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# Labor Law -- Representation Elections -- Union Right to Employee Mailing Lists

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courts will follow the precedent of *Clothing Workers,* i.e., the application of liberal agency principles. Such results would appear desirable since outside community pressure seems a major obstacle to the attainment of basic section 7 rights,[43] one that merely setting aside the representation election cannot fully remedy.[44]

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**Labor Law—Representation Elections—Union Right to Employee Mailing Lists**

In February, 1966, the National Labor Relations Board expounded a new rule governing future cases involving representation elections. The rule provides that after an election has been agreed to by the parties or directed by the regional director, the employer is required to "file with the Regional Director an election eligibility list, containing the names and addresses of all the eligible voters. The Regional Director, in turn, shall make this information avail-

category because section 7 rights are guaranteed to *employees,* not to citizens generally and because the right not to join a union, as guaranteed in section 7, is not wholly dependent upon an act of Congress because this right is only the embodiment of employees' pre-existing rights. *Id.* at 628. The court also stated that the NLRB and not the courts is to determine what constitutes an unfair labor practice. Furthermore, the court reasoned that since the Taft-Hartley Act only covers acts by employers, unions, or their agents, the states, and not the federal government, must punish others who might conspire to violate the rights of workers. *Id.* at 631. See also United States v. Moore, 129 Fed. 630 (N.D.Ala. Cir. 1904), where the court held that section 241 was not available to protect a miner in his right to organize because this right existed because of his status as an employee, not because of his being a citizen. *Cf.* UMW v. Patton, 211 F.2d 742 (4th Cir. 1954) (court denied recovery of punitive damages).

[43] Section 7 is the basic provision of labor law. It reads in part: Employees shall have the right to self-organization, to form, to join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for mutual aid or protection, and shall also have the right to refrain from any or all such activities. . . . National Labor Relations Act § 7, 41 Stat. 452 (1935), as amended, Labor Management Relations Act (Taft-Hartley Act) § 7, 61 Stat. 140 (1947), 29 U.S.C. § 157 (1965).

[44] Once the requisite laboratory conditions have been upset, it seems that they, to a large degree, remain so during the second election. It was found that after the election was "tainted," the party losing has about a one-in-three chance of winning the second. Pollitt, *NLRB Re-Run Elections,* 41 N.C.L. REV. 209 (1963). Also, it seems that antiunion elements, particularly in the South, have a ready made issue to use against unions in the form of race hate. See Pollitt, *The National Labor Relations Board and Race Hate Propaganda in Union Organizational Drives,* 17 STAN. L. REV. 373 (1965).

able to all parties in the case."[1] Noncompliance with this rule is grounds for setting the election aside.[2] The basis for this rule seems to be the imbalance in opportunity for each side in the election proceeding to reach the electorate with its arguments, an imbalance felt by the NLRB to exist when employee mailing lists are not made available to the labor organization involved.[3] The NLRB said,

> [W]e regard it as the Board's function to conduct elections in which employees have the opportunity to cast their ballots for or against representation under circumstances that are free not only from interference, restraint, or coercion violative of the Act, but also from other elements that prevent or impede a free and reasoned choice. Among the factors that undoubtedly tend to impede such a choice is a lack of information with respect to one of the choices available.[4]

In support of its ruling the NLRB maintained that "by providing all parties with employees' names and addresses, we maximize the likelihood that all the voters will be exposed to the arguments for, as well as against, union representation."[5] Additional reasons given were that mailing lists are usually not available from other sources,[6] and that the rule set forth here is commonly found in other election settings.[7] The Board rejected the employer's arguments that a valid

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[1] Excelsior Underwear Inc., 156 N.L.R.B. No. 12 (Feb. 4, 1966).

[2] *Id.* at —. The rule as announced was to be applied prospectively only, to elections directed or consented to thirty days from the date of decision, this "to insure that all parties to forthcoming representation elections are fully aware of their rights and obligations as here stated." *Id.* at n.5.

