* note 142, at 11-12, reprinted in 2 NLRA HISTORY, *supra* note 116, at 2310-11; Note, *Employer Interference with Lawful Union Activity*, 37 COLUM. L. REV. 816, 827-29 (1937). Of course, the main failing of § 7(a) of the NIRA was the lack of an enforcement provision in the statute and the ambiguity inherent in the text of that section. See Koenig, *The National Labor Relations Act—An Appraisal*, 23 CORNELL L.Q. 392, 392 (1938); Magruder, *A Half Century of Legal Influence upon the Development of Collective Bargaining*, 50 HARV. L. REV. 1071, 1089 (1937); 10 ST. JOHN'S L. REV. 358, 358-59 (1936).

¹⁵⁰ See S. 2926, 73d Cong., 2d Sess. (1934), reprinted in 1 NLRA HISTORY, *supra* note 116, at 1070.

¹⁵¹ 78 CONG. REC. 3443 (1934) (statement of Sen. Wagner).

¹⁵² *Id.* at 3444 (emphasis added). Representative Connery introduced the Wagner bill in the House with the same version of § 5(1). See H.R. 8423, 73d Cong., 2d Sess. § 5(1) (1934), reprinted in 1 NLRA HISTORY, *supra* note 116, at 1130.

¹⁵³ See, e.g., *To Create a National Labor Board: Hearings on S. 2926 Before the Senate Comm. on Educ. and Labor*, pt. 2, 73d Cong., 2d Sess. 355-57 (1934) (statement of Mr. Emery, Gen. Counsel, Nat'l Ass'n of Mfg.), reprinted in 1 NLRA HISTORY, *supra* note 116, at 389-91; *id.* at 499 (statement of Mr. Harriman, Pres., U.S. Chamber of Commerce), reprinted in 1 NLRA HISTORY, *supra* note 116, at 533; *id.* at 681 (statement of Mr. Vickers, economist with Am. Transit Ass'n), reprinted in 1 NLRA HISTORY, *supra* note 116, at 619.

On the other hand, many witnesses testified for the need of a provision to prohibit any employer attempt at influencing employees as a means to prevent the further growth of employer-dominated unions. See, e.g., *id.* pt. 1, at 71-73 (statement of Mr. Green, Pres., AFL), reprinted in 1 NLRA HISTORY, *supra* note 116, at 101-02; *id.* at 191-92 (statement of Dr. Lapp, Chairman, Nat'l Bituminous Coal Labor Bd., Div. 2), reprinted in 1 NLRA HISTORY, *supra* note 116, at 221-22. See generally 78 CONG. REC. 3443 (1934) (statement of Sen. Wagner).

result, the Wagner bill, as reported, dropped the references to "influence . . . favor . . . [and] other means" and instead forbade an employer's attempt "by interference or coercion" to impair organizational rights.¹⁵⁴ The bill was thus very similar to section 7(a) of the NIRA and was much less expansive than provisions in the RLA.¹⁵⁵ Senator Walsh, Chairman of the Senate Committee on Education and Labor and the chief draftsman of the revised Wagner bill, explained that the word "influencing" was deleted because the committee "believed that both employees and employers ought to enjoy the right of peaceful persuasion with respect to joining or not joining a labor organization."¹⁵⁶ The prohibitions on influencing and favors were in Walsh's view adequately dealt with in other provisions of the bill that would prohibit employers from dominating unions or undermining established unions.¹⁵⁷

At the request of Senator Walsh, Congress did not vote on Senator Wagner's bill in 1934.¹⁵⁸ The House and Senate instead approved a joint resolution amending the NIRA to provide authority for the National Labor Board to conduct representation elections among employees and to establish and enforce rules that "assure[d] freedom from co-

¹⁵⁴ S. 2926, *supra* note 150, § 3(1), *reprinted in* 1 NLRA HISTORY, *supra* note 116, at 1087.

¹⁵⁵ Section 2 of the RLA prohibits not only employer interference and coercion, but also employer "influence." The Senate report accompanying S. 2926 specifically noted the difference between the revised Wagner bill and the RLA in that "influence" was stricken from the former. *See* S. REP. NO. 1184, 73d Cong., 2d Sess. 4, 10, *reprinted in* 1 NLRA HISTORY, *supra* note 116, at 1103; 78 CONG. REC. 10,560-62 (1934) (statement of Sen. Walsh). Section 7(a) of the NIRA also did not contain the term "influence" but instead used the terms "interference," "coercion," and "restraint" to define the prohibited employer practices. *See* S. REP. NO. 1184, *supra*, at 4, 10, *reprinted in* 1 NLRA HISTORY, *supra* note 116, at 1102, 1110.

¹⁵⁶ 78 CONG. REC. 10,560 (1934) (statement of Sen. Walsh).

¹⁵⁷ Senator Walsh was the chief architect of the revised Wagner bill that was reported by his committee. He repeatedly emphasized that § 3(1) of the revised bill was designed to prevent coercion and interference, especially coercion that would assist the formation of employer-dominated unions. *See, e.g.*, 78 CONG. REC. 10,353 (1934) (statement of Sen. Walsh); 78 CONG. REC. 12,019 (1934) (statement of Sen. Walsh regarding H.R.J. Res. 143); 78 CONG. REC. 10,559-60 (1934) (statement of Sen. Walsh). Moreover, § 3(3) of the revised Wagner bill outlawed employer interference with or domination of a labor union. *See* S. 2926, *supra* note 150, § 3(3) (as reported), *reprinted in* 1 NLRA HISTORY, *supra* note 116, at 1087.

Although the legislative history is replete with explanations regarding the striking of the term "influence" from the original Wagner bill, *see supra* notes 154-55 and accompanying text, there is apparently no specific mention in the printed debates and reports of the term "favor," which was also stricken from § 5(1) of the original Wagner bill. It probably disappeared for the same reasons that the term "influence" disappeared. It is possible, however, that the prohibition against "favor" was eliminated because its counterpart may be § 3(3) (now § 8(a)(2)) of the revised Wagner bill, which outlawed financial assistance to dominated or company unions. Senator Walsh stated that his committee specifically rejected requests to allow employers to provide such financial assistance. *See* 78 CONG. REC. 10,560 (1934) (statement of Sen. Walsh). Whatever the explanation of the disappearance of "favor," nothing in the legislative history indicates rejection of promises or grants of benefits in a representation election context.

¹⁵⁸ *See* 78 CONG. REC. 11,267 (1934) (statement of Sen. Walsh). Walsh explained that the bill, as it stood, was too controversial. Of course, 1934 was an election year.

ercion in respect to all elections."¹⁵⁹ By its terms, the resolution remained in effect until June, 1935. Senator Wagner, who was also an officer on the National Labor Board, was disappointed with the passage of this resolution because he believed that it would not curtail the growth of company-dominated unions.¹⁶⁰ He reintroduced his comprehensive labor relations bill in early 1935, and Congress had another opportunity to give it full consideration after the Supreme Court invalidated the NIRA in May, 1935.¹⁶¹

Section 8(1) of Wagner's new bill, borrowing almost verbatim a passage from section 7(a) of the NIRA, made it an unfair labor practice for an employer "[t]o interfere with, restrain, or coerce employees" who exercised their right of concerted activity.¹⁶² The legislators, in their debates and discussions, provided neither a special definition of "coercion," "restraint," or "interference" nor any specific examples of employer conduct falling within these classifications.¹⁶³ Coercion, restraint and interference were treated as well-established legal concepts that had been employed in earlier labor and nonlabor legislation.¹⁶⁴ Contemporaneous applications and interpretations of these concepts

¹⁵⁹ H.R.J. Res. 375, 73d Cong., 2d Sess. § 3 (1934), reprinted in 1 NLRA HISTORY, *supra* note 116, at 1225.

¹⁶⁰ See 78 CONG. REC. 12,041-44 (1934) (statement of Sen. Wagner). Senator Wagner termed the Senate debates on H.R.J. Res. 375, substituted for S.J. Res. 143, which had been previously substituted for his bill, as "one of the most embarrassing moments of my whole political life." *Id.* at 12,041.

¹⁶¹ See A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

¹⁶² S. 1958, 74th Cong., 1st Sess. § 8(1) (1935), reprinted in 1 NLRA HISTORY, *supra* note 116, at 1299; see National Industrial Recovery Act § 2; *infra* note 172.

¹⁶³ Unlike the debates and testimony that accompanied the 1934 version of Wagner's bill, the legislative history of the 1935 bill evinces relatively little dispute over the wording of § 8(1). As noted above, the main concepts stressed from § 8(1)'s predecessor in the 1934 bill were coercion and interference; the addition of the term "restraint" was not intended to add anything significant to those two concepts. STAFF OF SENATE COMMITTEE MEMORANDUM COMPARING S. 1958, 74TH CONG., 1ST SESS. (1935) WITH THE BILL, REPORTED BY SENATOR WALSH ON MAY 26, 1934 AS A SUBSTITUTE FOR S. 2926, 73D CONG., 2D SESS. (1934), 2 (Senate Comm. Print) (1935), reprinted in 1 NLRA HISTORY, *supra* note 116, at 1322. Indeed, the strongest objection voiced about § 8 in general, and § 8(1) in particular by implication, was that it prohibited only an employer's but not an employee's or union's coercive and interfering conduct. See H.R. REP. NO. 969, *supra* note 142, at 13-14, reprinted in 2 NLRA HISTORY, *supra* note 116, at 2923-24; H.R. REP. NO. 972, 74th Cong., 1st Sess. 13-14 (1935), reprinted in 2 NLRA HISTORY, *supra* note 116, at 2969-70; 79 CONG. REC. 9726 (1935) (proposed amendment of Rep. Rich to § 7 of Wagner bill to prohibit coercion from any source not passed); H.R. REP. NO. 1147, 74th Cong., 1st Sess. 16 (1935), reprinted in 2 NLRA HISTORY, *supra* note 116, at 3064-65; 79 CONG. REC. 7668-71 (1935) (statement of Sen. Tydings regarding proposed amendment to prohibit coercion from any source); S. REP. NO. 573, *supra* note 142, at 16, reprinted in 2 NLRA HISTORY, *supra* note 116, at 2315-16.

¹⁶⁴ See S. REP. NO. 573, *supra* note 142, at 8-9, reprinted in 2 NLRA HISTORY, *supra* note 116, at 2308 (§ 8 similar to § 7(a) of NIRA and other statutes as well); H.R. REP. NO. 969, *supra* note 142, at 13-14, reprinted in 2 NLRA HISTORY, *supra* note 116, at 2923-24 (§ 8 of House version of Wagner bill merely restates § 7(a) of NIRA); see also National Industrial Recovery: Hearings on H.R. 5664 Before the House Comm. on Ways and Means, 73d Cong., 1st Sess. 117 (1933) (statement of William Green, Pres., AFL).

under the RLA and the NIRA, though not many in number, invariably involved efforts by employers to create a fear of reprisals or job loss if employees did not accede to the employer's wishes.¹⁶⁵ In other contemporaneous applications not directly related to labor relations, courts stressed similar interpretations of these concepts. Coercion was typically defined in non-labor cases as the use of fear to induce someone to perform the will of another, thus eliminating one's ability freely to choose between two alternatives.¹⁶⁶ Decisions evincing elements of interference were generally characterized as attempts unreasonably and insurmountably to prohibit someone from achieving a desired end.¹⁶⁷ Restraint, of course, connoted the affirmative act of holding back another against his will.¹⁶⁸ Stating these concepts in labor terms, coercion, interference, and restraint mean that the employer uses his superior economic power to compel employees to refrain from protected, concerted activity under penalty of losing their jobs or adversely affecting conditions of employment.¹⁶⁹

Other statements by legislators personally involved in securing passage of the Wagner bill indicate that section 8(1)'s prohibitions should be interpreted in a literal fashion and that coercion should not

¹⁶⁵ See, e.g., *Texas & N.O.R.R. v. Brotherhood of Ry. & S.S. Clerks*, 281 U.S. 548, 568 (1930) (RLA); *Virginian Ry. v. System Fed'n No. 40, Ry. Employees Dept. of A.F.L.*, 84 F.2d 641, 643 (4th Cir. 1966) (RLA), *aff'd*, 300 U.S. 515 (1937); *United States v. Weirton Steel Co.*, 7 F. Supp. 255, 257 (D. Del. 1934) (NIRA); cf. *Coppage v. Kansas*, 236 U.S. 1, 8 (1915) (defining coercion in context of employment contract). Unfortunately, the most relevant source of contemporaneous interpretations of § 8(1) spawned few judicial decisions. As noted above, § 8(1) is a verbatim reproduction of a portion of § 7(a) of the NIRA. The NIRA, unlike the NLRA, lacked an efficient, adequate judicial enforcement mechanism, and thus there are only a few reported decisions to draw from when giving meaning to the terms "interference," "restraint," and "coercion" as they were interpreted and applied in 1933-35.

