

EMPLOYER SPEECH AND RELATED ISSUES

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An employer violates section 8(a)(1) of the National Labor Relations Act if he interferes with, restrains, or coerces employees in the exercise of the rights guaranteed them by section 7, including the right to form, join, or assist labor organizations. Any employer unfair labor practice under section 8(a) of the NLRA also is a violation of section 8(a)(1),¹ but some types of employer conduct violate section 8(a)(1) only, constituting "independent" 8(a)(1) violations. Our inquiry in this paper is limited to the regulation of employer speech, interrogation, espionage and surveillance as "independent" 8(a)(1) violations.

Our primary effort will be to identify changes during the past twenty years in the Board's application of section 8(a)(1) to these forms of employer conduct. Where the timing of a change was proximate to a change in Board personnel or a shift in the political climate, we shall try to determine whether the latter event was a substantial causal factor in producing the change.

Although the NLRB at times has prescribed definite, easy-to-apply rules for some issues arising under section 8(a)(1) (the present "captive audience" rule, for example), the question whether an employer's conduct interferes with, restrains, or coerces employees is usually one of fact. The ultimate question in most cases is whether the conduct tended to produce a coercive effect. Direct proof of this effect is not necessary. A tendency to coerce, inferred by the Board from proved employer conduct, is enough.²

So many factual circumstances are pertinent in determining whether conduct or speech tends to coerce, and there are so many cases, that a mere comparison of a few such cases does not necessarily convey an accurate impression of the trend of the law. Reading all the cases as they have been reported over the past twenty years, one may gain an impression of certain shifts of emphasis in the decisions on what tends to coerce, but for the most part this impression is difficult to relate to specific cases. The problem is like that of tracing the trend in judicial opinions on what constitutes reasonable care in negligence cases. All that one can reasonably hope to do is to note the development and modification of criteria that the Board has applied in making its determinations. Where the Board's stated criteria have remained constant, it may nevertheless have varied the weight that it has given different facts in applying

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¹ NLRB v. Express Publishing Co., 312 U.S. 426 (1941).

² Republic Aviation Co. v. N.L.R.B., 324 U.S. 793 (1945). Cf. Radio Officers Union v. N.L.R.B., 347 U.S. 17 (1954). See N.L.R.B. v. Universal Camera Co., 340 U.S. 474 (1951).

those criteria to different situations. We have not, however, attempted to analyze the cases in these terms.

Even where one is able to trace definite changes in the Board's decisions, it is usually difficult to determine the reasons for those changes. The adoption by the Board of new rules or the modification of old ones may follow chronologically certain extrinsic events, such as a change in Board personnel, without the relationship being a causal one. The Board may sometimes change its position in response either to decisions of the reviewing courts or to a change in statutory language, or the modification of an old rule may merely reflect the inevitable growth of doctrine when it is applied to new facts. Finally, a change may result solely from the fact that as men acquire the wisdom of experience they sometimes change their minds, quite apart from any extrinsic event.

I. PERSUASION BY SPEECH

A. *What an Employer May Say*

The principle of section 8(a)(1) is that employers should not coerce, restrain, or interfere with their employees in the exercise of their right to join a union or engage in other protected activities.³ On the other hand, the principle of the First Amendment is that freedom of expression and the communication of ideas should not be restricted. The application of these two principles to employer anti-union speech results in a conflict that has been the source of many litigated cases. As the Court of Appeals for the Second Circuit has indicated:⁴

. . . any address or other communication from an employer made directly to his employees may have, and ordinarily will have, a double aspect: on the one hand, it is an expression of his own beliefs and an attempt to persuade his employees to accept them; on the other, it is an indication of his feelings which his hearers may believe will take a form inimicable to those of them whom he does not succeed in convincing.

In order to find a section 8(a)(1) violation, the employer's speech must "interfere with, restrain, or coerce." Accordingly, the Board has never, and could never, base an unfair labor practice finding on employer speech without first determining that the speech interfered with, restrained, or coerced employees in the exercise of their rights protected by section 7. Conversely, the Board has always held that speech violated the Act where it tended to coerce employees, as by threatening reprisal against those who join unions, or promising benefits to those who do not.

In the early years of the Wagner Act free speech was seldom a principal issue. The Board was concerned primarily with cases where the employer had, by present standards, flagrantly violated the law and

³ Since most section 8(a)(1) cases involve interference with union organization, we shall discuss section 8(a)(1) violations principally with reference to that type of interference. Of course, the right to join a union and to organize is only one of the rights protected by section 7.

⁴ *NLRB v. American Tube Bending Co.*, 134 F. 2d 993, 994 (2d Cir. 1943).

committed numerous unfair labor practices. Where employer speech formed a basis for an unfair labor practice charge it usually either contained threats of reprisal against those who joined unions or promises of benefit to those who did not or was surrounded by numerous other serious unfair labor practices. Nevertheless, the Board from its inception regarded employer anti-union speech with disapproval, and often cited such speech as an additional fact of interference. Thus the first annual report of the NLRB states: "[A] part from discrimination against union members, the most common form of interference with self organization engaged in by employers is to spread propaganda against unions and thus not only poison the minds of workers against them but also indicate that the employers are antagonistic to unions and are prepared to make this antagonism effective."^{4a}

When the issue was eventually presented to the Board squarely it tended to favor the principle of preventing any possible intimidation over the principle of encouraging freedom of expression. The Board emphasized that strong employer expressions of anti-union sentiment tend to cause employees to fear for their job security if they join a union. The Board sometimes seemed to say that strong employer expressions of anti-union sentiment are themselves coercive, or even that an employer must remain completely neutral in the matter of union organization.⁵

In 1941 in the *Virginia Electric* case⁶ the Supreme Court held that the employer anti-union speech is constitutionally protected where it is not coercive; the Court stated that the Wagner Act merely outlaws statements that are coercive. But in remanding the *Virginia Electric* case to the Board for further findings, the Court held that in determining whether speech is coercive the Board should examine the speech in the totality of the employer's conduct, and that even if the speech does not itself contain any threats or promises it may be considered coercive if it is surrounded by discriminatory discharges or other acts of hostility towards unions or interference with union organization. After the *Virginia Electric* decision the Board abandoned the intimations in its earlier opinions that an employer must maintain strict neutrality on the matter of union organization and adhered at least in principle to the criteria stated by the Supreme Court. However in the period immediately following the *Virginia Electric* decision the Board appeared to find that speech was coercive on the basis of the totality of the employer's conduct wherever the employer had engaged in some prohibited anti-union conduct.⁷

^{4a} 1 N.L.R.B. Ann. Rep. 73 (1936).