In ruling as it did the NLRB was apparently well within its authority. "Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees." NLRB v. A. J. Tower Co., 329 U.S. 324, 330 (1946). See, *e.g.*, NLRB v. Waterman S.S. Corp., 309 U.S. 206, 226 (1940).

[3] As a practical matter, an employer, through his possession of employee names and home addresses as well as his ability to communicate with employees on plant premises, is assured of the continuing opportunity to inform the entire electorate of his views with respect to union representation. On the other hand, without a list of employee names and addresses, a labor organization, whose organizers normally have no right of access to plant premises, has no method by which it can be certain of reaching all the employees with its arguments in favor of representation, and, as a result, employees are often completely unaware of that point of view.

156 N.L.R.B. at —.

[4] *Id.* at —.

[5] *Id.* at —.

[6] *Id.* at —.

[7] *Id.* at —. Examples cited were public, shareholder, and intraunion elections.

property interest exists in such a mailing list,[8] that the employees' rights are infringed by the giving out of such a list without their consent,[9] that the Board's rule creates a danger of harassment and coercion of the employees in their homes,[10] and that other avenues of union communication with the employees are available.[11] In both its rule and its reasoning, the NLRB had the prior support of many commentators.[12]

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Another reason given by the NLRB in behalf of its new rule was that there is a public interest in the speedy resolution of questions of representation. The NLRB maintained that with

> little time (and no home addresses) with which to satisfy itself as to the eligibility of the 'unknowns', the union is forced either to challenge all those who appear at the polls whom it does not know or risk having ineligible employees vote. The effect of putting the union to this choice, we have found, is to increase the number of challenges, . . . thus requiring investigation and resolution by the Regional Director or the Board. Prompt disclosure of employee names as well as addresses will, we are convinced, eliminate the necessity for challenges based solely on lack of knowledge as to the voter's identity.

*Id.* at —.

[8] The NLRB found that there was not an employer interest here of such significance as to warrant protection. *Id.* at —.

[9] The NLRB found no merit in this argument, pointing out that the employees could express their wishes by their vote in the election. *Id.* at —.

[10] The NLRB maintained that such union conduct cannot be assumed, but that if it happened, the Board would provide an appropriate remedy. *Id.* at —.

[11] Rejecting this argument the NLRB maintained that "the existence of alternative channels of communication is relevant only when the opportunity to communicate made available by the NLRB would interfere with a significant employer interest." Since there is no significant employer interest in the secrecy of the names and addresses of his employees, there is no need for the NLRB to consider the existence of alternative channels of communication. *Id.* at —.

[12] See, *e.g.*, SUBCOMM. ON NATIONAL LABOR RELATIONS BOARD, HOUSE COMM. ON EDUCATION AND LABOR, 87TH CONG., 1ST SESS., ADMINISTRATION OF THE LABOR MANAGEMENT RELATIONS ACT BY THE NLRB 4 (Comm. Print 1961); Bok, *The Regulation of Campaign Tactics in Representation Elections under the National Labor Relations Act*, 78 HARV. L. REV. 38, 99-100 (1964); Pollitt, *The National Labor Relations Board and Race Hate Propaganda in Union Organization Drives*, 17 STAN. L. REV. 373, 407 (1965); Note, 72 YALE L.J. 1243, 1263-64 (1963). See also, Summers, *Judicial Regulation of Union Elections*, 70 YALE L.J. 1221, 1227-28 (1961).

In attempting to enforce its *Excelsior* rule by means of a subpoena ordering production of the employee mailing list, the NLRB has two successes in federal district courts. NLRB v. Rohlen, 64 L.R.R.M. 2168 (N.D. Ill. 1967), and NLRB v. Wolverine Indus. Div., 64 L.R.R.M. 2060 (E.D. Mich. 1966). In enforcing the NLRB's subpoena, both decisions found the merits of the cases involved to be in accord with the finding in

As a general proposition, in representation cases the NLRB strives to cure any imbalance which tends to prevent the voters from being fairly informed of the issues involved in the election.[13] Where employees are denied a free and fair election choice, the results may be set aside even though there has been no commission of an unfair labor practice.[14] A brief examination of some earlier cases may aid in explaining how the Board reached the *Excelsior* decision.