¹⁶⁶ See, e.g., *Weathers v. United States*, 126 F.2d 118, 119-20 (5th Cir.), *cert. denied*, 316 U.S. 681 (1942); *McKenzie-Hague Co. v. Carbide & Carbon Chem. Corp.*, 73 F.2d 78, 85 (8th Cir. 1934); *New York Life Ins. Co. v. Talley*, 72 F.2d 715, 718 (8th Cir. 1934); *Tennessee Elec. Power Co. v. TVA*, 21 F. Supp. 947, 954-55 (E.D. Tenn.), *appeal dismissed*, 305 U.S. 663 (1938); *Weir v. McGrath*, 52 F.2d 201, 203 (S.D. Ohio 1928), *aff'd*, 41 F.2d 1021 (6th Cir. 1930).

¹⁶⁷ See, e.g., *United States v. Peterson*, 28 F.2d 669, 670-71 (9th Cir. 1928); cf. *Lapham v. Noble*, 54 F. 108, 109 (S.D.N.Y. 1893) (interference defined as "intermeddling").

¹⁶⁸ See, e.g., *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897); *The Athanasios*, 228 F. 558, 560 (S.D.N.Y. 1915); *United States v. Eastern States Retail Lumber Dealers' Ass'n*, 201 F. 581, 584 (S.D.N.Y. 1912), *aff'd*, 234 U.S. 600 (1914).

¹⁶⁹ This is the same interpretation Judge Wisdom gave to these concepts years later in his *Exchange Parts* opinion. See *NLRB v. Exchange Parts Co.*, 304 F.2d 368, 374 (5th Cir. 1962), *rev'd*, 375 U.S. 405 (1964); see also *NLRB v. Graphic Arts Int'l Union Local 13-B*, 682 F.2d 304 (2d Cir. 1982). Judge Bazelon provided one of the few other detailed analyses of coercion in a grant of benefits case in *Teamsters, Local 633 v. NLRB*, 509 F.2d 490 (D.C. Cir. 1974). Recognizing that "[t]he specific focus of § 8(a)(1) is the prohibition of the use of employer economic power to interfere with [employee] free choice," Judge Bazelon noted that neither §§ 8(a)(1) nor 8(b)(1) could prohibit attempts to inform workers of the costs and benefits of unionization. *Id.* at 493 (footnote omitted). Thus, according to Judge Bazelon, one needs to "distinguish between employer attempts to persuade workers of the disadvantages of unionization and employer attempts to use their economic power to 'coerce' workers into voting against the union." *Id.*

be interpreted in an exotic or strained manner. Coercion in the sense of trading on the employee's relative economic weakness by threatening his job security was clearly prohibited by section 8(1).¹⁷⁰ The *Exchange Parts* notion of implied coercion, however, bears no relation to job loss as a penalty for exercising statutory rights. Moreover, unlike the 1934 version of Wagner's bill, the 1935 bill did not prohibit employers from attempting to "influence" or "favor" employees, thus undermining the *Exchange Parts* proscription of "conduct immediately favorable to employees."¹⁷¹ As Senator Walsh noted, the right to influence employees in the selection or rejection of bargaining representatives was expressly reserved to employers,¹⁷² and the Board and the courts were specifically admonished against prohibiting whatever labor practices they judged unfair.¹⁷³ Congress enacted section 8(1) of the Wagner bill without further change.

2. Pre-Exchange Parts Promises and Grants Decisions: From a Coercion-Based Analysis to an Inferential Fist in the Velvet Glove

Within a few years after enactment of the NLRA, a large body of case law applying section 8(1) had developed. These early interpretations of section 8(1) by the courts and the Board were consistent with Congress's views on the meaning of "coercion," "interference," and "restraint." In general, the courts and the Board required evidence of affirmative acts by an employer¹⁷⁴ reasonably tending to deprive employees of their free will to engage in concerted activities. For example,

¹⁷⁰ See, e.g., 79 CONG. REC. 7661 (1935) (statement of Sen. Walsh) (§ 8(1) prescribes economic coercion); *id.* at 9684 (statement of Rep. Connery that Wagner bill prohibits interference with any union, not just company union); see also *id.* at 7568-71 (statement of Sen. Wagner). See generally Magruder, *supra* note 149, at 1117, who encouraged employers to accept with right good will the principles of the National Labor Relations Act . . . [which] would mean: Away with yellow dogs, company unions, blacklists, deputy sheriffs in the pay of employers, barricades, tear gas, machine guns, vigilante outrages, espionage, and all that miserable brood of union-smashing detective agencies.

¹⁷¹ *Exchange Parts*, 375 U.S. at 409.

¹⁷² Senator Walsh emphasized on several occasions that § 8(1) of the Wagner bill would not prevent an employer from attempting to influence his employees in the selection or rejection of a collective bargaining representative. See *National Labor Relations Board: Hearings On S. 1958 Before the Senate Comm. on Educ. and Labor*, 74th Cong., 1st Sess. 305 (1935) (statement of Sen. Walsh) ("I do not think there is anything in this bill to prevent an employer . . . from [attempting to exert influence] . . . , and that is why we struck out the word 'influence.'"), reprinted in 2 NLRA HISTORY, *supra* note 116, at 1691; *id.* at 557-58, reprinted in 2 NLRA HISTORY, *supra* note 116, at 1943-44; *id.* at 713-14, reprinted in 2 NLRA HISTORY, *supra* note 116, at 2099-100.

¹⁷³ The Senate report on the Wagner bill stressed that unfair labor practices were limited to those activities falling within §§ 8(1) through 8(5). Thus, "[n]either the National Labor Relations Board nor the courts are given any blanket authority to prohibit whatever labor practices that in their judgment are deemed to be unfair." S. REP. NO. 573, *supra* note 142, at 8-9.

¹⁷⁴ See, e.g., *NLRB v. Remington Rand, Inc.*, 94 F.2d 862, 869 (2d Cir.), *cert. denied*, 304 U.S. 576 (1938).

section 8(1) prohibited black-listing union members, threatening employees with wage cuts, plant closings or termination, engaging in espionage and surveillance of union members, denying privileges to union members, promoting company-dominated unions, interrogating employees about union sympathies, forcing prospective employees to sign "yellow-dog" contracts, and prohibiting union solicitation.¹⁷⁵ Each of these situations shared the element of literal compulsion: job security or retention of employment benefits were conditioned on forsaking statutory rights. On the other hand, attempts to sway and influence an employee's choice in a representation campaign — even the expression of anti-union sentiments — were generally not proscribed (at least by the courts) in the 1930's and 1940's so long as job security was not imperiled.

Because a primary concern of the NLRA was to prevent employer domination of unions,¹⁷⁶ many early decisions under the Act involved attempts by employers to require employees to join either company-dominated unions or inside unions.¹⁷⁷ The first Supreme Court case discussing in detail benefit grants and promises concerned a company-dominated union. In *International Association of Machinists Lodge No. 35 v. NLRB*,¹⁷⁸ the employer entered into a contract with a favored union even though the large majority of employees preferred the disfavored United Auto Workers. As part of its campaign to assist the fa-

¹⁷⁵ See, e.g., *NLRB v. Fruehauf Trailer Co.*, 301 U.S. 49, 54-55 (1937) (espionage and surveillance); *Texarkana Bus Co. v. NLRB*, 119 F.2d 480, 482-83 (8th Cir. 1941) (interrogations regarding union sympathies); *Stewart Die Casting Corp.*, 14 N.L.R.B. 872 (1939) (blacklisting union members), *modified*, 114 F.2d 849 (1940), *cert. denied*, 312 U.S. 680 (1941). Of course, many employers today shun more blatant conduct constituting interference and coercion in favor of conduct that, although compulsive in a more subtle fashion, achieves the same goals. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 614 (1969). Thus, the courts and the Board are engaged in the continuous process of analyzing new forms of conduct for their potentially coercive effect. But the important point evident not only from the language of § 8(a)(1) but also from the early cases interpreting that statute is that only *compulsive* conduct that interferes with the exercise of free will is prohibited. Not even the "subtle" nature of specific conduct can alter this fundamental principle. To the extent that prohibited conduct is identified by being *presumed* coercive, the Board and the courts have not followed the statutory command.

¹⁷⁶ See Note, *Employer Interference with Lawful Union Activity*, 37 COLUM. L. REV. 816, 827-30 (1937); 35 COLUM. L. REV. 1098, 1100-04 (1935); *supra* text accompanying notes 147-52.

¹⁷⁷ See, e.g., *Western Cartridge Co. v. NLRB*, 134 F.2d 240, 244 (7th Cir.), *cert. denied*, 320 U.S. 746 (1943); *NLRB v. Porcelain Steels, Inc.*, 138 F.2d 840, 841 (6th Cir. 1943); *NLRB v. Condenser Corp. of Am.*, 128 F.2d 67, 73 (3d Cir. 1942); *Corning Glass Works v. NLRB*, 118 F.2d 625, 629 (2d Cir. 1941), *remanded*, 129 F.2d 967 (1942); *NLRB v. W.A. Jones Foundry & Mach. Co.*, 123 F.2d 552, 554 (7th Cir. 1941); *Springfield Mach. & Foundry Co.*, 48 N.L.R.B. 974 (1943); *Bradford Mach. Tool Co.*, 44 N.L.R.B. 759 (1942), *enforcement denied*, 138 F.2d 246 (6th Cir. 1943); *Columbia Powder Co.*, 40 N.L.R.B. 223 (1942); *Curtiss-Wright Corp.*, 39 N.L.R.B. 992 (1942); *Leyse Aluminum Co.*, 37 N.L.R.B. 839 (1941); *Germain Seed & Plant Co.*, 37 N.L.R.B. 1090 (1941), *modified*, 134 F.2d 94 (9th Cir. 1943); *West Ky. Coal Co.*, 24 N.L.R.B. 863 (1940); *Dow Chem. Co.*, 13 N.L.R.B. 993 (1939), *modified*, 117 F.2d 455 (6th Cir. 1941); *Picker X-Ray Corp.*, 12 N.L.R.B. 1384 (1939).

¹⁷⁸ 311 U.S. 72 (1940).

vored union, the employer fired UAW members and threatened to close its plant. It also offered one employee a favorable job performance rating if he would join the union supported by the employer.¹⁷⁹ Thus, *IAM Lodge 35* is consonant with the legislative proscription of threats to job security, the statutory policy against dominated unions, and the numerous lower court and Board decisions of this era.

The Court's 1943 decision in *Medo Photo Supply Corp. v. NLRB*,¹⁸⁰ on which the *Exchange Parts* Court placed significant reliance,¹⁸¹ was a logical extension of *Lodge 35* into another area of abuse during the early days of the Act — direct dealing with employees and interference with previously recognized or certified bargaining agents. In *Medo*, a number of employees told their employer that, in return for a pay raise, they would leave the previously recognized union. The employer granted the pay raise, the employees gave up their union memberships, and the employer subsequently refused to bargain with the union. The Court held both that the employer's refusal to bargain with the employees' exclusive representative and his grant of pay raises violated sections 8(5) and (1) (now sections 8(a)(5) and (1)) of the Act.¹⁸² The Court reasoned that the employer's benefit grant constituted an attempt to prompt employee repudiation of a previously recognized statutory bargaining representative. This interfered not only with employee rights but also with the independent statutory policy of exclusive representation under the NLRA.¹⁸³

Other promises or grants cases also demonstrate that job security

¹⁷⁹ See *id.* at 76-79.

¹⁸⁰ 321 U.S. 678 (1944).

¹⁸¹ See 375 U.S. at 409.

¹⁸² See 321 U.S. at 684, 687.

¹⁸³ See *id.* at 685-86. The Court did not consider the circumstance if the employer had told the employees "you can do as you please about the union." *Id.* at 685 n.3 (emphasis in original). Had the Court reached the same result on the § 8(a)(1) allegation in the absence of the § 8(a)(5) violations, *Medo* would be a much more troubling case. As Justice Rutledge argued in dissent, the record was replete with evidence that the company went to great lengths to honor the employees' wishes. *Id.* at 688 (Rutledge, J., dissenting). As one commentator has noted, *Medo* "vividly demonstrates the tension between pro-union policies which were designed to eliminate a particular form of employer-employee relation (the company [dominated] union) and policies designed to facilitate employee wishes and desires." Bailey, *supra* note 13, ch. 3, at 6-7.