⁵ See *Ford Motor Co.*, 14 N.L.R.B. 346, 377, 379 (1939); *Sunbeam Electric Manufacturing Co.*, 41 N.L.R.B. 469, 1485 (1942); *American Tube Bending Co.*, 44 N.L.R.B. 121, 129 (1942).

⁶ *NLRB v. Virginia Electric and Power Company*, 314 U.S. 469 (1941). Compare *Thomas v. Collins*, 323 U.S. 516 (1945).

⁷ See the cases cited in footnote 8, *infra*.

The Board continued to adhere in principle to the criteria stated in the *Virginia Electric* decision through to the Taft-Hartley amendments, but by 1946 and 1947 it was no longer so strict in applying the criteria to specific cases.

There are several reasons that might be advanced for the Board's changed attitude. It might have been caused by the more critical public view of unions and collective bargaining that was generated by some dramatic war and post war work-stoppages. The Board might also have been influenced to give greater latitude to employer speech because the greatly increased strength of unions seemed to lessen the potential intimidating effect of anti-union speech. In ascribing reasons for the Board's changed attitude, it is also perhaps significant that there was a constant turnover of Board personnel. By August 1941 all of the original members of the Madden Board of the 1930's had been replaced; by August 1946 only Houston remained as a survivor of the Millis Board of the early 1940's, Herzog having become chairman a year earlier; although it is difficult to generalize about personalities, it is arguable that some of the later appointees were not as imbued with a fervor in support of unionization as some of the earlier ones. These comments are, of course, highly speculative. The fact is that irrespective of any of the above circumstances, the Board's changed attitude can be easily and fully explained by the numerous decisions of the courts of appeal that held that the Board had previously gone too far in basing a finding that speech was coercive on the totality of the employer's conduct.⁸

In any event, by 1947 the Board was conforming to the decisions of the courts of appeal. It continued to consider coercive *per se* statements that contained an actual, implied, or veiled promise of benefit or threat of reprisal, and it continued to hold that otherwise privileged statements acquired a coercive character when they were an integral part of a course of anti-union conduct which in its totality was coercive.⁹ But the Board did not find a coercive totality of conduct to exist where anti-

⁸ NLRB v. Ford Motor Co., 114 F. 2d 905, 913-915 (6th Cir. 1940), *modifying and enforcing* 14 N.L.R.B. 346, NLRB v. American Tube Bending Co., 134 F. 2d 993 (2d Cir. 1943), *denying enforcement* of 44 N.L.R.B. 121.

Edward G. Budd Mfg. Co. v. NLRB, 142 F. 2d 922 (3rd Cir. 1944); Diamond T. Motors Co. v. NLRB, 119 F. 2d 978 (7th Cir. 1941). NLRB v. J. L. Brandeis & Sons, 145 F. 2d 556 (8th Cir. 1944), *denying enforcement* of 54 N.L.R.B. 880. NLRB v. West Kentucky Coal Co., 152 F. 2d 198, *modifying and enforcing*, 57 N.L.R.B. 89.

For a thorough discussion of free speech under the Wagner Act, *See* Morgan, *Employer's Freedom of Speech and the Wagner Act*, 20 TUL. L. REV. 469 (1946).

⁹ 10 N.L.R.B. Ann. Rep. 37 (1945); 11 N.L.R.B. Ann. Rep. 34 (1946). *See* Montgomery Ward & Co., 64 N.L.R.B. 432 (1945). Kalamazoo Stationery Co., 66 N.L.R.B. 930, 949-51 (1946). Kopman-Worachek Shoe Mfg. Co., 66 N.L.R.B. 789 (1946). American Laundry Machine Co., 57 N.L.R.B. 25 (1944).

union statements which contained no threats or promises were separated from other acts of hostility against union members.¹⁰

Taft-Hartley Law

Although the legislative history of the free speech amendment of the Taft-Hartley law is confusing in terms of its meaning,¹¹ Congress plainly felt that the Board had gone too far in basing unfair labor practice charges on employer speech. The majority House Report on H.R. 3020 stated: "Although the Labor Board says it does not limit free speech, its decisions show that it uses against people what the Constitution says they can say freely."^{11a} Also see the Senate Report on S.R. 1126 where the committee stated that the Board had placed a limited construction on the Supreme Court decisions by holding speeches by employers to be coercive if the employer was found guilty of some other unfair labor practice, even though severable or unrelated.^{11b}

The Taft-Hartley law relettered former subsection 8(1) as 8(a)(1), but did not change the language of that subsection. However, Congress added the "free speech" section, 8(c), which 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 the act, if such expression contains no threat of reprisal or force or promise of benefit.

Speaking of section 8(c) shortly after its enactment, the NLRB stated: "This section appears to enlarge somewhat the protection previously accorded by the original statute and to grant immunity beyond that contemplated by the free speech guarantees of the Constitution."^{11c} As a consequence of section 8(c) there was a noticeable shift in the Board decisions on several points:

- a. The Board did not admit an employer's noncoercive statements to show his anti-union motive in cases where motive was in issue.¹²
- b. The Board did not consider coercive an employer's statements which in their context did not contain a threat of reprisal or promise of benefit, irrespective of other acts of hostility towards a union.¹³

¹⁰ Fisher Governor Co., 71 N.L.R.B. 1921, 1924 (1946). Bausch & Lomb Optical Co., 72 N.L.R.B. 132, 134 (1947); La Salle Steel Co., 72 N.L.R.B. 411, 413 (1947).

¹¹ See Cox, *Some Aspects of the Labor Management Relations Act*, 61 HARV. L. REV. 1, 16-20 (1947).

^{11a} H. R. REP. 245, 80th Cong., 1st Sess. 33 (1947).