One group of cases demonstrates that the Board has long balanced the employer's right to free speech against the employees' right to have a free choice in selecting their bargaining representative. At times the result was a finding that an employer's speech amounted to an unfair labor practice,[15] especially if the Board felt that the employees had been restrained or coerced in the exercise of their rights to organize and to engage in collective bargaining.[16] In 1947, Section 8(c),[17] the so-called "free speech proviso," was added to the National Labor Relations Act. It limited the NLRB in its finding of an unfair labor practice in this situation to cases in

*Excelsior*. No express jurisdictional issue was discussed in *Wolverine*. In *Rohlen* jurisdiction was based expressly on 61 Stat. 150 (1947), 29 U.S.C. § 161(2) (1964) (§ 11(2) of the N.L.R.A.), which gives United States district courts jurisdiction to issue orders enforcing Board subpoenas "to produce evidence" or "to give testimony touching the matter under investigation," and 28 U.S.C. § 1337 (1964), which gives the district courts jurisdiction over "any civil action or proceeding arising under any Act of Congress regulating commerce." In two other similar cases, the NLRB was unsuccessful. NLRB v. Hanes Hosiery Div., 63 L.R.R.M. 2513 (M.D.N.C. 1966), and NLRB v. Montgomery Ward & Co., 64 L.R.R.M. 2061 (M.D. Fla. 1966). Neither decision ruled on the merits of *Excelsior*, both decisions declining jurisdiction to enforce the NLRB's subpoena. In *Hanes* jurisdiction was expressly denied under 61 Stat. 150 (1947), 29 U.S.C. § 161(2) (1964) on the ground that an employee mailing list had no relation to "evidence" or "testimony touching the matter under investigation." The court also declined, in its discretion, to take jurisdiction under 28 U.S.C. § 1337 (1964). Jurisdiction in *Montgomery Ward* was denied on the same ground as in *Hanes*.

[13] In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees. It is our duty to establish those conditions; it is also our duty to determine whether they have been fulfilled. When, in the rare extreme case, the standard drops too low, because of our fault or that of others, the requisite laboratory conditions are not present and the experiment must be conducted over again.
General Shoe Corp., 77 N.L.R.B. 124, 127 (1948).

[14] *Id.* at 126.

[15] NLRB v. Federbush Co., 121 F.2d 954 (2d Cir. 1941).

[16] *But see* NLRB v. Virginia Elec. & Power Co., 314 U.S. 469 (1941).

[17] 61 Stat. 140 (1947), 29 U.S.C. § 158(c) (1964).

which the employer's speech amounted to a "threat of reprisal or force or promise of benefit."[18] However, many other cases decided subsequent to the passage of 8(c) have held that even though the employer's speech was not an unfair labor practice, it might nevertheless upset the requisite "laboratory conditions" surrounding an election to such an extent that a new election was necessary.[19]

In another group of cases the NLRB has employed a balancing process in deciding the validity of company rules prohibiting union solicitation or the distribution of union literature on company property. In the solicitation situation the Board must balance the right of employees to organize against the right of the employer to maintain discipline in his establishment.[20] The Board has said that a rule which prohibits solicitation by an employee on company property outside of working hours "must be presumed to be an unreasonable impediment to self-organization and therefore discriminatory in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline."[21] Distribution of union literature is distinguished from solicitation, since distribution could result in littering work areas and impinging on the employer's right to engage in production. Therefore, the employer can limit distribution to non-work areas of his establishment, but a rule prohibiting employees from distributing literature anywhere on the employer's premises is invalid on its face.[22] Another distinction that is made in this area is that between organizing activities by employee and non-employee. An example is found in *NLRB v. Babcock & Wilcox Co.*,[23] in which the nondiscriminatory refusal of the employer to permit distribution of union literature by non-employee union organizers on company-owned parking lots was held not to have unreasonably impeded the employees' right to self-organization because the locations of the plants and of the living quar-

[18] Section 8(c) by its terms is limited to situations involving unfair labor practices and not those in which representation elections can be set aside because of the employer's speech.