See also *May Dep't Stores Co. v. NLRB*, 326 U.S. 376, 383-86 (1945); *NLRB v. Epstein*, 203 F.2d 482, 484 (3d Cir. 1953), *cert. denied*, 347 U.S. 912 (1954); *Superior Engraving Co. v. NLRB*, 183 F.2d 783 (7th Cir. 1950), *cert. denied*, 340 U.S. 930 (1951); *NLRB v. Hoppes Mfg. Co.*, 170 F.2d 962 (6th Cir. 1948); *L.B. Hartz Stores*, 71 N.L.R.B. 848 (1946); *May Dep't Stores Co.*, 59 N.L.R.B. 976 (1944), *modified*, 154 F.2d 533 (8th Cir.), *cert. denied*, 329 U.S. 725 (1946); *May Dep't Stores Co.*, 53 N.L.R.B. 1366 (1943), *modified*, 146 F.2d 66 (8th Cir. 1944), *modified*, 326 U.S. 376 (1945); *Southern Cotton Oil Co.*, 26 N.L.R.B. 177 (1940); *American Hair & Felt Co.*, 19 N.L.R.B. 202 (1940); *Hercules-Campbell Body Co.*, 7 N.L.R.B. 431 (1938); *cf. Chicago Apparatus Co.*, 12 N.L.R.B. 1002 (1939) (even though union unable to show it represented majority of employees, employer violated Act by granting benefits after refusing to negotiate with union), *enforced*, 116 F.2d 753 (7th Cir. 1940).

or protection of other independent statutory policies were at the fulcrum of early benefit grants and promises cases. These cases involved benefit grants and promises discriminatorily provided to some employees but denied to union members or other employees¹⁸⁴ or benefit grants offered as bribes to union members to encourage them to break up or leave the union.¹⁸⁵ Most reported decisions of the Board and the appellate courts during the 1940's did not involve "pure" employer promises or grants comparable to the *Exchange Parts* case.¹⁸⁶

This construction of coercion is also implicit in those cases that rejected any across-the-board rule prohibiting promises and grants. For example, in *Peter J. Schweitzer, Inc. v. NLRB*,¹⁸⁷ the Court of Appeals for the District of Columbia Circuit stated that "[c]ertainly it cannot be claimed that an employer would be guilty of an unfair labor practice because he treated his employees well in order to forestall a

¹⁸⁴ See, e.g., *NLRB v. Sifers Candy Co.*, 171 F.2d 63, 66 (10th Cir. 1948); *NLRB v. Fairmont Creamery Co.*, 143 F.2d 668, 671 (10th Cir.), cert. denied, 323 U.S. 752 (1944); *NLRB v. Security Warehouse & Cold Storage Co.*, 136 F.2d 829, 831, 834 (9th Cir. 1943); *Great S. Trucking Co. v. NLRB*, 127 F.2d 180, 184 (4th Cir.), cert. denied, 317 U.S. 652 (1942); *C.D. Beck & Co.*, 63 N.L.R.B. 1426 (1945), enforced sub nom. *NLRB v. Peterson*, 157 F.2d 514 (6th Cir. 1946), cert. denied, 330 U.S. 838 (1947); *L. Hardy Co.*, 44 N.L.R.B. 1013 (1942); *Brown Paper Mill Co.*, 36 N.L.R.B. 1220, enforced, 133 F.2d 988 (5th Cir. 1943); *Knoxville Publishing Co.*, 12 N.L.R.B. 1209 (1939), modified, 124 F.2d 875 (6th Cir. 1942); *Taylor Trunk Co.*, 6 N.L.R.B. 32 (1938); see also *Texas Textile Mills*, 58 N.L.R.B. 352 (1944); cf. *National Licorice Co. v. NLRB*, 309 U.S. 350 (1940) (employer violated NLRA by conditioning receipt of benefits upon signing of "yellow dog" contract, i.e. agreement not to join union). Independent of § 8(a)(1), an employer's offer or grant of a wage increase only to nonunion employees or conditioned solely on an employee's withdrawal from the union and union activities will constitute "discrimination" in violation of § 8(a)(3). See, e.g., *East Towne Chrysler Motors, Inc.*, 238 N.L.R.B. 1379 (1978); cf. *NLRB v. Lowell Sun Publishing Co.*, 320 F.2d 835 (1st Cir. 1963) (\$10 per week pay raise given as "reward" to union adherent after he assured management he was on its side violates § 8(a)(1)).

¹⁸⁵ See, e.g., *NLRB v. Hollywood-Maxwell Co.*, 126 F.2d 815, 819 (9th Cir. 1942); *Rapid Roller Co. v. NLRB*, 126 F.2d 452, 455 (7th Cir.), cert. denied, 317 U.S. 650 (1942); *Reliance Mfg. Co. v. NLRB*, 125 F.2d 311, 319 (7th Cir. 1941); *Northwest Glove Co.*, 74 N.L.R.B. 1697 (1947); *Chicago Metal Mfg. Co.*, 48 N.L.R.B. 1370 (1943); *Cherry River Boom & Lumber Co.*, 44 N.L.R.B. 273 (1942); *Hygrade Food Prods. Corp.*, 35 N.L.R.B. 120 (1941); *Brown Paper Mill Co.*, 36 N.L.R.B. 1220 (1941), enforced, 133 F.2d 988 (5th Cir. 1943); *Leyse Aluminum Co.*, 37 N.L.R.B. 839 (1941); *National Motor Rebuilding Corp.*, 19 N.L.R.B. 503 (1940).

¹⁸⁶ In the majority of cases, the employer's promise or grant of benefit accompanied other conduct that, standing alone, would constitute an unfair labor practice. In contrast, what is termed here a "pure" benefits case is characterized by the absence of coercive conduct. Nonetheless, the courts and the Board gradually developed a rule proscribing all promises or grants of benefits during pending union elections. See, e.g., *NLRB v. La Salle Steel Co.*, 178 F.2d 829, 831 (7th Cir. 1949), cert. denied, 339 U.S. 963 (1950); *NLRB v. Williamson-Dickie Mfg. Co.*, 130 F.2d 260, 262 (5th Cir. 1942); *F.W. Woolworth Co. v. NLRB*, 121 F.2d 658, 660 (2d Cir. 1941); *M.H. Ritzwoller Co. v. NLRB*, 114 F.2d 432, 434 (7th Cir. 1940); *Southern Colo. Power Co. v. NLRB*, 111 F.2d 539, 544 (10th Cir. 1940); *Robert L. Jackson, Sr.*, 71 N.L.R.B. 447 (1946); *Bergmann's Inc.*, 71 N.L.R.B. 1020, 1079 (1946); *Reliance Mfg. Co.*, 60 N.L.R.B. 946 (1945); *Mellin-Quincy Mfg. Co.*, 53 N.L.R.B. 366 (1943); *Jasper Blackburn Prods. Corp.*, 21 N.L.R.B. 1240 (1940); *Dow Chem. Co.*, 13 N.L.R.B. 993 (1939), modified, 117 F.2d 455 (6th Cir. 1941); *Montgomery Ward & Co.*, 9 N.L.R.B. 538 (1938), modified, 107 F.2d 555 (7th Cir. 1939).

¹⁸⁷ 144 F.2d 520 (D.C. Cir. 1944).

union movement . . . [and] remind[ed] them of that fact and claim[ed] credit for it during a period of union election."¹⁸⁸ A number of pre-Taft-Hartley Board decisions also upheld the employer's right to promise or grant wage increases during union election campaigns where existing employment conditions were not threatened.¹⁸⁹ Moreover, many of the Board's decisions involving promises or grants of benefits arose under conditions where independent unfair labor practices were present.¹⁹⁰ In those cases, the Board at least implicitly required proof that benefit promises and grants were linked to independent offenses before finding the employer's conduct unlawful under section 8(1).

¹⁸⁸ *Id.* at 524 (footnote omitted). The court specifically held that although an employer may offer the benefits of liberal compensation and personnel plans to the employees during a representation drive, those benefits cannot be offered contingent only upon the defeat of the union in the election. *Id.* at 522. Thus, the court upheld the Board's order to the extent it directed the employer to assure the employees that the benefits would not be rescinded if they voted for the union. *Id.* at 525; see also *NLRB v. Exchange Parts Co.*, 304 F.2d 368, 373, 375 (5th Cir. 1962), *rev'd*, 375 U.S. 405 (1964). But see 58 HARV. L. REV. 137 (1944) (criticizing the *Schweitzer* decision).

Benefit grants were upheld in several other contemporaneous cases. In *Wyman-Gordon Co. v. NLRB*, 153 F.2d 480 (7th Cir. 1946), the Board charged that the employer violated § 8(3) by discriminatorily discharging several employees active in promoting an outside union. As background evidence of the employer's anti-union animus, the Board pointed to an example of unlawful interference (presumptively a violation of § 8(1)) that occurred when the employer granted a pay hike and altered the pay system during the outside union's activities in the plant. The court rejected the Board's argument as lacking any "scintilla of direct evidence" notwithstanding that the latter benefit was provided directly in response to the employer's solicitation of employee grievances shortly before a representation election. *Id.* at 484-85. Expressing its displeasure with the Board's willingness to infer interference "without any justification," the court noted that it was hard-pressed to find interference when the change in pay system was made "at the express request of the employees . . . in an attempt by management to eradicate their dissatisfaction." *Id.* at 485. In an analogous decision, the Fourth Circuit held that an employer who granted a wage hike to employees in a nonunionized division but withheld the hike from unionized employees in another division did not commit an unfair labor practice. See *NLRB v. Appalachian Elec. Power Co.*, 140 F.2d 217, 219 (4th Cir. 1944). Although the court, like the *Wyman-Gordon* court, ostensibly based its decision on the lack of substantial evidence to support the Board's order, it is apparent from the court's opinion that the court was not pleased with the Board's attempt to find unlawful coercion in a situation devoid of coercion. Shortly after the union was certified, the employer raised the wages of all employees in the nonunionized divisions pursuant to a compensation policy review undertaken before the union was certified. Neither raising the wages of these nonunion employees, even though some union activity was evident for a time in one division, nor telling the unionized employees that they were not receiving raises because the employer was obligated to begin bargaining with the union later that month constituted interference or coercion. See *id.* at 219-20. Another noteworthy case is *Diamond T Motor Car Co. v. NLRB*, 119 F.2d 978 (7th Cir. 1941). In *Diamond T*, the employer, after learning of an impending union organizing drive, announced a pay hike and implied that vacations might also be improved in the future. In the same announcement, the employer's representative said to the employees: "you have a perfect right to organize in any way you see fit a union in our plant," and he also expressed his desire that they select a representative knowledgeable about the plant. *Id.* at 979-80. The court refused to enforce the Board's order in this case, finding that under all the facts the employer's statement of preference "cannot by any stretch of the imagination be deemed to be coercive in character." *Id.* at 982.

¹⁸⁹ See, e.g., *Exposition Cotton Mills Co.*, 76 N.L.R.B. 1289 (1948); *Radio Station WFHR*, 71 N.L.R.B. 518 (1946); *Barber Mfg. Co.*, 60 N.L.R.B. 235 (1945); *Hill Indep. Mfg. Co.*, 50 N.L.R.B. 768 (1943); *Holland Mfg. Co.*, 23 N.L.R.B. 1215 (1940); *Huch Leather Co.*, 11 N.L.R.B. 394 (1939); see also *Grove Regulator Co.*, 66 N.L.R.B. 1102 (1946); *Locomotive Finished Material Co.*, 52 N.L.R.B. 922 (1943), *enforced*, 142 F.2d 802 (10th Cir. 1944).

¹⁹⁰ See *supra* notes 177 & 183-85.

On the other hand, the Board began in the early 1940's to establish a contrary principle in a line of cases described by one contemporary commentator as "somewhat startling."¹⁹¹ In these cases the Board found violations of section 8(1) where an employer attempted to soothe employee grievances by making necessary changes in working conditions or benefits despite the absence of threats to job security or statutory policies.¹⁹² The courts in the 1940's did not uniformly accept this extension of section 8(1) by the Board,¹⁹³ but many eventually agreed.¹⁹⁴ This development remained largely unchallenged until 1962

¹⁹¹ Note, *Improvement in Terms of Employment as an Unfair Labor Practice*, 54 HARV. L. REV. 1036, 1039 (1941).

¹⁹² In one class of cases, however, the NLRB has established a more far-reaching principle. When there have been no union demands, and when there has been no question of illegal support, to allay dissatisfaction among the men by improving working conditions has been held an interference if it discourages organizational activity. The same principle has been applied when no union was involved, but grievances were removed to prevent concerted activity by an employee grievance meeting. This principle is so well established that recently the NLRB has cited it as authority for its holding that an employer could not properly tell his men that he had always done as much for them as he could, and would be glad to discuss their grievances.

These decisions are somewhat startling since they suggest the possibility that they will cause non-union employers to withhold better terms of employment in the fear of NLRB proceedings. While no difficulty will be felt over the condemnation of such concessions if the employer intends to withdraw them upon the cessation of union activity, this has never been made a criterion. . . . The Board is, in effect, in the embarrassing position of holding that once organization begins an employer whose men are dissatisfied with conditions must keep them dissatisfied in order to smooth the path of union organizers.

Id. at 1039 (footnotes omitted); accord Syme, *The New Trend in the Decisions of the National Labor Relations Board*, 16 TEMP. U. L.Q. 292, 303-04 (1942); cf. Myers, "Interference" in *Labor Relations Acts*, 19 B.U.L. REV. 208, 218-19 (1939) (arguing that promises and grants of benefits are subtle forms of interference). See generally West Tex. Utils. Co., 22 N.L.R.B. 522 (1940), modified, 119 F.2d 683 (5th Cir. 1941); F.W. Woolworth Co., 25 N.L.R.B. 1362 (1940), modified, 121 F.2d 658 (2d Cir. 1941); Picker X-Ray Corp., 12 N.L.R.B. 1384 (1939).