^{11b} S. REP. 105, 80th Cong., 1st Sess. 23-24 (1947).

^{11c} 13 N.L.R.B. Ann. Rep. 49 (1948).

¹² Compare, Fisher Governor Co., 71 N.L.R.B. 1291 (1946), enforced in 163 F. 2d 913 (8th Cir. 1947), with Consumers Cooperative Refinery Association, 77 N.L.R.B. 528, 530 (1948), enforced in 180 F. 2d 581 (5th Cir. 1950). See also The Carpenter Steel Co., 76 N.L.R.B. 670 (1948); 13 N.L.R.B. Ann. Rep. 49-50 (1948).

¹³ Bailey Co., 75 N.L.R.B. 941, 942 (1948); D. D. Bean & Sons Co., 79 N.L.R.B. 724 (1948); D. H. Holmes Ltd., 81 N.L.R.B. 753 (1949); In view of the

c. The Board did not necessarily consider employer speech coercive by reason of the fact that it contained broad untrue charges against, or ridiculed or villified, a union, its officers, or its members, or used intemperate language.¹⁴

Since the enactment of section 8(c) a principle source of controversy has been whether particular instances of speech contain threats of reprisal or promises of benefit. The first question in these cases is what the employer said; the second question is whether the statement amounted to a threat or promise. An employer plainly commits an unfair practice where he makes a promise of benefit or threat of reprisal which is expressly conditioned on whether a union wins an election or whether the employees engage in some other form of protected activity.¹⁵ For example, an employer's threat that he will shut down a plant, or reduce employment, or reduce wages if a union prevails in an election was an unfair labor practice under the Wagner Act, was an unfair labor practice under the Taft-Hartley Act prior to the recent changes in the national administration and in Board personnel, and is still an unfair labor practice.¹⁶

The line becomes a difficult one to draw where the employer attempts to convince his employees that dire results will follow if the plant is unionized, but bases his arguments on alleged inevitable consequences of unionization, rather than on any threat on his part to punish the employees for joining a union. Thus the employer may state that it would be impossible for him to meet union wages, and that therefore he would have to lay off men or close the shop. Or the employer may state that a union would be so disruptive or would so act to retard hard work that he could not operate as efficiently and therefore could not raise wages.

The employer's position in these cases is that he is not making any threats, but is merely stating his opinion of the consequences that will come from unionization. Even if one concedes that unionization seldom leads to the dire consequences that some employers predict, nevertheless, such consequences occur in enough cases so that one can not say that every employer who makes these arguments is acting in bad faith. If it

decision of the Seventh Circuit in *NLRB v. Kropp Forge Co.*, 178 F. 2d 822 (1949), it is arguable, however that section 8(c) did not completely abrogate the totality of conduct doctrine.

¹⁴ *Atlantic Stages*, 78 N.L.R.B. 553 (1948); *Globe Wireless, Ltd.*, 88 N.L.R.B. 1252 (1950); *Grand Central Aircraft Co., Inc.*, 103 N.L.R.B. 1114 (1953). 14 N.L.R.B. Ann. Rep. 54-55 (1949). Compare *R. R. Donnelly & Sons*, 60 N.L.R.B. 635 (1945), decided under the Wagner Act.

¹⁵ For a detailed listing of some of the types of promises and threats which are not protected, see 16 N.L.R.B. Ann. Rep. 141-4 (1951); Daykin, *The Employer's Right of Free Speech Under the Taft-Hartley Act*, 37 IOWA L. REV. 212, 223-8 (1952).

¹⁶ See *Barby's Frosted Foods*, 108 N.L.R.B. No. 111 (1954); *Richards and Associates*, 110 N.L.R.B. No. 23 (1954); *Mills-Morris Co.*, 108 N.L.R.B. No. 169 (1954); *Diaper Jean Mfg. Co.*, 109 N.L.R.B. No. 152 (1954).

is at least possible that such consequences will follow, then the policy favoring free discussion of the advantages and disadvantages of unionization applies to employer predictions of such consequences. On the other hand, in most cases a prediction by an employer that unionization will lead to lower wages, lay offs, and shut downs, though couched as an opinion, will have the same effect as a threat. The intelligent employer certainly may word a statement so carefully and persuasively that it will be only an effective statement of the employer's opinion, yet its effect may be the same as a threat.¹⁷

Although the board at one time tended to treat as an implied threat any prophecy that unionization would lead to loss of employment,¹⁸ since 1947, immediately before and ever since the Taft-Hartley amendments, the Board has held that such prophecies are protected where the employer does not threaten to use his economic power to make the prophecy come true.¹⁹

In recent years the number of cases has increased where the Board has sustained employer speech which prophesied loss of employment or shut-down in the event of unionization.²⁰ Although one commentator²¹ has ascribed this numerical increase to shifts in Board personnel and greater leniency towards employer speech, the increased number of cases may be attributable solely to the fact that employers have learned to bring their statements within rules previously accepted by the Board.

Of course, it does not follow from the fact that the Board is applying the same principles today as it did prior to 1952 that there has been no shift in Board attitudes. As we said at the outset, the question whether a statement contains a threat or promise is essentially a factual one, and one

¹⁷ The mere fact that a statement is in form a prophecy of course does not bring it within the free speech protection where under all the circumstances it may reasonably be interpreted as a threat. See J. S. Abercrombie, 83 N.L.R.B. 524 (1949); New Madrid Mfg. Co., 104 N.L.R.B. 117 (1953).

¹⁸ See A. J. Showalter, 64 N.L.R.B. 573 (1945) (opinion that unionization might cause principal customer to withdraw his business).

¹⁹ Electric Steel Foundry, 74 N.L.R.B. 129 (1947); Hagy, Harrington & Marsh, 74 N.L.R.B. 1455 (1947); Mylan-Sparta Co., 73 N.L.R.B. 1144 (1948); Cleveland Plastics, Inc., 85 N.L.R.B. 513 (1949); Silver Knit Hosiery Mills, Inc., 99 N.L.R.B. 422 (1952).