[19] See, *e.g.*, Lord Baltimore Press, 142 N.L.R.B. 328 (1963) (election set aside where employer's promise to litigate was coupled with statements which pointed out that union might cause a strike and pursue other policies detrimental to the employees); Sewell Mfg. Co., 138 N.L.R.B. 66 (1962) (inflammatory mass of race hate literature by the employer to defeat union organizational attempts).

[20] Republic Aviation Corp. v. NLRB, 324 U.S. 793, 797-98 (1945).

[21] Peyton Packing Co., Inc., 49 N.L.R.B. 828 (1943).

[22] Stoddard-Quirk Mfg. Co., 138 N.L.R.B. 615 (1962).

[23] 351 U.S. 105 (1956).

ters of the employees did not place the employees beyond the reach of reasonable efforts of the unions to communicate with them by other means. However, where there are no other avenues of approach open to the union in its organization attempts, it is an unfair labor practice for the employer to deny the union access to its premises.[24]

Earlier cases having a more direct bearing on *Excelsior* are those in which the labor organization has sought an opportunity to reply to antiunion speeches made by the employer, a situation analogous to the union's demand for a mailing list in *Excelsior*. In *Bonwit Teller, Inc.*,[25] the employer had a no-solicitation rule which forbade solicitation during working and non-working time on the selling floors of a department store.[26] Pre-election antiunion speeches were made to employees in the selling areas but the employer refused the union's request for an opportunity to reply on equal terms. The Board's order required the employer to cease and desist from making such antiunion speeches unless, upon request, a like opportunity was accorded to the labor organization against which the speeches were directed. On appeal the Court of Appeals for the Second Circuit limited the Board's order to the extent that if the employer abandoned his broad no-solicitation rule, he would be free to make antiunion speeches without having to accord the union equal time.[27] The NLRB nevertheless continued to apply its "equal opportunity" principle in several later cases[28] until, in *Livingston Shirt Corp.*,[29] that principle was rejected by a majority of the Board.[30] In *Livingston* the employer, who had a no-solicitation rule in effect, made

[24] See NLRB v. Stowe Spinning Co., 336 U.S. 226 (1949), where the NLRB was upheld in finding an unfair labor practice where the employer discriminated against the labor organization by denying it the use of a company-owned meeting hall which was the only available meeting hall in a company town.

[25] 96 N.L.R.B. 608 (1951).

[26] Such a broad rule was privileged in the case of retail department stores. Famous-Barr Co., 59 N.L.R.B. 976, 981 (1944).

[27] Bonwit Teller, Inc. v. NLRB, 197 F.2d 640, 646 (2d Cir. 1952).

[28] Stow Mfg. Co., 103 N.L.R.B. 1280 (1953); Onondaga Pottery Co., 103 N.L.R.B. 770 (1953); Seamprufe, Inc., 103 N.L.R.B. 298 (1953); Metropolitan Auto parts, Inc., 102 N.L.R.B. 1634 (1953).

[29] 107 N.L.R.B. 400 (1953).