¹⁹³ Compare NLRB v. Fitzpatrick & Weller, Inc., 138 F.2d 697, 699 (2d Cir. 1943) (upholding Board finding of § 8(1) violation from noncoercive benefit grant or promise) and NLRB v. Williamson-Dickie Mfg. Co., 130 F.2d 260, 262 (5th Cir. 1942) (same) and F.W. Woolworth Co. v. NLRB, 121 F.2d 658, 660 (2d Cir. 1941) (same) and M.H. Ritzwoller Co. v. NLRB, 114 F.2d 432, 434 (7th Cir. 1940) (same), with Peter J. Schweitzer, Inc. v. NLRB, 144 F.2d 520, 523, 525 (D.C. Cir. 1944) (refusing to enforce Board order finding § 8(1) violation from noncoercive benefit grant or promise) and Diamond T Motor Car Co. v. NLRB, 119 F.2d 978, 983 (7th Cir. 1941) (same).

¹⁹⁴ See, e.g., NLRB v. Mitchell Plastics, Inc., 260 F.2d 472, 473 (6th Cir. 1958); NLRB v. Armstrong Tire & Rubber Co., 228 F.2d 159, 161 (5th Cir. 1955); NLRB v. Pyne Molding Corp., 226 F.2d 818, 820 (2d Cir. 1955); NLRB v. Radcliffe, 211 F.2d 309, 311, 316 (9th Cir.), cert. denied, 348 U.S. 833 (1954); Joy Silk Mills, Inc. v. NLRB, 185 F.2d 732, 739 (D.C. Cir. 1950), cert. denied, 341 U.S. 914 (1951); NLRB v. Vermont Am. Furniture Corp., 182 F.2d 842, 843-44 (2d Cir. 1950); Superior Engraving Co. v. NLRB, 183 F.2d 783, 790 (7th Cir. 1950), cert. denied, 340 U.S. 930 (1951); NLRB v. Elyria Tel. Co., 158 F.2d 868, 872-73 (6th Cir. 1946).

It is interesting to note that as the appellate courts began to accept the Board's rule finding a violation of § 8(a)(1) from noncoercive benefit grants and promises, the courts also became more willing to rely on various exceptions to the rule, perhaps indicating in this way some displeasure with the Board's *per se* approach. See, e.g., NLRB v. Cleveland Trust Co., 214 F.2d 95, 99 (6th

when Judge Wisdom refocused section 8(a)(1) analysis on coercion.

Several identifiable patterns regarding employer promises and grants are thus evident in both the Board and the appellate court decisions predating *Exchange Parts*. First, as Professor Wirtz noted, promises and grants "were accompanied in most instances by other unfair labor practices, usually discriminatory discharges, which further revealed either lack of knowledge of the law or complete disdain for it."¹⁹⁵ In other words, a threat to employee job security, diminution in other existing benefits, or violations of independent statutory policies accompanied the employer's beneficence. Second, relatively few cases involving pure promises or grants of benefits during representation campaigns were addressed by the Board or the courts. These few decisions evince a mixed, if not inconsistent, appraisal of employer conduct.¹⁹⁶

Cir. 1954); *NLRB v. W.T. Grant Co.*, 208 F.2d 710, 712 (4th Cir. 1953); *NLRB v. West Ohio Gas Co.*, 172 F.2d 685, 687 (6th Cir. 1949); *Wyman-Gordon Co. v. NLRB*, 153 F.2d 480, 487 (7th Cir. 1946). Compare *NLRB v. Armco Drainage & Metal Prods., Inc.*, 220 F.2d 573, 577-78 (6th Cir.) (employer did not violate § 8(a)(1) by telling employees they would not receive contemplated wage hike while union election was pending for fear of committing unfair labor practice), *cert. denied*, 350 U.S. 838 (1955) and *Bonwit Teller, Inc. v. NLRB*, 197 F.2d 640, 644 (2d Cir. 1952) (same), *cert. denied*, 345 U.S. 905 (1953) with *NLRB v. Dothan Eagle, Inc.*, 434 F.2d 93, 97-99 (5th Cir. 1970) (employer violated §§ 8(a)(1) and 8(a)(5) by withholding scheduled pay raise during pending election) and *NLRB v. Great Atl. & Pac. Tea Co.*, 409 F.2d 296, 297-98 (5th Cir. 1969) (employer violated § 8(a)(3) by refusing to give employees benefits received by other area employees because of pending union election). The Board also apparently became more receptive to employer exceptions defenses during this same period, as is reflected in the increased number of reported decisions invoking exceptions to find an employer's conduct lawful. See, e.g., *Jackson Tile Mfg. Co.*, 122 N.L.R.B. 764 (1958), *enforced*, 272 F.2d 181 (5th Cir. 1959); *Linton-Summit Coal Co.*, 120 N.L.R.B. 346 (1958); *Taylor-O'Brien Corp.*, 112 N.L.R.B. 1 (1955); *Campbell & McLean, Inc.*, 106 N.L.R.B. 1049 (1953), *enforced*, 215 F.2d 652 (9th Cir. 1954); *Onondaga Pottery Co.*, 103 N.L.R.B. 770 (1953); *Wenzel Tent & Duck Co.*, 101 N.L.R.B. 217 (1952); *Eisner Grocery Co.*, 93 N.L.R.B. 1614 (1951); *W.C. Nabors*, 89 N.L.R.B. 538 (1950), *enforced*, 196 F.2d 272 (5th Cir.), *cert. denied*, 344 U.S. 865 (1952); *Dixie Mercerizing Co.*, 86 N.L.R.B. 285 (1949), *enforced*, 188 F.2d 366 (6th Cir. 1951); *Kallahar & Mee, Inc.*, 87 N.L.R.B. 410 (1949); *Artcraft Hosiery Co.*, 78 N.L.R.B. 333 (1948); *Burns Brick Co.*, 80 N.L.R.B. 389 (1948); *Wichita Eng'g Co.*, 65 N.L.R.B. 1382 (1946); *Fisher Governor Co.*, 71 N.L.R.B. 1291 (1946), *enforced*, 163 F.2d 913 (8th Cir. 1947); *Harry Heisler*, 71 N.L.R.B. 1114 (1946); *King Ventilating Co.*, 60 N.L.R.B. 1 (1945); *Mississippi Valley Structural Steel Co.*, 64 N.L.R.B. 78 (1945). Typically, in the period preceding 1945, the Board would find that the record did not sustain the allegations in those cases where it wished to find lawful an employer's promise or grant of benefit. See, e.g., *Federal Eng'g Co.*, 60 N.L.R.B. 592 (1945), *modified*, 153 F.2d 233 (6th Cir. 1946); *Regal Knitwear Co.*, 49 N.L.R.B. 560 (1943), *enforced*, 140 F.2d 746 (2d Cir. 1944), *aff'd*, 324 U.S. 9 (1945); *Firth Carpet Co.*, 33 N.L.R.B. 191 (1941), *enforced*, 129 F.2d 633 (2d Cir. 1942). But see *Bell & Howell Co.*, 46 N.L.R.B. 700 (1943).

¹⁹⁵ Wirtz, *Board Policy and Labor-Management Relations: "Employer Persuasion,"* 7 N.Y.U. CONF. ON LAB. 79 (1954).

¹⁹⁶ In accord with the rationale of those cases that refused to find § 8(a)(1) violations, Professor Bok has argued that the law is not violated merely because the employer is the source of the benefit. See Bok, *supra* note 13, at 112-14. *Exchange Parts*, on the other hand, adopted the result of those cases that based a finding of coercion on the mere presence of anti-union motivation, but went further by creating a presumption of coercion in these situations. See *Bata Shoe Co.*, 116 N.L.R.B. 1239, 1241-42 (1956); *Lake Superior Dist. Power Co.*, 88 N.L.R.B. 1496, 1498 (1950); *supra* note 35. Compare *Exchange Parts*, 375 U.S. at 409, with *Hudson Hosiery Co.*, 72

3. Section 8(c): Codification of 1947 Standards

At this stage of the development of the rule proscribing promises and grants of benefits, Congress amended the NLRA by placing the employee's right to refrain from concerted activity on equal footing with the right to engage in such activity.¹⁹⁷ Equally significant to promises and grants analysis was the enactment of section 8(c) — an amendment designed to preserve the employer's right to persuade employees in a noncompulsive and noncoercive manner.

Enacted as part of the Taft-Hartley amendments of 1947, section 8(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.*¹⁹⁸

The obvious argument suggested by the inclusion of the phrase "promise of benefit" in section 8(c)'s proviso is that it indicates legislative approval of the *Exchange Parts* rule. Speech is protected unless promises of benefits — which are equated with threats of reprisal and force — are made. But a review of both the cases preceding the enactment of section 8(c) and its legislative history reveals that the promise of benefit proviso codified something quite unlike *Exchange Parts*. The better interpretation of this proviso is that it denies protection only to demonstrably *coercive* employer speech and promises of benefit. Briefly stated, the reasons are that section 8(c) cannot be equated with section 8(a)(1), that section 8(c) functions merely as a rule of evidence, and that, in any case, section 8(c) does not redefine coercive employment practices to mean something different from that concept under section 8(a)(1).

Section 8(c) was specifically enacted to codify and, to a certain extent, expand upon a Supreme Court decision preserving rights of "free speech" for employers.¹⁹⁹ In *NLRB v. Virginia Electric & Power*

N.L.R.B. 1434, 1436-37 (1947).

¹⁹⁷ See Labor Management Relations Act, 1947, ch. 120, § 101, 61 Stat. 136, 136-52 (codified as amended at 29 U.S.C. § 158(b) (1976)).

¹⁹⁸ *Id.* (emphasis added) (codified as amended at 29 U.S.C. § 158(c) (1976)).

¹⁹⁹ See 93 CONG. REC. 3837 (1947) (statement of Sen. Taft about S. 1126), reprinted in 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 1011 (1948) [hereinafter cited as LMRA HISTORY]; H.R. REP. NO. 245, 80th Cong., 1st Sess. 84 (1947), reprinted in 1 LMRA HISTORY, *supra*, at 375. See generally Koretz, *Employer Interference with Union Organization Versus Employer Free Speech*, 29 GEO. WASH. L. REV. 399 (1960).

Co.,²⁰⁰ decided in 1941, the employer mounted a first amendment challenge to the Board's finding of unfair labor practices based solely on several allegedly coercive speeches and a posted bulletin.²⁰¹ The Court held that the employer had a right to take any position it chose on unionization, thus rejecting the Board's "enforced neutrality" doctrine. Further the Board was required to base its finding of coercion on "the whole complex of [the employer's] activities, of which the bulletin and speeches are but parts."²⁰² Mere speech, separated from conduct, would not support a finding of an unfair labor practice.²⁰³

Notwithstanding the Court's admonition against basing unfair labor practice findings solely upon employer speech, the Board continued to cling to its enforced neutrality position. Professor Cox described this situation as "the most striking example of [the Board's] previous tendency to press the policies of the original Act to extremes at the expense of competing considerations of equal or greater importance."²⁰⁴ Congress stepped into the dispute in 1947 with the enactment of section 8(c):²⁰⁵ Employer speech should be considered wholly permissible provided it does "not by its own terms threaten force or economic reprisal."²⁰⁶ Most of the debate in Congress regarding this provision involved section 8(c)'s evidentiary effect.²⁰⁷ Thus, section 8(c) functions as a "rule of evidence" that bars use of employer speech as a basis for finding an unfair labor practice.

Congressional debate concerning the promise-of-benefit proviso was less clear. Fairly read, however, it does not prohibit noncompulsive promises and grants. Representative Hartley's bill, as reported by the House Committee on Education and Labor and as approved by the House, did not include "promise of benefit" in the proviso defining the

²⁰⁰ 314 U.S. 469 (1941).

²⁰¹ See *id.* at 477.

²⁰² *Id.* at 478.

²⁰³ See *id.* at 479-80.

²⁰⁴ Cox, *supra* note 110, at 15.

²⁰⁵ Congress intended § 8(c) to apply not only to employers but also to employees. See 93 CONG. REC. A1222 (statement of Rep. Landis), reprinted in 1 LMRA HISTORY, *supra* note 199, at 582. See generally *Automation & Measurement Div., Bendix Corp. v. NLRB*, 400 F.2d 141 (6th Cir. 1968).

²⁰⁶ 93 CONG. REC. app. at A1910 (1947) (statement of Rep. Meade about H. 3020), reprinted in 1 LMRA HISTORY, *supra* note 199, at 869; cf. 93 CONG. REC. 4143 (statement of Sen. Ellender) (S. 1126 "would permit an employer to speak his mind, provided he refrained from any threat of coercion, or any indication of bribery."), reprinted in 1 LMRA HISTORY, *supra* note 199, at 1077.