²⁰ Morgantown Full Fashioned Hosiery Co., 107 N.L.R.B. 1534 (1954); Syracuse Color Press, Inc., 103 N.L.R.B. 377 (1953); Gillcraft Furniture Co., 103 N.L.R.B. 81 (1953). Also see National Furniture Mfg. Co., 106 N.L.R.B. 1300 (1953) and Chicopee Mfg. Corp., 107 N.L.R.B. 106 (1953).

²¹ Wirtz, *The New National Labor Relations Board; Herein of "Employer Persuasion,"* Professor Wirtz cites in support of his view the statement in *Chicopee Manufacturing Corp.*, *supra*, footnote 20, that "[A] prophecy that unionization might ultimately lead to loss of employment is not coercive where there is no threat that the employer will use its economic power to make its prophecy come true." Yet this is almost the exact language of the Board in the *Mylan-Sparta* case, *supra*, footnote 19, decided in 1948. Moreover, two of the four members deciding the *Chicopee* case were not Eisenhower appointees.

trier of fact may weigh evidence differently than another. Although the Board now appears to apply the same criteria as formerly, it is arguable that it is less inclined than formerly to find that a statement is or tends to coerce. We have not attempted to analyze the cases in these terms.

B. Where, when and how the employer may speak

Since the effect of an employer's conduct is a "subtle thing" requiring "a high degree of introspective perception,"²² the trier of fact must not only appraise the content of the speech but must also weigh the circumstances surrounding it, including the place and time at which it is delivered.

The question whether restraint should be placed on employer speech at certain times and places raises policy issues similar to those presented where the question is whether peaceful picketing should be restrained. The words spoken on a picket line, even though innocuous on their face, lose "significance as an appeal to reason" and become "part of an instrument of force" where they are set in a context of coercion;²³ and they are not immune from regulation where they are an integral part of conduct otherwise unlawful.²⁴ Similarly, in the employer speech cases the effect of language is judged in its context and against the "totality of conduct."

Quite apart from what is said, a picket line as a means of communication "involves patrol of a particular locality" and "may induce action of one kind or another irrespective of the . . . ideas . . . disseminated."²⁵ For this reason, it has been held that a court may restrain the communication of information by a picket line in circumstances where dissemination of the same information by some other mode of communication, e.g., a newspaper, might be privileged under the First Amendment.²⁶ It is method, not content, that is the subject of regulation. The same kind of analysis may be applied to employer speech on company property and time.

The 20-year history of the NLRB reveals a very unsteady approach to the question of the extent to which employer anti-union speech is permissible when uttered under these circumstances. In decisions as early as 1937 and 1938 the Board held that employer speeches delivered on company property violated section 8(a)(1). However, the rationale of these decisions was that the speech was coercive either because it contained threats, was part of a pattern of improper conduct, or was so hostile to

²² *Radio Officers Union v. NLRB*, 347 U.S. 17, 51 (1954).

²³ *Milk Wagon Drivers Union of Chicago v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 293 (1941).

²⁴ *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1950).

²⁵ *Bakery and Pastry Drivers and Helpers v. Wohl*, 315 U.S. 769, 776 (1942) (concurring opinion). *Accord*: *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949) and *Hughes v. Superior Court*, 339 U. S. 460 (1950).

²⁶ *Hughes v. Superior Court*, 339 U.S. 460 (1950).

unions that it impaired freedom of choice.²⁷ In studying the NLRB's handling of the "captive audience" problem, these decisions are not significant, for the Board put little stress on how, when, and where the speech was delivered.

It was not until 1942, after the Supreme Court expressly disapproved the tenet that employers may not express themselves vigorously on the pros and cons of unionism,²⁸ that the Board found that employer speech tended to produce a coercive effect primarily because it was made to employees assembled during working hours.²⁹ The Board's rationale in *American Tube Bending* was that words take their meaning "from the setting in which they are used, of which the relation between the speaker and the hearer is perhaps the most important part";³⁰ that vigorous but non-threatening expressions of anti-unionism become coercive under a "totality of conduct" doctrine when they are made to an assembly of employees during working hours. The doctrine expressed in this case was short-lived, for the Second Circuit refused to enforce the Board's order.³¹

The seeds for a different approach to the "captive audience" problem were planted in 1945 by the Board's decision in *Thompson Products, Inc.*,³² a case involving a petition to set aside an election on the ground that employer speech to a "captive audience" substantially disturbed the ability of the employee-voters to make the kind of free choice contemplated by the statute. The Board held that anti-union speeches delivered to workers assembled during working hours were a sufficient basis for invalidating an election. The rationale was that this *avenue of communication* brought to bear on the employees the weight of economic power in a manner not available to the union, rendering them "unduly responsive to the slightest suggestions," thus making the "adjurations of the speakers" coercive, and impairing freedom of choice. Since the decision stressed that otherwise proper speech tended to coerce because of where and when it was uttered, it might be viewed as an application of the *American Tube Bending* doctrine. However, the emphasis of the opinion on the *act of compelling* the employees to attend the meeting suggested that perhaps such conduct was an independent ground for restraint.

This suggestion was confirmed the following year by the decision in

²⁷ Harrisburg Children's Dress Co., 2 N.L.R.B. 1058 (1937); Indianapolis Glove Co., 5 N.L.R.B. 231 (1938); Triplett Electrical Instrument Co., 5 N.L.R.B. 835 (1938); Nebel Knitting Co., Inc., 6 N.L.R.B. 284 (1938). For a later "captive audience" case grounded on the same theory, see *Van Ralite, Inc.*, 69 N.L.R.B. 1326 (1946). (Speech contained a "covert threat," a "plain intimation of reprisal," and was an integral part of a pattern of coercive conduct.)

²⁸ NLRB v. Virginia Electric & Power Co., 314 U.S. 469 (1941).

²⁹ American Tube Bending Co., 44 N.L.R.B. 121 (1942).

³⁰ NLRB v. Federbush Co., 121 F. 2d 954, 957 (2d Cir. 1941).

³¹ NLRB v. American Tube Bending Co., 134 F. 2d 993 (2d Cir. 1943), cert. denied, 320 U.S. 768 (1943).