[30] [T]hat [*Bonwit Teller*] view rested on the belief that the employer exerted undue and unlawful influence upon the employees by monopolizing their workplace as a speechmaking platform. NLRB appraisal of the basic elements underlying this type of situation

noncoercive antiunion speeches to the employees, but refused to allow equal time to the union. The Board ruled that

> [I]n the absence of either an unlawful broad no-solicitation rule (prohibiting union access to company premises on other than working time) or a privileged no-solicitation rule (broad, but not lawful because of the character of the business), an employer does not commit an unfair labor practice if he makes a pre-election speech on company time and premises to his employees and denies the union's request for an opportunity to reply.[31]

This viewpoint was seemingly approved by the Supreme Court in *NLRB v. United Steelworkers of America*[32] [Nutone, Inc.], where the employer used methods of persuasion forbidden to the employees by a no-solicitation rule. The Court said that if "the opportunities for effectively reaching the employees with a pro-union message, in spite of a no-solicitation rule, are at least as great as the employer's ability to promote the legally authorized expression of his antiunion views, there is no basis for invalidating these 'otherwise valid' rules."[33] However, in that case there was no request made by the union for equal time so it may be maintained with certainty that the Supreme Court was approving the Board's denial of equal time to the union. Finally, in *The May Co.*,[34] the NLRB reaffirmed its "equal opportunity" rule in regard to retail department stores.[35] There, the Board recognized that the employer, because of the character of its business, was privileged to adopt a no-solicitation rule covering both working and nonworking time even though such a rule significantly restricted the employees' self-organization rights by foreclosing discussion of the advantages and disadvantages of organization among employees at their place of work. The Board

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persuades us that the Act does not require the employer, absent unusual circumstances, to accede to such a union request.

*Id.* at 405.

[31] *Id.* at 409.

[32] 357 U.S. 357 (1958).

[33] *Id.* at 364.

[34] 136 N.L.R.B. 797, *enforcement denied,* 316 F.2d 797 (6th Cir. 1963).

[35] "[T]he Board and court holding in the *Bonwit Teller* case, which we consider to be legally sound, squarely controls the issue in the present case." *Id.* at 799. The Court of Appeals for the Sixth Circuit reversed and denied enforcement of the NLRB's order, May Dep't Stores Co. v. N.L.R.B., 316 F.2d 797 (6th Cir. 1963), but the NLRB has continued to affirm its holding in *May.* See Montgomery Ward & Co., Inc., 145 N.L.R.B. 846, 848 n.4 (1964).

found that when the employer used the company premises and company time to make an antiunion speech to the employees, he "created a glaring imbalance in organizational communication." The Board then ruled that the employer could give such speeches but that he was under an obligation, in order to allow a proper balance to be maintained, to accede to the union's request to address the employees under similar circumstances.[36]

After *May,* the status of the law was that the NLRB was imposing an "equal time" rule on an employer only in retail department store cases and then only when the employer had in effect a broad, but privileged, no-solicitation rule. In other cases a union request for equal opportunity to address the employees has been refused where other avenues of approach have been open.[37] *Excelsior* seems to make an inroad on this practice since awarding the union a mailing list goes far toward putting it on a par with the employer.

In *General Elec. Corp.,*[38] decided the same day as *Excelsior,* the Board was asked to apply its department store rule of "equal time" to the industry in general. It refused, primarily because of its *Excelsior* ruling, saying that

> [I]n light of the increased opportunities for employees' access to communications which should flow from *Excelsior,* but with which we have, as yet, no experience, . . . we prefer to defer any reconsideration of current Board doctrine in the area of plant access until after the effects of *Excelsior* become known.[39]

After more than a year of NLRB administrative experience with the *Excelsior* rule, it appears safe to assume the rule has resulted in sufficient union accessability so that a stiffer rule is not needed at this time.[40]

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**Taxation—Interest Deductions—Sham and Business Purpose Tests**

The Internal Revenue Code of 1954 provides, "There shall be allowed as a deduction all interest paid or accrued within the taxable

[36] 136 N.L.R.B. at 802.
[37] NLRB v. United Steelworkers of America [Nutone, Inc.], 357 U.S. 357 (1958).
[38] 156 NLRB No. 112 (Feb. 4, 1966).
[39] *Id.* at —.
[40] See note 11 *supra* for cases in which the Board has sought to enforce its *Excelsior* rule in federal district court.