²⁰⁷ See, e.g., 93 CONG. REC. 6453 (1947) (statement of Sen. Morse), reprinted in 2 LMRA HISTORY, *supra* note 199, at 1555; 93 CONG. REC. 6496, 6503 (1947) (statement of Sen. Murray), reprinted in 2 LMRA HISTORY, *supra* note 199, at 1567, 1580; 93 CONG. REC. 6514 (1947) (statement of Sen. Pepper), reprinted in 2 LMRA HISTORY, *supra* note 199, at 1590-91. Indeed, even the Supreme Court in its *Exchange Parts* opinion noted the evidentiary concern of considering speech disassociated from conduct. See 375 U.S. at 409 n.3.

forms of unprotected coercive speech. Speech was protected under the Hartley bill so long as it did "not by its own terms threaten force or economic reprisal."²⁰⁸ On the other hand, Senator Taft's bill, as reported and as approved by the Senate, stated that speech was protected "if such [speech] contains under all the circumstances no threat, express or implied, of reprisal or force, or offer, express or implied, of benefit."²⁰⁹ In both the House and the Senate, there was virtually no debate over the meaning of the "promise of benefit" language other than several passing references to employer "bribery" of, and "discrimination" against, employees.²¹⁰ There is nothing in the legislative history to indicate that promises, of themselves, necessarily coerce.²¹¹ Nevertheless, the Conference draft, although based primarily upon the House's version of the free speech guarantee,²¹² included the reference to promise of benefit now found in section 8(c).²¹³ No specific explanation for the proviso's purpose was given in either the pre- or post-Conference reports and debates.

While the absence of legislative history explaining the benefit proviso's purpose leaves it subject to conflicting interpretation, there are several reasons for not reading section 8(c) as approving the *Exchange Parts* rule. First, as noted earlier, section 8(c) was considered by Congress as a rule of evidence.²¹⁴ Section 8(c) clearly allows the Board to

²⁰⁸ H.R. 3020, 80th Cong., 1st Sess. § 8(d)(1) (1947) (as reported), *reprinted in 1 LMRA HISTORY*, *supra* note 199, at 56; H.R. 3020, 80th Cong., 1st Sess. § 8(d)(1) (1947) (as passed), *reprinted in 1 LMRA HISTORY*, *supra* note 199, at 183.

²⁰⁹ S. 1126, 80th Cong., 1st Sess. § 8(c) (1947) (as reported), *reprinted in 1 LMRA HISTORY*, *supra* note 199, at 114; H.R. 3020, 80th Cong., 1st Sess. § 8(c) (1947) (retitled S. 1126, as passed), *reprinted in 1 LMRA HISTORY*, *supra* note 199, at 242.

²¹⁰ See H.R. REP. NO. 510, 80th Cong., 1st Sess. 45 (1947) (interpreting § 8(d) of House bill as prohibiting "favorable discrimination"), *reprinted in 1 LMRA HISTORY*, *supra* note 199, at 549; 93 CONG. REC. 4143 (1947) (statement of Sen. Ellender that "bribery" is prohibited), *reprinted in 2 LMRA HISTORY*, *supra* note 199, at 1077; see also 93 CONG. REC. 6282-83, 6437 (1947) (statement of Reps. Hoffman and Case), *reprinted in 1 LMRA HISTORY*, *supra* note 199, at 871-73; cf. 93 CONG. REC. 3521 (1947) (statement of Rep. Price claiming that § 8(d) of House bill would allow employers to bribe employees), *reprinted in 1 LMRA HISTORY*, *supra* note 199, at 680-81. The concerns about bribery and discrimination are directly traceable to numerous pre-1947 Board and court decisions in which employers attempted to buy support for company-dominated unions or provided benefits to only a few select employees who refrained from union activities. See Note, *supra* note 191; *supra* notes 176-86 and accompanying text.

²¹¹ One passage from the Conference Report states that § 8(c)'s "purpose is to protect the right of free speech when what the employer says or writes is not a threatening nature or does not promise a *prohibited favorable discrimination*." H.R. REP. NO. 510, *supra* note 210, at 45 (1947) (emphasis added), *reprinted in 1 LMRA HISTORY*, *supra* note 199, at 549. If anything, this passage indicates that Congress probably was aware of the difference between noncoercive promises and those that were coercively or discriminatorily made, offending other provisions of the Act (e.g., § 8(a)(3)).

²¹² See 93 CONG. REC. 6443-44 (1947) (summary of differences between S. 1126 and conference agreement), *reprinted in 2 LMRA HISTORY*, *supra* note 199, at 1540-41.

²¹³ See H.R. REP. NO. 510, *supra* note 210, at 8, *reprinted in 1 LMRA HISTORY*, *supra* note 199, at 512.

²¹⁴ See *supra* note 207 and accompanying text.

find an unfair labor practice based on a promise or grant of benefit; but this does not mean that the mere presence of a promise or grant necessarily violates section 8(a)(1). At most, section 8(c) declares that the presence of a promise or grant may "constitute or be evidence of an unfair labor practice." Second, because section 8(c) is merely evidentiary, it cannot be said to change what constitutes an 8(a)(1) violation. Thus, while a promise may be used as evidence of an unfair labor practice, it can constitute an unfair labor practice only to the extent the promise coerces employees by threatening job security or other employment benefits. But where there is no coercion, a promise of benefit does not violate the Act. Third, the general purpose of section 8(c) was to expand employer rights, not to impose limits on them. Congress sought to express its displeasure with Board decisions circumscribing employer speech that was, by itself, uncoercive.²¹⁵ One should therefore be reluctant to interpret section 8(c) to limit employers' rights.²¹⁶ Fourth, because section 8(c) was enacted to give employers the widest possible protections for uncoercive speech, interpreting the section to proscribe nonthreatening promises may create problems of constitutional dimension. In *Brown v. Hartlage*,²¹⁷ the Supreme Court recently took this approach in overturning, on first amendment grounds, an application of a state statute prohibiting a political candidate from promising to reduce his public salary if elected.²¹⁸ It is not inconceivable that where no threat to job security is involved, *Brown* and *Virginia Electric & Power*

²¹⁵ See S. REP. NO. 105, 80th Cong., 1st Sess. 23 (1947), reprinted in 1 LMRA HISTORY, supra note 199, at 429-30; H.R. REP. NO. 510, supra note 210, at 45, reprinted in 1 LMRA HISTORY, supra note 199, at 549. Only coercive speech was beyond § 8(c)'s protection. See, e.g., H.R. REP. NO. 510, supra note 210, at 45, reprinted in 1 LMRA HISTORY, supra note 199, at 549; 93 CONG. REC. app. at A1910 (1947) (statement of Rep. Meade); cf. 93 CONG. REC. 4904 (1947) (statement of Sen. Murray that substitute bill would continue § 8(c)'s emphasis on noncoercive speech).

²¹⁶ Neither the courts nor the Board explicitly have attempted to analyze § 8(c)'s promise of benefit proviso in terms of coercion. Indeed, section 8(c) has been considered in only a few benefit grants and promises cases. See, e.g., NLRB v. Gissel Packing Co., Inc., 395 U.S. 575, 616-18 (1969); *Exchange Parts*, 375 U.S. at 409 n.3 (not relied on as basis for holding); *Sonoco Prods. Co. v. NLRB*, 399 F.2d 835, 838 (9th Cir. 1968). The promise of benefit proviso is generally mentioned only when a court is expressing offhand a recapitulation of § 8(c). See, e.g., NLRB v. Marine World USA, 611 F.2d 1274, 1277 (9th Cir. 1980); NLRB v. Kaiser Agricultural Chem., Div. of Kaiser Aluminum & Chem. Corp., 473 F.2d 374, 380 (5th Cir. 1973); *Indiana Rayon Corp. v. NLRB*, 355 F.2d 535, 539 (7th Cir. 1966).

²¹⁷ 102 S. Ct. 1523 (1982).

²¹⁸ Although the Court's holding was qualified with statements that a state may prohibit candidates from "buying votes," 102 S. Ct. at 1530-31, the Court found dispositive the candidate's promise to extend the benefit to all taxpayers and citizens, and not only those who voted for him. See *id.* at 1531. "The State's fear that voters might make an ill-advised choice does not provide the State with a compelling justification for limiting speech." *Id.* at 1532. There are numerous bases upon which this political speech case may be distinguished from a NLRA promise of benefit case, but where the promise is made in a nondiscriminatory fashion the parallels are obvious. Cf. *International Longshoremen's Ass'n v. Allied Int'l, Inc.*, 102 S. Ct. 1656, 1664-65 (1982) (first amendment protects speech but not coercion).

Co. may help to draw the outer limit of permissible Board regulation of employer speech. In sum, the view of the NLRA's original draftsmen that literal compulsion is the crux of a section 8(a)(1) violation is not countermanded by anything contained in section 8(c).

C. Vote "Buying" and the Balance of Industrial Power

1. The Act's Policies as a Barrier to Unregulated Promises and Grants of Benefits

The Wagner Act was enacted in 1935 to "encourag[e] the practice and procedure of collective bargaining" as the means through which workers would improve their economic well-being.²¹⁹ Section 7 of the Act declared that the right to engage in concerted activity was national policy,²²⁰ and section 8 prohibited numerous employer practices in the government's effort to remove all obstacles to worker self-organization.²²¹ It may fairly be argued that in 1935 the government's policy supported unionization. Thus, a rule against employer promises and grants of benefits—putting aside its problematic threat content—might make sense if justified as promoting that objective. Employers would not be permitted to improve job conditions during the pendency of an election because such improvements discourage voting for the union. Therefore, at least to the extent elimination of the rules against employer benefit grants and promises might discourage votes for the union, as some courts and the Board have argued,²²² the Act's objective of promoting collective bargaining requires their retention. This argument, however, does not survive the 1947 Taft-Hartley Act amendments. Taft-Hartley's sweeping amendments to the NLRA made certain labor union conduct that interferes with employee exercise of free choice an unfair labor practice.²²³ Section 7 was also amended to state that the Act's policies are equally advanced where workers freely choose to refrain from collective bargaining and other protected, con-

²¹⁹ National Labor Relations Act, ch. 372, § 1, 49 Stat. 449, 449 (1935) (codified as amended at 29 U.S.C. § 151 (1976)).

²²⁰ See *id.* § 7, 49 Stat. at 452 (codified as amended at 29 U.S.C. § 157 (1976)).

²²¹ See *id.* § 8, 49 Stat. at 452-53 (codified as amended at 29 U.S.C. § 158 (1976)).

²²² Courts assume that when the employer's "noblesse oblige" is attributable to union organizing, the right to engage in union activity is thwarted. See *NLRB v. WKRK-TV, Inc.*, 470 F.2d 1302, 1308 (5th Cir. 1973). See *generally* *Teamsters, Local 633 v. NLRB*, 509 F.2d 490 (D.C. Cir. 1974). We assume that employer promises and grants of benefits are motivated, at least in part, by a desire to defeat unionization. The question, however, is not whether the union wins but whether such grants constitute permissible persuasion or forbidden coercion.

²²³ See Labor Management Relations Act, 1947, ch. 120, § 101, 61 Stat. 136, 136-52 (codified as amended at 29 U.S.C. § 158(b) (1976)).

certed activity.²²⁴ Reading the union unfair labor practice provisions and the section 7 proviso together, most commentators have concluded that the NLRA now does not promote unionization as such, but instead protects unionization only insofar as it is the employees' choice.²²⁵ The benefits grants and promises rule we propose below thus does not run afoul of the Act's current policies. Employees are entitled to choose union representation or to decline it. In every case, it is for the employees to decide the merits of an employer's or a union's promise or grant of benefit.

Moreover, the *Exchange Parts* rule actually conflicts with the Act's fundamental goal of improving the standard of living of workers because it discourages granting benefits that operate to the employees' advantage. In effect, *Exchange Parts* holds "that it is the duty of the Employer to refrain from benefiting his employees in order to make them more inclined to vote for a union."²²⁶ This construction elevates the unionization objective over those of economic improvement and free choice, a result that, after Taft-Hartley, is not sanctioned by national labor policy. Nevertheless, to the extent a policy of fostering collective activity is still a separately identifiable objective, this objective is promoted even if employees ultimately decide to vote against the union, because the employer, under pressure of unionization, has improved working conditions.²²⁷

²²⁴ See *id.* (codified as amended at 29 U.S.C. § 157 (1976)).

²²⁵ See, e.g. A. COX, D. BOK & R. GORMAN, *CASES ON LABOR LAW 93-94* (8th ed. 1977); B. MELTZER, *LABOR LAW 32* (2d ed. 1977); Cox, *supra* note 10, at 24-25; Jackson, *An Alternative to Unionization and the Wholly Unorganized Shop: A Legal Basis for Sanctioning Joint Employer-Employee Committees and Increasing Employee Free Choice*, 28 SYRACUSE L. REV. 809, 833-35 (1977); Note, *Employee Choice and Some Problems of Race and Remedies in Representation Campaigns*, 72 YALE L.J. 1243, 1245-46 (1963); see also *NLRB v. Savair Mfg. Co.*, 414 U.S. 270, 280 (1973) ("Board in its supervision of union elections may not sanction procedures that cast their weight for the choice of a union and against a non-union shop or for a non-union shop and against a union").

It is also useful to consider promises and grants of benefits in the context of recent emphasis on "workplace democracy." See, e.g., Summers, *Industrial Democracy: America's Unfulfilled Promise*, 28 CLEV. ST. L. REV. 29 (1979). To the extent that decisions concerning unionization are indicative of democracy (or its absence) in the workplace, it can be argued that allowing an employer to offer increased wages or other benefits as an inducement to reject union representation gives employees a wider range of informed choices on which to base this decision.