³² 60 N.L.R.B. 1381, 1385, 1386 (1945).

the *Clark Brothers Co.* case.³³ In this decision the Board placed stress on how, when, and where the speech was delivered. The case held that the act of compelling employees to listen to an anti-union speech during working hours, irrespective of the words used or the ideas conveyed, was itself coercive. The Board felt that the employer's conduct produced this effect because it was a particularly telling exercise of economic force, not unlike the show of physical force involved when one person holds another while he tells him something; and that the employer had also intruded on the employees' right to be free to determine whether or not to receive aid, advice, and information concerning self-organization.

A possible explanation for the doctrinal change evident in the *Clark Brothers* decision is that the Board felt that the *American Tube Bending* doctrine, which stressed the effect of the method by which a speech is made on its contents, would receive no better treatment from other courts than from the Second Circuit³⁴ and that the approach of *Clark Brothers*, with its emphasis on the coercive effect of the act of compulsion, would be more apt to succeed.

However, if this was the Board's expectation, it must have been disappointed. Reviewing the decision in the *Clark Brothers* case, the Second Circuit accepted the proposition that section 7 of the NLRA guarantees employees the right to be free to determine whether or not to receive aid, and information concerning self-organization, but it rejected the view that compelling employees to assemble and listen to anti-union speeches is an invasion of that right *per se*. The court enforced the Board's order in the case in part on the ground that the employer's conduct in addressing the employees on company time is improper if he does not provide a similar or "equal opportunity" to the union.³⁵

Three months later (October 27, 1947) the NLRB appeared to turn away from its approach in the *Clark Brothers* case and to adopt the Second Circuit's position. The Board dismissed a complaint based on an employer's speech to an assembly of employees during working hours on the ground that there was no evidence that a like opportunity to speak to the employees had been unavailable to the union.³⁶ The Board did not pass on the question of whether section 8(c) of the Taft-Hartley amendments compelled this result.

In April of the next year the Board, while denying that it was relying on the *Clark Brothers* doctrine, granted a petition to set aside

³³ 70 N.L.R.B. 802 (1946), Reilly dissenting.

³⁴ See *NLRB v. Montgomery Ward Co.*, 157 F. 2d 486 (8th Cir. 1946), denying enforcement of 64 N.L.R.B. 432 (1945) on the ground that the conditions under which a listener receives a message do not make it coercive.

³⁵ *NLRB v. Clark Brothers Co.*, 163 F. 2d 373 (2d Cir. 1947). The employer had also committed a number of other unfair labor practices, a circumstance which also supported the Board's order on a "totality of conduct" theory. Cf. *NLRB v. American Laundry Machinery Co.*, 152 F. 2d 400 (2d Cir. 1945).

³⁶ *Merry Brothers Brick & Tile Co.*, 75 N.L.R.B. 136 (Oct. 27, 1947).

an election in the *General Shoe Corp.* case.³⁷ The decision was grounded in part on the fact that the president of the employer, not content to talk to a large assemblage of employees, had called twenty to twenty-five employees into his office, the "locus of final authority in the plant," to listen to intemperate anti-union statements during working hours. The opinion stated that the privilege of section 8(c) operates in unfair labor practice cases, not in election cases, and suggested, if it did not hold, that the *Clark Brothers* doctrine would no longer be applied in the former.

Any doubt that the *Clark Brothers* doctrine had lost its vitality ended a month later when the Board, after examining the language and the legislative history of section 8(c), abandoned it for all purposes.³⁸ The *General Shoe* case was distinguished in election cases on the ground that there the employer's conduct had "so far abused normal campaign tactics that the employees were inhibited in their free choice of a bargaining representative."³⁹ In May of 1950 the Board went a step further, holding that an employer's speech to his employees assembled during working hours did not justify invalidating the election even though there was evidence that the employer had ignored the union's request for a like opportunity to address employees.⁴⁰

Thus, by 1950 it not only appeared that the *Clark Brothers* doctrine had been set to rest for all purposes, but it also seemed that the "equal opportunity" approach suggested by the Second Circuit in its enforcing opinion had died aborning.

However, after 15 years of experience and two doctrinal failures the Board still believed that "captive audiences" should be regulated. Apparently the search was for some ground which would survive the scrutiny of the circuit courts and conform with congressional intention as manifested in section 8(c). Neither *American Tube Bending* nor *Clark Brothers* appeared to satisfy these requirements, but the "equal opportunity" doctrine suggested by the Second Circuit was promising. In any event, for whatever reason, the Board in 1951 took the position in *Bonwit Teller, Inc.* that the employer who delivers a speech to an audience of his employees assembled on company property and time and denies the union's request for a similar opportunity to address the employees thereby violates section 8(a)(1)⁴¹. *Bonwit Teller* was not simply a revival of the Board's earlier doctrine in the *Clark Brothers* case; it was a different approach, grounded on a different analysis.⁴² The decision was rationalized on two separate but related grounds.

³⁷ 77 N.L.R.B. 124 (April 16, 1948).

³⁸ Babcock & Wilcox Co., 77 N.L.R.B. 577 (May 13, 1948).

³⁹ Hinde & Dauch Paper Co., 78 N.L.R.B. 483 (July 22, 1948).

⁴⁰ S & S Corrugated Paper Machinery Co., 89 N.L.R.B. 1363 (May 16, 1950).

⁴¹ 96 N.L.R.B. 608 (1951), Reynolds dissenting.

⁴² The Board adhered to Babcock & Wilcox, 77 N.L.R.B. 577 (1948), which had overruled *Clark Brothers*. However, it overruled S & S Corrugated Paper Machinery Co., 89 N.L.R.B. 1363 (1950), *supra*, footnote 40, which was inconsistent in principle with *Bonwit Teller*.

First, the Board stated that while generally an employer may not prohibit the solicitation of union memberships on company property during non-working time, a retail store has a special privilege to bar such solicitation on its selling floors at any time.⁴³ This privilege fixes on the employer an obligation to enforce the rule with an even hand, *i.e.*, to apply it without discrimination.⁴⁴ An employer who bars pro-union electioneering on his premises while at the same time utilizing them himself for anti-union electioneering violates this duty.

Second, the Board held that section 7 guarantees employees the right to a reasonable opportunity to hear both sides of the story under circumstances which are approximately equal. This right is abridged where the employer makes a speech on company time and property and refuses the union's request to do likewise, if the circumstances are such that the employees' right can be preserved only by granting the request. Such circumstances exist when the union has no access to company property and the employer speech is delivered so close to the time of the election that the union has insufficient time to offset it by campaigning with other methods.

The Board soon extended the principle spelled out in the second part of its *Bonwit Teller* opinion. In a number of cases involving unfair labor practices or election challenges the Board held that an employer who makes an anti-union speech to an assemblage of his employees on company property during working time has a duty to grant the union an equal opportunity, even though there is no rule banning solicitation on company property during non-working time.⁴⁵ In short, the Board's view was that nothing short of an opportunity for the union to reply under substantially similar circumstances is enough to preserve the employees' right to hear both sides of the story. This was the "broad" *Bonwit Teller* doctrine, based on the principle that conditions of free

⁴³ May Dept. Stores Co., 59 N.L.R.B. 976 (1944); Goldblatt Bros., Inc., 77 N.L.R.B. 1262 (1948). J. L. Hudson Co., 67 N.L.R.B. 1403 (1946).

⁴⁴ Cf. Hershey Metal Products Co., 76 N.L.R.B. 695 (1948).

⁴⁵ Biltmore Mfg. Co., 97 N.L.R.B. 905 (1951) (Election set aside because employer's speech was made shortly before polls opened and union adherent's request was denied, although there was no rule prohibiting solicitation, Reynolds dissenting.) *Accord*: Bennardin Bottle Cap Co., 97 N.L.R.B. 1559 (1952); Belknap Hardware & Mfg. Co., 98 N.L.R.B., 484 (1952); Foreman & Ciark, Inc., 101 N.L.R.B. 40 (1952) (Herzog dissenting because speech made two days before election and union made no request); National Screw & Mfg. Co., 101 N.L.R.B. 1360 (1952) (Herzog dissenting because union reply speech via sound truck reached employees assembled in plant's eating area during lunch period); Metropolitan Auto Parts, Inc., 102 N.L.R.B. 1634 (1953) (speech two days before election followed by denial of union's request violated section 8(a)(1) because employer's conduct invaded the employees' "right to hear both sides of the story under circumstances which reasonably approximate equality." Herzog dissenting because the employer had no rule prohibiting solicitation); *Accord*: Onondaga Pottery Co., 103 N.L.R.B. 770 (1953); Seamprufe, Inc., 103 N.L.R.B. 298 (1953).

choice are preserved if, and only if, the employer dosage is followed by an opportunity for an equally strong union antidote.

Equality of opportunity is an appealing basis for doctrine. However, as applied in a "captive audience" situation it runs afoul of other notions. While an employer's property rights may be subordinated to the extent necessary to permit his employees effectively to exercise the right of self-organization by, for example, requiring him to permit union solicitation on company property during non-working time,⁴⁶ it seems anomalous to require him to subsidize the speeches of the union whom he sees as an economic adversary.

In large part for this reason the *Bonwit-Teller* doctrine was not warmly received by the courts of appeal.⁴⁷ The Second Circuit accepted the narrow holding of the *Bonwit Teller* case itself, basing its decision on the employer's discriminatory application of the no-solicitation rule. Rejecting the Board's broad order directing the company to stop making speeches on company property without granting a similar opportunity to the union, the court gave the employer a choice. He could either take advantage of his special privilege as a retail store to bar union organizers from the selling floors at any time and desist from making such speeches without granting the union's request. Or he could give up the privilege, thereby opening up his premises to union solicitation during non-working hours, make such speeches, and refuse the union's request. While the employer's property rights are to some extent subordinated under either alternative, the latter choice does not involve any direct cash outlay for pro-union activities.

Under the Second Circuit's view the employer's offense is his discriminatory application of a no-solicitation rule. It should not be supposed, however, that all such discrimination offends the statute. Apparently an employer may bar union solicitation during working time while paying his employees to hear his views on unionism.⁴⁸ In short, the Second Circuit's view is that union access to company premises during non-working hours is a sufficient antidote to the employer's "captive audience" speeches.

Despite the views of the Second Circuit, the Board continued to apply the "broad" *Bonwit Teller* doctrine until December of 1953 when it decided the *Livingston Shirt* case,⁴⁹ holding that the employer's refusal

⁴⁶ *Republic Aviation v. NLRB*, 324 U.S. 793 (1945). Cf. *NLRB v. Waterman Steamship Corp.*, 309 U.S. 206 (1940); *NLRB v. Stowe Spinning Co.*, 336 U.S. 226 (1949); and *NLRB v. Lake Superior Lumber Corp.*, 167 F. 2d 147 (6th Cir. 1948).

⁴⁷ *NLRB v. Bonwit Teller, Inc.*, 197 F. 2d 640 (2d Cir. 1952), enforcing 96 N.L.R.B. 608, cert. denied, 345 U.S. 905 (1953), *NLRB v. F. W. Woolworth Co.*, 214 F. 2d 78 (6th Cir. 1954), refusing to enforce 102 N.L.R.B. 581. But see *Foreman & Clark, Inc. v. NLRB*, 215 F. 2d 396 (9th Cir. 1954).

⁴⁸ See *NLRB v. American Tube Bending Co.*, 205 F. 2d 45 (2d Cir. 1953), enforcing 102 N.L.R.B. No. 68.

⁴⁹ 107 N.L.R.B. 400 (1953), (Murdock dissenting).

of the union's request did not violate section 8(a)(1) although there was a rule prohibiting activity for or against any union on company property during working time. While *Livingston Shirt* is consistent with the actual Board holding in the *Bonwit Teller* case, it is plainly a rejection of the "broad" doctrine and represents the Board's fourth try in eleven years to deal with the "captive audience" situation. The Board now agrees with the Second Circuit that the employees' right to hear both sides of the story is preserved if the union has access to company premises during non-working time.