²²⁶ *NLRB v. Cleveland Trust Co.*, 214 F.2d 95, 100 (6th Cir. 1954).

²²⁷ At least one commentator has noted that the *Exchange Parts* rule deprives employees of one tool for extracting additional benefits from employers. See Gould, *Taft-Hartley Comes to Great Britain: Observations on the Industrial Relations Act of 1971*, 82 YALE L.J. 1421, 1446 (1972); see also DAILY LABOR REPORT (BNA) No. 3, at A-6 (January 6, 1982) (remarks of United Steelworkers' organizer John Oshinski, who, after defeat of Steelworkers after eight-year campaign to organize E.I. DuPont deNemours & Co., claimed that Steelworkers prompted DuPont to increase wages and benefits).

2. "Practical" Considerations as a Barrier to Nonregulation

Apart from policy objections based on the statutory scheme, a number of "practical" objections may be raised to a rule permitting benefit grants and promises. Unionists might argue that nonregulation will eventually empower large employers to eliminate unions altogether through strategically timed benefit grants or promises. Management proponents may argue that large labor unions will force many small- to medium-sized employers to capitulate to union demands. Although both of these positions possess some superficial appeal, neither gives sufficient consideration to the checks on bargaining latitude provided by the labor relations system.

Unionists' fears that employers will be able to buy elections away from unions rest on the assumption that employer benefit grants and promises will inordinately persuade or compel employees to vote against union representation. There is no empirical foundation for this concern.²²⁸ The only available evidence of what employees think of grants and promises is that the employer's actions or statements during the pendency of a representation election do not generally affect employees' votes.²²⁹ Benefit grants and promises, unaccompanied by other conduct of a coercive nature, should not be extensively regulated because employees are simply voting on an economic basis.²³⁰

There are a number of other reasons why the balance of industrial power, in terms of the number of representation elections the unions win, is not likely to be affected by a rule modifying the *Exchange Parts* doctrine. Professors Getman, Goldberg, and Herman conclude that the lack of effect on employee voting patterns from objectionable conduct and unfair labor practices is attributable largely to the failure of employees to pay close attention to campaign propaganda.²³¹ There may also be a number of other explanations. First, there is no assurance that employees will interpret "well-timed" promises or grants favorably to the employer or union bestowing them. Such gestures may or may not be persuasive. It is equally possible, given the variables of every separate employment situation, that employees may interpret the employer's beneficence as an admission that the union can improve conditions and attribute the benefits to the union's efforts. Grants of benefits by a union in the form of reduced fees and dues may convey an ability to improve conditions and protect employee rights; but if the benefits are

²²⁸ See LAW AND REALITY, *supra* note 13, at 141; Bok, *supra* note 13, at 114-16; Bailey, *supra* note 13, ch. II, at 2-6.

²²⁹ See LAW AND REALITY, *supra* note 13, at 147-48, 151.

²³⁰ *Id.*

²³¹ See *id.* at 140-41, 146-47.

conferred only for a short period of time, then the message conveyed may be that the union is only interested in increasing membership rolls. In any given case, no one—including the Board and the courts—knows what motivates the employee vote. But even to the extent, as Professor Bok suggests, that last-minute grants or promises may discourage union organizing,²³² this concern is not a stated basis of the *Exchange Parts* decision, nor could it have been given the policy structure of the NLRA. Nevertheless, if such an advantage to employers is considered unfair to union organizing, the remedy is to promulgate a rule, similar to that which bans captive audience speech-making within twenty-four hours of representation elections, prohibiting promises and grants within a prescribed period to afford the opposing party time to respond.

There are also tactical reasons that permitting promises and grants of benefits is unlikely to produce an atmosphere in which large companies buy elections away from unions or large unions prey upon vulnerable companies. It is difficult to envision employers rushing to increase benefits dramatically before an election only to create a more expensive plateau from which to negotiate once the union wins. The willingness of employers to resort to benefit grants is also subject to cost pressures from competitors and the fear of establishing a precedent of raising wages any time employees lead management to believe that union representation is under consideration. Similarly, union organizational efforts accompanied by benefit grants may or may not be successful. Unions may legitimately fear that they could spend a great deal of money granting benefits to employees only to lose at the ballot box. Unions may also be loathe to create an impression of vote buying with workers they seek to organize or an expectation of pre-election benefits as a prerequisite to signing authorization cards.

Finally, parties are capable today, even under *Exchange Parts*, of surreptitiously but legally influencing election results to the same extent that benefit grants and promises might affect employee decisions. In fact, the rule against promises and grants of benefits works to the detriment of employees because it is contrary to a policy of free and open disclosure. During representation campaigns, employers are now free, with varying degrees of sophistication, to stop just short of explicitly promising or granting a benefit but still to convey the message that a benefit is in the offing should the union lose. Indeed, *Exchange Parts* encourages this sort of gamesmanship in election campaigning. Relying on unarticulated messages, employees may vote against the union only to find that they have misread the employer's ephemeral message and

²³² See Bok, *supra* note 13, at 115.

are barred from reconsidering the union again until after the expiration of the certification year.²³³ If the employer or union has something tangible to offer, it should be disclosed before the election is held. Employee choice is enhanced to the degree all the benefits from voting for or against the union are disclosed. Furthermore, some employers engage in legal but highly sophisticated antiunion campaign tactics to achieve a "union-free environment";²³⁴ it is doubtful that nonregulated benefit grants and promises would measureably provide employers with an additional election advantage. Even if they did, the same methods would be available to unions, leaving it to employees to choose with whom they will side.

Nonregulation of promises and grants of benefits during union representation campaigns will not materially alter the balance of industrial power between employers and unions. If promises or grants do make a difference in any single representation election, however, it should be left to employees, and not the government, to decide what is in the employees' best interests. Indeed, it is impossible for the government to know what employees perceive is best for them apart from the actual vote tally on election day.²³⁵

III. ABANDONING THE BENEFITS/THREATS EQUATION

A. *The Available Alternatives*

Promises and grants of benefits regulation today is plagued with an unnecessary complex of rules, exceptions, and fictions. The genesis of this disarray is the *NLRB v. Exchange Parts Co.*²³⁶ focus on motive and presumed coercive impact. This approach simply makes no sense: motive is irrelevant in section 8(a)(1) cases. The NLRA's drafters were concerned with literal compulsion, not with today's attenuated presumptive "coercion." Confronted with this state of affairs, we see three available approaches.

The first is to leave things as they are. The system is not perfect, but its general contours are at least settled. When representation elections are conducted, the parties know the rules, and free choice, though not perfectly discerned, is generally protected. Further, as former NLRB Chairman Miller has argued, the "democratic mythology" includes a belief that rational workers ought to vote "free of the raw and ugly power of threats and bribes," irrespective of whether such conduct

²³³ See generally R. GORMAN, *supra* note 38, at 52-54.

²³⁴ See CENTER TO PROTECT WORKERS' RIGHTS, *supra* note 139.

²³⁵ LAW AND REALITY, *supra* note 13, at 150.

²³⁶ 375 U.S. 405 (1964).

actually has an effect on the vote.²³⁷

There are several responses to this position. Most fundamentally, to the extent that employees find promises and grants persuasive, today's rules do not protect employee choice but, in fact, impede it. After all, the *Exchange Parts* rule is nothing more than a presumption—a mere substitute for actual evidence of coercion. Moreover, the certainty aspect of retaining the current rules is undermined by the vast amount of litigation encouraged by inquiries into motive. It may take years—with rerun elections, appeals, and so on—to determine the final result of a representation election. Third, the *Exchange Parts* rule promotes an election strategy of promise-fudging and campaign gamesmanship that undermines meaningful choice for employees. Finally, it is a serious mistake to characterize promises and grants as “bribes” rather than as workplace economic choices. The NLRA's most basic purpose is to improve wages and working conditions. The “democratic mythology” hardly requires a presumption against the exercise of one economic choice (for the promise) as opposed to another (for the union). Threats, on the other hand, offend the democratic mythology. More important, however, threats are proscribed because the Act's policy declares unlawful all employer actions that reasonably threaten existing conditions of employment.

The second approach, with which we sympathize, would junk representation campaign regulation altogether. In their important social science statistical study of election campaign behavior, Professors Getman, Goldberg, and Herman concluded that unlawful campaigning during a representation election has no greater effect on vote than does lawful campaigning.²³⁸ Therefore, neither objectionable conduct nor unfair labor practices should be used as a basis for overturning elections; employee choice as expressed in the vote tally should be final.²³⁹ Subject to certain procedural safeguards, principally equal union access to employees, the authors concluded that the interests of employee free choice are best promoted by dispensing with governmental campaign regulation altogether.²⁴⁰

The German-Goldberg-Herman study has not escaped criticism. Significantly, virtually all criticism focuses on perceived deficiencies in the study itself;²⁴¹ no critic has compiled a study that *disproves* the con-

²³⁷ Miller, *The Getman, Goldberg and Herman Questions*, 28 STAN. L. REV. 1163, 1174 (1976).

²³⁸ See LAW AND REALITY, *supra* note 13, at 150.

²³⁹ See *id.* at 150, 152.

²⁴⁰ See *id.* at 159-63.

²⁴¹ See, e.g., Eames, *An Analysis of the Union Voting Study from a Trade-Unionist's Point of View*, 28 STAN. L. REV. 1181 (1976); Kochan, *Legal Nonsense, Empirical Examination and*

tentions of the authors and *supports* traditional NLRB campaign regulation. Yet even if one is sympathetic with the study's conclusions, this criticism poses a dilemma. Discarding all regulation may not be appropriate if the Getman conclusions are wrong in some cases and employee free choice is actually impaired. But one need not necessarily accept all of the study's conclusions to realize that we can do better than *Exchange Parts*. Eschewing both inertia and complete deregulation, we endorse a third approach: formulating new rules to deal with promises and grants of benefits cases. To the extent that promises and grants have no effect on free choice, or a permissible effect, the problem is to formulate a rule—or an approach—that allows noncoercive conduct but no other.

B. *The Objective Evidence Standard*

The first step in formulating a new rule is to discard a presumption that never should have been adopted. *Exchange Parts* did not pronounce an obvious truth; it simply established a presumption of illegality, now riddled with exceptions, that is predicated on the false premises of inherently coercive impact and improper motive. Promises and grants are thus unlawful even though social science tells us they make no difference, no coercion necessarily accompanies them, and motive is statutorily irrelevant. To get back on track, it is useful to recognize a simple truth noted by Judge Wisdom some twenty years ago: “[p]ersuasion is not coercion.”²⁴² Plainly, persuasive conduct or speech may influence voting, but this influence is by noncompulsive means. Persuasive conduct and compulsive conduct are qualitatively different. Absent a threat to existing conditions of employment, the benefit grant or promise is simply one more economic fact of life the employee should weigh in deciding whether to vote in favor of being represented by a labor union.

We propose, therefore, making a simple, almost surgical change in promises and grants law: eliminating the *Exchange Parts* presumption of inherent coercion.²⁴³ Facially beneficial or benign acts such as wage

Policy Evaluations (Book Review), 29 STAN. L. REV. 1115 (1977); Peck, Book Review, 53 WASH. L. REV. 197 (1977); Roomkin, Book Review, 27 CASE W. RES. L. REV. 1056 (1977); Shapiro, *Why Do Voters Vote?* (Book Review), 86 YALE L.J. 1532 (1977); see also Grunewald, *Empiricism in NLRB Election Regulation: Shopping Kart and General Knit in Retrospect*, 4 INDUS. REL. L.J. 161 (1981) (policies based exclusively on scientific methodology would ignore other political and institutional interests). But see Goldberg, Getman & Brett, *Union Representation Elections: Law and Reality: The Authors Respond to the Critics*, 79 MICH. L. REV. 564 (1981).

²⁴² NLRB v. *Exchange Parts Co.*, 304 F.2d 368, 376 (5th Cir. 1962), *rev'd*, 375 U.S. 405 (1964).