The Board has continued to adhere to *Livingston Shirt*,⁵⁰ but its success in the circuit courts is by no means assured, particularly where the no-solicitation rule which runs to non-working time is valid because a retail store is involved. If the rule is lawful, the speech non-coercive, and the act of compulsion proper, why should the employer be obligated to give the union a helping hand? If the no-solicitation rule does not unreasonably abridge the employees' opportunity to exercise the rights of section 7, why should a lawful speech made by lawful methods obligate the employer to change the rule?⁵¹

The difficulty seems to stem primarily from the Board's failure to recognize that underlying both *Bonwit Teller* and *Livingston Shirt* is the basic notion of the discarded *Clark Brothers* doctrine—viz., that an employer's act of compelling his employees to attend a meeting on company time and property is an exercise of economic power which has an impact on freedom of choice separate and apart from anything the employer says. Like the union that sets up a picket line, the employer who calls his employees into a company meeting room or into his office establishes a "locus in quo" which has more potential for inducing action or non-action than the message he conveys.⁵² Whether this impact violates section 8(a)(1) is a question which "involves pre-eminently an exercise of judgment on matters peculiarly within . . . [the Board's]

⁵⁰ See *Johnston Lawn Mower Corp.*, 110 N.L.R.B. No. 220 (1954), Beeson dissenting.

⁵¹ See *NLRB v. F. W. Woolworth Co.*, 214 F. 2d 78 (6th Cir. 1954), denying enforcement of 102 N.L.R.B. 581 (1953). By rejecting the proposition that the employer's speech plus refusal to grant the union's request was a discriminatory application of the retail store's no-solicitation rule, the court threw doubt on the validity of the *Livingston Shirt* case. But see *Johnston Lawn Mower Corp.*, 110 N.L.R.B. No. 220 (1954), applying *Livingston Shirt* and distinguishing the *Woolworth* case on the ground that the no-solicitation rule was unlawful. (Beeson dissenting). See also *Foreman & Clark, Inc. v. NLRB*, 215 F. 2d 396 (9th Cir. 1954), upholding the Board's decision setting aside an election on the ground that both the *Bonwit Teller* and *Peerless Plywood* doctrines, 107 N.L.R.B. 427 (1953), *infra*, footnote 54, are within the Board's "wide . . . discretion in establishing the procedures and safeguards necessary to insure the fair and free choice of bargaining representatives by employees."

⁵² Compare, *Bldg. Serv. Employees v. Gazzam*, 339 U.S. 532, 537 (1950).

special competence."⁵³ Apparently the Board's present answer to the question is that it does not.

It is noteworthy, however, that the Board's current doctrine in election cases recognizes that such speeches produce an impairment of freedom of choice so substantial that they cannot be tolerated if they are made within the twenty-four hours immediately preceding the opening of the polls.⁵⁴ It is also noteworthy that the Board apparently still follows a *Clark Brothers* type of analysis in election cases where an employer delivers an anti-union speech to groups of ten or twelve employees called into his office during working hours.⁵⁵

⁵³ *Radio Officers Union v. NLRB*, 347 U.S. 17, 57 (1954) (concurring opinion); *Republic Aviation Co. v. NLRB*, 324 U.S. 793 (1945).

⁵⁴ *Peerless Plywood Co.*, 107 N.L.R.B. 427 (1953), holding that an employer's speech to his employees involuntarily assembled on company property and working time during the 24-hour period immediately prior to the opening of the polls justifies invalidating the election, regardless of what he said or how generous he was in permitting the union access to his property. (Murdock dissenting in part). The rationale of the rule is that such speeches becloud the employees' judgment and interfere with the thoughtful weighing of the issues involved. They have an "unwholesome and unsettling effect and tend to interfere with that sober and thoughtful choice which a free election is designed to reflect."

This rule is applicable even though the employer granted the union's request to make a speech under similar circumstances. *Cross Co.*, 107 N.L.R.B. 1267 (1954), (Murdock dissenting). *Accord*: *Hamilton Watch Co.*, 107 N.L.R.B. 1608 (1954), (Murdock dissenting). But if the union wins the election, the employer cannot urge his misconduct in making a speech and permitting the union to do likewise as a ground for setting aside the results. *Camp Milling Co.*, 109 N.L.R.B. No. 73 (1954), (Rodgers dissenting).

A violation of *Livingston Shirt* will cause the Board to set aside an election, *Detergents, Inc.*, 107 N.L.R.B. 1022 (1954), but a violation of *Peerless Plywood* is not an unfair labor practice, *Sparkletts Drinking Water Corp.*, 107 N.L.R.B. 1462 (1954). Thus, the Board has adopted a double standard in "captive audience" situations arising during the 24-hour period before the polls open. However, the Board apparently follows a single standard in other situations involving employer speech. *See American Laundry Machinery Co.*, 107 N.L.R.B. 511 (1953); *compare Metropolitan Life Ins. Co.*, 90 N.L.R.B. 935 (1950) with *National Furniture Mfg. Co.*, 106 N.L.R.B. 1300 (1953) and *Esquire, Inc.*, 107 N.L.R.B. 1238 (1954), which apparently abandon the double standard of *General Shoe Corp.*, 77 N.L.R.B. 124 (1948), *supra*, footnote 37. It follows that the Board believes that "captive audience" speech is more than the dissemination of ideas and information.

⁵⁵ *General Shoe Corp.*, 97 N.L.R.B. 499 (1951) (Such conduct by an employer is coercive because his statements are uttered in the locus of final authority). *Compare General Shoe Corp.*, 77 N.L.R.B. 124 (1948), cited in footnote 37, *supra*. *See George J. Meyer Mfg. Co.*, 111 N.L.R.B. 154 (1955) (Citing *General Shoe Corp.*, 97 N.L.R.B. 499, with approval in holding that interviews with each employee in employer's office constituted ground for setting aside an election). *See also Coolidge Corp.*, 108 N.L.R.B. No. 1 (1954) (Not ground for setting aside election where group meetings held in office outside working hours and attendance not compulsory). *Compare The Great Atlantic & Pacific Tea Co.*, 111 N.L.R.B. No. 106 (1955) (*Peerless Plywood* doctrine applied and election set aside where supervisor made speeches to groups of three to ten employees within the 24-hour period. Farmer dissenting).

Future developments remain to be seen. However, one cannot help but suspect that the last word on "captive audiences" has not been written.