²⁴³ To implement the change, courts must not defer to the Board's "expertise" in promises and grants cases concerning the extent that conduct interferes with employee rights. The Supreme

increases should be held unlawful only if the General Counsel proves by objective evidence that the promise or grant actually coerced employees in the sense that they suffered a threat to job security or a diminution in other employment benefits, or that the employer violated an independent policy prohibited by the NLRA. This approach varies slightly from the typical manner in which section 8(a)(1) violations are established. Under the Board's "objective standard" approach, the General Counsel is usually not required to make a factual demonstration by direct testimony or otherwise that the employer's actions interfered with section 7 rights.²⁴⁴ It is enough, for example, to show that an employee was threatened with job loss. Because the conduct complained of is facially compulsive and reasonably tends to coerce, no additional evidence is necessary to show that section 7 rights were impaired. In fact, proof that a threat of discharge coerces is redundant. Thus, all the General Counsel needs to show is that the employer's actions would reasonably tend to coerce employees. Insofar as the acts complained of are facially compulsive or contrary to employee interests, there can be little quarrel with this approach.²⁴⁵ But it cannot objectively be said

Court at times defers to the presumed expertise of the Board to assess the impact of election and other conduct. *See, e.g.,* NLRB v. Hendricks County Rural Elec. Membership Corp., 102 S. Ct. 216 (1981); NLRB v. Gissel Packing Co., Inc., 395 U.S. 575, 612 n.32 (1969) (Board able to give "expert estimate as to the effects on the election process of unfair labor practices of varying intensity"); NLRB v. Virginia Elec. & Power Co., 314 U.S. 469, 479 (1941) (Board has ability to consider "imponderable subtleties" in weighing effect of employer speech). On other occasions the Court is far less charitable. *See, e.g.,* NLRB v. Baptist Hosp., Inc., 442 U.S. 773, 782 (1979); NLRB v. Savair Mfg. Co., 414 U.S. 270 (1973); *see also* Hutzler Bros. Co. v. NLRB, 630 F.2d 1012, 1017 (4th Cir. 1980); NLRB v. Jamaica Towing, Inc., 632 F.2d 208 (2d Cir. 1980); Teamsters Local Union 769 v. NLRB, 532 F.2d 1385, 1390 (D.C. Cir. 1976) (no reasoned basis for NLRB decision); International Union, UAW v. NLRB, 459 F.2d 1329, 1346 (D.C. Cir. 1972). *See generally* Getman & Goldberg, *The Myth of Labor Board Expertise*, 39 U. CHI. L. REV. 681 (1972); Winter, *Judicial Review of Agency Decisions: The Labor Board and the Court*, 1968 SUP. CT. REV. 53.

²⁴⁴ *See* 33 NLRB ANN. REP. 60 (1968); Murray Envelope Corp., 130 N.L.R.B. 1574, 1576 (1961); Shovel Supply Co., 118 N.L.R.B. 315, 316 (1957); Lane Drug Stores, Inc., 88 N.L.R.B. 584, 586 (1950); *see also* R. GORMAN, *supra* note 38, at 132. *Cf.* NLRB v. Great Dane Trailers, Inc., 388 U.S. 26 (1967) (discussing burden of proof in § 8(a)(3) cases).

²⁴⁵ The usual "objective standard" makes sense in cases where the employer fires or threatens to fire employees because of union activity, or threatens to close his plant or to reduce benefits should the union win. In each case the employee may reasonably fear losing something of value—security, money, and so on—if he exercises his statutory rights. In the presence of such actions evidentiary proof of coercion would be redundant. Literal coercive tendency is manifest in the act itself, unlike the promises and grants context.

One court may have already opted for this approach. In *Sioux Prods., Inc. v. NLRB*, 111 L.R.R.M. 2077, 2079 n.4 (7th Cir. 1982) (citations omitted), the Seventh Circuit analyzed a promise to grant benefits as follows:

The Supreme Court has reasoned that a promise to grant benefits made during a union representation election violates section 8(a)(1) because one may infer from the promise an implied threat to take away benefits if the union wins the election. Although that inference may not seem plausible in every case where an employer promises benefits to persuade employees to vote against the union, it is evident in this case that the promise of increased benefits made by Sioux was coercive in na-

that facially benign promises and grants, standing alone, coerce employees.²⁴⁶ If the General Counsel is unable to prove, in the context of a given case, that employees could reasonably have felt compelled or restrained, the benefits should be considered permissive, noncompulsive attempts to influence employee voting. This same analysis of promises and grants should also govern in elections objections cases.²⁴⁷

A rule that substitutes proof for the *Exchange Parts* presumption of inherent coercion harmonizes the Act's policies of promoting worker economic well-being and employee free choice to engage in or refrain from unionization.²⁴⁸ It also delimits the number of cases in which the

ture and was utilized to mask Sioux's threat to decrease benefits upon a union victory. Both the promises and the threats made here by Sioux were closely linked in time and circumstances as part of Sioux's otherwise coercive efforts to discourage support for the union. In such a case, it is preferable to analyze the promise of benefits as violating section 8(a)(1) because it is so closely associated with threatening conduct rather than to rely on inferences and assumptions about how an employee may have interpreted the promise. It is with this understanding that we enforce this portion of the Board's order since neither the Board nor the ALJ explained the basis for their decisions.

²⁴⁶ Requiring the General Counsel to put forward evidence demonstrating the alleged coercive nature of a promise or grant of benefit is not inconsistent with the objective standard of § 8(a)(1). It is difficult to infer that conduct that lacks the attributes of facial compulsion reasonably impedes the exercise of protected rights unless *some* evidence is available tending to show that this conclusion accurately describes the effect on a typical employee. Thus, in cases involving potentially innocuous employer conduct, it is common for courts to analyze surrounding circumstances—especially the presence of contemporaneous unfair labor practices—to determine if the conduct rises to the level of a § 8(a)(1) violation. See *NLRB v. Tom Wood Pontiac, Inc.*, 447 F.2d 383 (7th Cir. 1971). Moreover, placing the initial burden on the General Counsel is consistent with the principle embodied in *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963), of balancing employer rights against the effect on the ability of employees to exercise § 7 rights. Such balancing necessitates at the outset a demonstration that the employer's conduct has at least some perceptible impact on the exercise of those rights by employees.

²⁴⁷ Thus, the extent the Board uses the *General Shoe* doctrine, see *General Shoe Corp.*, 77 N.L.R.B. 124 (1948) ("laboratory conditions" doctrine), to proscribe promises and grants of benefits should be limited to situations in which the promise or grant is at least coupled with independent conduct that disturbs laboratory conditions for the election. See, e.g., *NLRB v. Decoto Aircraft, Inc.*, 512 F.2d 758 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975); *J.P. Stevens & Co. v. NLRB*, 461 F.2d 490 (4th Cir. 1972); cf. *Virgin Islands Spinning Corp.*, 194 N.L.R.B. 885 (1972) (employer did not interfere with laboratory conditions even though bonus given to employees on payday preceding election).

²⁴⁸ This point was evident in Justice O'Connor's recent dissenting opinion in *Charles D. Bonanno Linen Serv., Inc. v. NLRB*, 102 S. Ct. 720 (1982). At issue in *Bonanno Linen* was whether an employer could unilaterally withdraw from a multiemployer bargaining unit after an impasse in negotiations under §§ 8(a)(1) and (5) of the Act. Rejecting the "absolute positions" of the majority and the dissent of Justice Burger, which would hold, respectively, that withdrawal is unlawful or lawful in almost all circumstances, Justice O'Connor opted for an approach requiring the Board to "examine the circumstances surrounding and following an impasse to determine" if withdrawal is justified. *Id.* at 733 (O'Connor, J., dissenting). Characterizing the Board's approach (which the majority adopted) as "an excellent example of the result which obtains when the Board applies a general rule without analysis of the particular factual situation," Justice O'Connor argued "that the Board should be required to *analyze*, not *simply label*, a deadlock in negotiations." *Id.* at 733-34 (emphasis added). Justice O'Connor's reasoning is also applicable to promises and grants of benefits cases. Rather than blindly applying the metaphoric principle of the "fist inside the velvet glove," the Board and the General Counsel should adduce actual evidence to demonstrate coercion or restraint.

Getman conclusions are dispositive.

To meet this standard, "objective evidence" could be supplied by live testimony or other evidence. For example, where the promising party historically grants such benefits as a pretext for subsequent impermissible conduct, it might be inferred that the grant at issue would likewise result in similar retaliatory, and hence compulsive, conduct. If the General Counsel demonstrated that past refusal of employees to knuckle under after a benefit grant would precipitate retaliatory layoffs, discharges, or other adverse consequences, or reasonably create such an impression in the minds of employees, a section 8(a)(1) violation might be made out. In close election cases, the General Counsel might succeed in demonstrating actual compulsion by placing a number of workers on the witness stand to testify that the employer's seemingly innocuous benefit conferral could reasonably be perceived as a threat to existing employment conditions. Irrespective of the evidence presented, the most important point is that the *Exchange Parts* presumption must be eliminated in favor of an evidentiary showing that employee free choice was impaired by the otherwise innocent benefit grant or promise.²⁴⁹ Under the "objective" test, the "pure" promises or grants case should rarely, absent unusual circumstances, constitute unlawful activity. Nevertheless, even if independent unfair labor practices are present, a section 8(a)(1) violation will not necessarily be made out unless it can reasonably be concluded that the *combination of a promise or grant and the independent unfair labor practice demonstrably imperils job security, results in diminution of other employment privileges, or offends an independent statutory policy.*²⁵⁰

²⁴⁹ See Irving, Taylor & Wallace, *General "Empirical" Studies: Not a Substitute for Proof in Individual NLRB Proceedings*, 1981 U. ILL. L.F. 99, 105 (criticizing Board's use of "various generalizing techniques to bridge the gap between fact and conclusion without proving that the facts support the conclusion").

It might fairly be argued that under the standard proposed, the General Counsel in many cases would have difficulty proving coercion. If this means that the General Counsel might not be able to persuade an administrative law judge by testimony that employees could reasonably fear reprisal from their employer after the employer had just conferred a wage increase on them, we agree. On the other hand, if the General Counsel also produced evidence that the employer coupled the wage increase with threats of job loss should the union win, the contention that the wage increase served to coerce employees would be much more plausible.

²⁵⁰ Application of this standard is best illustrated by an overview of a spectrum of hypothetical promises and grants of benefits cases, starting with the worst case scenario and proceeding to instances of lawful conduct. An obvious example of illegal conduct under this standard might arise when an employer couples a promise of benefit with a threat to shut down if the union wins the election, see, e.g., *Great Chinese Am. Sewing Co. v. NLRB*, 578 F.2d 251 (9th Cir. 1978), or when the employer promises a benefit to induce employees to replace a union officer, see, e.g., *NLRB v. Max Factor & Co.*, 640 F.2d 197 (9th Cir. 1980), or when the employer offers benefits to employees who withdraw from the union, see, e.g., *NLRB v. Cosmopolitan Studios, Inc.*, 291 F.2d 110 (2d Cir. 1961). The first hypothetical involves an illegal threat related to job security, and the second and third involve independent policies under the Act. See also *Ingress-Plastene, Inc. v. NLRB*, 430 F.2d 542 (7th Cir. 1970); *Surface Indus., Inc.*, 224 N.L.R.B. 155 (1976). A

Much of this comports with the analysis of Judge Wisdom in his *Exchange Parts* opinion, with one crucial difference. Judge Wisdom would permit promises and grants except where the benefit was conditioned on "voting against the union or relinquishing rights of self-organization."²⁵¹ Presumably, in a benefits grant case, Judge Wisdom would find a statement to this effect sufficient to invalidate the election. Judge Wisdom also considered benefit promises cases distinguishable from grant cases because "in *some* cases it is a fair inference that the benefits promised are contingent on a rejection of the union."²⁵² As Professor Gorman frames the argument, the "promise is tantamount to a threat, should the listener vote against the employer, to withhold a reward otherwise forthcoming."²⁵³

This argument raises an important concern — forsaking statutory rights to be represented by a labor union to obtain improved working conditions — but should be dismissed for three reasons. First, employees to whom benefit grants matter are not more likely to be swayed by a promise, even if contingent, than by a benefit grant. In either case the employee's rejection of the union is implied by the employer's conduct. Second, employee free choice is enhanced to the degree the full economic consequences of the vote for or against the union are disclosed. Contingent promises set out fully what employees may gain without

less obvious example of illegal conduct might arise when an employer, during a representation drive, announces a benefit hike in a notice mailed to the employees accompanied by a statement from the employer urging the employees to vote against the union. See *Bryant Chucking Grinder Co. v. NLRB*, 389 F.2d 565, 567 (2d Cir. 1967), *cert. denied*, 392 U.S. 908 (1968). While this conduct, standing alone, most likely does not evidence coercion, the Board and the courts might still find a violation of the Act if the promise and statement were made against a background of contemporaneous unfair labor practices demonstrating that this ostensibly benign behavior is only a ruse for the employer's efforts to threaten job security or violate some other labor law policies. See also *Madison Brass Works, Inc. v. NLRB*, 381 F.2d 854, 857 (7th Cir. 1967).

On the other hand, if an employer gave a union-organizing employee a raise and told her to stop "bad-mouthing" the company, the grant of benefit would not violate the Act because it does not intimate any concerns with job security or other independent labor law policies. Cf. *General Thermo, Inc. v. NLRB*, 664 F.2d 195 (8th Cir. 1981) (employer did not violate § 8(a)(1) under these facts where comment not related to any union organizing activities). A factual situation similar to that in *Exchange Parts*, where an employer promises and grants benefits unaccompanied by any other conduct that could be construed as violative of the Act, would generally also represent lawful conduct under this standard. Finally, even if the promise of benefit is conditioned upon rejection of the union, or if an employer reneges on a previously promised benefit, § 8(a)(1) is not violated nor are laboratory conditions sufficiently upset to justify a new election without other evidence of actual coercion. Conditioning the promise or even misrepresenting the promise does not impinge job security or other independent labor law policies. Indeed, the employer who does not keep his promises only hands to the union the key for winning the next election if his conduct does not violate the law. Cf. *NLRB v. Graphic Arts Int'l Union Local 13-B*, 682 F.2d 304 (2d Cir. 1982) (union unlawfully coerces members if policy enforced by union adversely affects job security or working conditions).

²⁵¹ *NLRB v. Exchange Parts Co.*, 304 F.2d 368, 372 (5th Cir. 1962), *rev'd*, 375 U.S. 405 (1964).

²⁵² 304 F.2d at 373 (emphasis added).

²⁵³ R. GORMAN, *supra* note 38, at 164.

union backing. Employees may then weigh these gains against those anticipated if the union wins. Third, a promise does not present the same problem caused by conditioning a wage increase on an employee's withdrawing from a union, activity that has been held illegal.²⁵⁴ In the pure promise case, it is only the prospect of improvement that is traded, not something the employee already has that the employer threatens to take away.²⁵⁵ Further, because employees today have the statutory right to refrain from collective activity,²⁵⁶ noncompulsive promises and grants conditioned on the exercise of one of two statutory options should not render the offer unlawful. Should the employer fail to deliver on promises made or retract benefits bestowed during the election campaign, the remedy for employees, as Professor Bok argues, is to correct their error by voting in another representation election at the end of the certification year.²⁵⁷

Under this analysis, the decisions in *Medo Photo Supply Corp. v. NLRB*²⁵⁸ and *International Association of Machinists Lodge No. 35 v. NLRB*²⁵⁹ were unquestionably correct. In the first, a separate policy (exclusive representation) was threatened; in the second, the promise or grant was but a small part of a greater campaign of coercion that demonstrably was contrary to free exercise of employee choice. On the other hand, the *Uarco Inc.*²⁶⁰ line of solicitation of grievance cases should be rejected as an absurdity. Our labor policy simply has no place for a rule declaring it wrong during an election campaign for employers to ask employees about the source of discontent. Under our approach, the rule in most exceptions cases is superfluous. Like bad employer motivation good employer motivation is irrelevant to the coercion question. Therefore, the timing, business necessity, and pattern defenses should not be available to an employer when coercion is shown. As for *Exchange Parts* itself, the Board and the courts should reexamine the legal underpinnings of the doctrine and limit *Exchange Parts* to its facts—direct, concrete benefit grants—and thus abandon all presumptions that extend its rationale to the promise of benefit, the implied promise, and the solicitation of grievance cases. The more honest route,

²⁵⁴ See *NLRB v. Exchange Parts Co.*, 304 F.2d 368, 373 (5th Cir. 1962), *rev'd*, 375 U.S. 405 (1964).

²⁵⁵ Insofar as the employer couples its promise with a requirement that the employee withdraw from a previously recognized union or engages in other conduct violative of §§ 8(a)(2)-8(a)(5), employees retain the independent statutory protections of those provisions regardless of any change in the § 8(a)(1) analysis.

²⁵⁶ See 29 U.S.C. § 157 (1976).

²⁵⁷ See Bok, *supra* note 13, at 115.

²⁵⁸ 321 U.S. 678 (1944); see *supra* text accompanying notes 180-83.

²⁵⁹ 311 U.S. 72 (1940); see *supra* text accompanying notes 178-79.

²⁶⁰ 216 N.L.R.B. 1 (1974); see *supra* text accompanying notes 52-63.

however, would be for the Supreme Court expressly to reconsider and overrule *Exchange Parts*.

C. *The Effect Of The Proposed Standard on Other Unfair Labor Practice and Election Conduct Regulation*

The view of promises and grants cases that eliminates motive analysis and focuses on job security should, if adopted, significantly reduce litigation under sections 8(a)(1) and 9(c) without appreciably disrupting existing legal precedent.

At least where section 8(a)(1) charges are not joined with section 8(a)(3) charges, the elimination of motive analysis comports both with the statutory language²⁶¹ and the Supreme Court's analysis of section 8(a)(1).²⁶² Therefore, the Board and the courts should reject motive analysis not only in promises and grants cases, but also as a basis for finding a violation of section 8(a)(1) in other contexts such as unlawful discharge cases.²⁶³ As demonstrated above, sections 7 and 8(a)(1) do not require an employer gladly to embrace a union.²⁶⁴ The issue instead is whether employees are being harmed by what the employer says or does.

The proposed approach, if used under other subsections of section 8, will not change the result in most other unfair labor practice cases because they may be explained in large part by the general paradigm of employee job security or other independent labor law policies. For example, section 8(a)(2) prohibits employers from rewarding the proponents of favored labor organizations and simultaneously threatening the proponents of disfavored labor organizations with job and benefit losses. Discriminatory wage and benefit rewards are unlawful for the same

²⁶¹ See *supra* notes 110-17 and accompanying text.

²⁶² See *supra* notes 129-38 and accompanying text.

²⁶³ The Board's inattention to the elements of a § 8(a)(1) offense resulted in a recent statement, without reference to the Supreme Court's statements on the issue, that some § 8(a)(1) cases turn on a motive analysis similar to that used in § 8(a)(3) cases. See *Wright Line, Inc.*, 251 N.L.R.B. 1083, 1089 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 102 S. Ct. 1612 (1982). The position conflicts with other Board statements on the issue, see *Norton Concrete Co.*, 249 N.L.R.B. 1270, 1274 (1980); *Caterpillar Tractor Co.*, 242 N.L.R.B. 523 (1979), *enforced*, 638 F.2d 140 (9th Cir. 1981), but it has been accepted by the court of appeals in § 8(a)(1) cases, see *Zurn Indus., Inc. v. NLRB*, 680 F.2d 683 (9th Cir. 1982); *NLRB v. Fixtures Mfg. Corp.*, 669 F.2d 547 (8th Cir. 1982); *Red Ball Motor Freight, Inc. v. NLRB*, 660 F.2d 626 (5th Cir. 1981), *cert. denied*, 102 S. Ct. 2282 (1982); but see *Behring Int'l, Inc. v. NLRB*, 675 F.2d 83 (3d Cir. 1982) (applying *Wright Line* only to the § 8(a)(3) violations alleged, not to the § 8(a)(1) violations); *Peavey Co. v. NLRB*, 648 F.2d 460 (7th Cir. 1981) (same). For a more detailed discussion of the confusing use of motive in § 8(a)(1) and (3) cases by the Board and the courts, and a proposed resolution of the questions posed by the Board's decision in *Wright Line*, see Jackson & Heller, *The Irrelevance of the Wright Line Debate: Returning to the Realism of Erie Resistor in Unfair Labor Practice Cases*, 77 NW. U.L. REV. (forthcoming).

²⁶⁴ See *supra* notes 223-25 and accompanying text.

reason that more obnoxious forms of discriminatory conduct violate section 8(a)(3). Rewarding employees for testimony at Board proceedings constitutes a violation of the independent policies of section 8(a)(4), as does an employer's recriminations against testifying employees. Finally, direct dealing with employees in the form of promises and grants of benefits violates section 8(a)(5) when these offerings are used to denigrate the exclusive representation status of labor unions.²⁶⁵ As for election objection regulation, the job security and independent policies standard will often produce the same results the existing "laboratory conditions" and "rational choice" doctrines. Some cases, however, would be decided differently under the reasonable threat to job security or independent policies tests. Misrepresentations of fact, for example, might no longer be made the basis for overturning an election where the misrepresentation has nothing to do with job security.²⁶⁶ Telling lies might not be an admirable election approach, but, as in politics, it is difficult to understand why the government must be the guardian of what employees are told by unions or employers. The best approach in this area might be for the Board to formulate a *Peerless Plywood*-type of rule that would invalidate elections based on lies within, say, one to two days of the election to ensure that the opposing party has time to

²⁶⁵ A problem closely analogous to promises and grants of benefits during union representation campaigns is whether an increase in benefits (e.g., wage increase to nonstriking employees, union and nonunion) during an otherwise lawful strike constitutes an unfair labor practice. Courts have held that payments of additional benefits to induce strikers to return to work violates § 8(a)(1). See, e.g., *Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055, 1077-79 (1st Cir. 1981); *United Steelworkers v. NLRB*, 405 F.2d 1373, 1376 (D.C. Cir. 1968); cf. *NRLB v. James Thompson & Co.*, 208 F.2d 743, 748 (2d Cir. 1953) (Judge Learned Hand noting that employer's statement to union strike leader "in a week they will be satisfied," although equivocal, still was an impermissible promise of benefit to induce strikers to return to work). However, not all increases in benefits during a strike are unlawful. An employer may give wage increases to nonunit employees during a strike without violating the Act. See *Soule Glass*, 652 F.2d at 1079. Moreover, if the employer can show that the benefit increases were part of his bargaining proposal prior to impasse, he may grant the benefits even after a strike begins. Compare *NLRB v. Rubatex Corp.*, 601 F.2d 147, 150 (4th Cir.) (employer's grant of special bonus payments to nonstrikers violates § 8(a)(1) where they were not intended to satisfy prior promises made to employees), cert. denied, 444 U.S. 928 (1979) with *Gulf States Mfrs., Inc. v. NLRB*, 579 F.2d 1298, 1326-27 (5th Cir. 1978) (company did not violate § 8(a)(1) by implementing wage increases offered before strike began).

We believe that proscriptions against grants and promises of additional benefits during a strike may violate § 8(a)(1) not because of the employer's intent in offering such benefits but rather because such benefits may unreasonably interfere with the exercise of protected activity. The withholding of labor is a union's most potent economic weapon, and an offer of increased wages during a strike may substantially hinder the use of this weapon. However, the interference with protected activities may, on balance, be outweighed when the employer asserts the business interest of additional pay for additional work. Thus, unlike the usual promise or grant of benefit case where the issue, as we see it, is whether there is a reasonable tendency to believe that the grant restrained or coerced employees, the issue in strike benefit cases is more likely to be whether the promise or grant outweighs the adverse effect on the right to strike.

²⁶⁶ Cf. *Midland Nat'l Life Ins. Co.*, 263 N.L.R.B. No. 24 (1982) (election will be overturned if misrepresentations based on forgeries).

respond.²⁶⁷

In sum, in both unfair labor practice and election cases, our analysis suggests that notions of threatening or coercive conduct are essentially meaningless unless they may reasonably be interpreted to impair existing employment conditions. What is reasonable may vary from situation to situation, but one thing is clear. The legislative history and the policy of the Act, and its pre-*Exchange Parts* application, counsels that employer favor or influence should not, without more, support a finding of coercion under section 8(a)(1).

IV. CONCLUSION

Judge Wisdom was right. Persuasion is not coercion. The National Labor Relations Act, both in intent and design, does not prohibit non-compulsive pre-election efforts by employers and unions to persuade employees even if those efforts consist of promises and grants of benefits.

The decision in *NLRB v. Exchange Parts Co.*²⁶⁸ was aberrational and wrongfully conceived. It was an aberration because it departed from traditional section 8(a)(1) analysis by examining motive to determine if conduct is unlawful. Both before and after *Exchange Parts*, the Supreme Court has rejected motive analysis in section 8(a)(1) cases. Moreover, motive analysis under section 8(a)(1) cannot be reconciled with the statutory right to wage a vigorous but lawful campaign in the pre-election period. *Exchange Parts* was wrongly conceived because it uncritically accepted the premise that all pre-election largesse, especially that of the employer, has a compulsive, threatening effect on the employees to whom it is directed.

The *reductio ad absurdum* of this approach is that good is now bad. The National Labor Relations Board today considers it wrong during an election campaign for an employer even to ask employees what is wrong: improper motivation is presumed; the mere asking implies a promise to remedy, and the remedy, no matter how innocuous, necessarily coerces employees. The Board thus apparently believes its statutory duty is to protect employees from devious employers because employees will feel threatened by the employer's facially beneficial gestures. These highly questionable presumptions are not supported by legislative history. In fact, the drafters of the Wagner Act, the early court decisions, and the drafters of the Taft-Hartley amendments all

²⁶⁷ Cf. *Peerless Plywood Co.*, 107 N.L.R.B. 427 (1953) (outlawing "captive audience" speeches on company time during 24-hour period preceding representation election).

²⁶⁸ 375 U.S. 405 (1964).

sought to prohibit employer (and presumably union) largesse only insofar as it was linked to compulsive conduct that *prevented* employees from exercising statutory rights. Even the strongest argument against employer promises and grants — that they would improperly tip the balance of industrial power to companies over unions — does not survive an analysis of the premises of the current statutory scheme.

We therefore recommend abandoning the *Exchange Parts* presumption of inherent coercion. Promises and grants should be considered lawful unless the Board proves they in effect force employees to choose between statutory rights and existing conditions of employment. This approach gives employees the best of two worlds. On one hand, their choice is increased: they may vote for or against the union, for or against the employer because present conditions satisfy or dissatisfy them, or for or against the employer based on his stated willingness to improve conditions. On the other hand, the approach continues to protect employees against compulsive conduct. If promises and grants are bestowed in such a way to coerce employees into voting contrary to their desires, the Board should find an unfair labor practice. This approach thus reconciles competing statutory policies without sacrificing the section 7 rights of employees. It also relieves sympathetic appellate courts of the task of employing fictions to reach results consonant with both the literal requirements of *Exchange Parts* and common sense. Finally, our approach makes the NLRA's representation election framework more direct and responsive, decreasing the incentive to litigate and postpone final election decisions.