II. INTERROGATION

Employers often want to know, for good or bad reasons or just out of idle curiosity, whether their employees are or have been union members, what their attitudes are towards unions, or what their reasons are for wanting unions. The NLRB has held since its inception that an employer's interrogation of his employees with respect to activities protected by section 7 may interfere with, restrain, or coerce them in the exercise of their rights to engage in such activities. An employer's questioning of his employees about their union activities manifests his interest, concern, or even apprehension about such activities, which may be interpreted by an employee, reasonably or unreasonably, as indicating displeasure, opposition, or even an intention to take discriminatory action against those engaged in such activities. One consequence may be that the employees will be intimidated into not engaging in such activities. Moreover, an employer's questioning often will force the employee to express a view against the union, which he may be embarrassed to reverse later.

Although interrogation involves speech, it is not primarily a means of expressing an opinion; it is rather a process of gathering information. Accordingly, the policy reasons for permitting an employer to freely state his views, arguments, and opinions do not apply to interrogation, and the Board does not apply section 8(c) of the Taft-Hartley amendments to interrogation.⁵⁶

In determining whether an employer's questioning of employees on their protected activities is an unfair labor practice, the test is necessarily the factual one under language of section 8(a)(1) whether the questioning interferes with, restrains, or coerces employees in the exercise of the rights guaranteed them in section 7 of the Act. The situations that arise are extremely varied.⁵⁷ There has never been any doubt under Board decisions that questioning may be coercive; the only issue has been whether all questioning is coercive *per se*, or whether a line may be drawn, and, if so, where.

At first the Board proceeded on a case by case basis and held various instances of interrogation to be unfair labor practices. However, gradually the rule evolved that any *systematic* interrogation of employees about their protected activities was *per se* an unfair labor practice. This became known as the *Standard-Coosa-Thatcher* doctrine.⁵⁸ The Board based this doctrine upon two grounds: (1) "Inherent in the very nature of the rights protected by section 7 is the . . . right of privacy in their enjoyment," and employer interrogation is an intrusion into this exclusive

⁵⁶ Ames Spot Welder Co., 75 N.L.R.B. 352, 355 (1947).

⁵⁷ For a resume of some of the situations involving interrogation, see 15 N.L.R.B. Ann. Rep. 93-6 (1950); and 16 N.L.R.B. Ann. Rep. 144-6 (1951).

⁵⁸ 85 N.L.R.B. 1358 (1949).

employee domain which interferes with this right; (2) Interrogation about union activities, like open surveillance of union meetings, always tends to restrain or coerce.

The Board applied this rule even where the employer's purpose in interrogating the employees was to determine whether the union represented a majority so that he could know whether he was compelled to bargain with it or to determine whether unionization was imminent in order to decide how much wages he would have to pay so he could determine how much to bid on a government contract.⁵⁹

The Board gradually extended the doctrine to its extreme, and by the 1950's it took the position that almost all interrogation was *per se* an unfair labor practice, notwithstanding that the inquiries were isolated or innocuous.⁶⁰ However, either because the courts would not accept such an extreme doctrine or because the Board itself felt that the doctrine should be reasonably limited, it refused to base an unfair labor practice on extremely isolated, casual and in-consequential questioning.⁶¹

In July 1954, after the change in national administration in Washington in 1952 and after the Republican appointees became a majority on the Board, there was a noticeable shift in the Board's attitude on interrogation. In the *Blue Flash Express* case⁶² the Board ruled that an employer did not commit an unfair labor practice where he systematically questioned all the employees in the office individually to determine whether a union had majority status in order to answer the union's request to bargain. Both the majority and the dissenting members agreed that this decision represented a shift in Board policy. Indeed, the Board expressly overruled the *Standard-Coosa-Thatcher* doctrine, and held that the test is whether, under all the circumstances, the interrogation reasonably tends to restrain or interfere with employees in the exercise of rights guaranteed by the act.

No reasonable man would deny that this change was a result of a change in Board personnel brought about by a change in national administration. The fact that the new members were in the majority whereas the old members dissented, the fact that the change came so quickly after the change in Board personnel, and the fact that the change was not caused by any very recent appellate decision, makes this seem

⁵⁹ C. Pappas Co., 82 N.L.R.B. 765 (1949); Russell Kingston, 74 N.L.R.B. 484 (1947), *petition for enforcement denied*, 172 F. 2d 771 (6th Cir. 1949). An exception was made, however, where the questioning was necessary to enable the employer to defend against an unfair labor practice charge. See discussion in Joy Silk Mills, 85 N.L.R.B. 1263 (1949).

⁶⁰ 16 N.L.R.B. Ann. Rep. 146 (1951); 17 N.L.R.B. Ann. Rep. 112 (1952). Montgomery Ward & Co., Inc., 93 N.L.R.B. 640 (1951).

⁶¹ U. S. Gypsum Co., 93 N.L.R.B. 966, 968 (1951); Wilson & Company, 95 N.L.R.B. 882 (1951), (Herzog dissenting); Stafford Operating Company, 96 N.L.R.B. 1217, 1221 (1951); Beaver Machine & Tool Co., 97 N.L.R.B. 33 (1951); Boston & Lockport Block Co., 98 N.L.R.B. 686, 692 (1952).

⁶² 109 N.L.R.B. No. 85 (1954).

certain. However, the motivations of the new personnel in making this change are by no means so clear. Critics of the new Board have intimated that the change must have been motivated by a pro-employer bias. Board Chairman Farmer on the other hand has contended that this decision was required by decisions in several circuit courts, and that the Board was obliged to conform to those decisions.⁶³ The only way of resolving this dispute is to examine the difference between the majority and minority opinions and then examine the decisions of the court of appeals to see whether such decisions require acceptance of the majority view or the dissenting view.

A. The difference between the majority and the dissent.

The majority and the dissent agree that the test is whether the interrogation, reasonably interpreted, tends to impair the free exercise by employees of their rights under the Act, and that in applying this test the Board may carefully weigh and evaluate all the evidence. Since the dissenters agree with this formulation of the test, apparently they join the majority in rejecting the right of privacy rationale upon which the *Standard-Coosa-Thatcher* doctrine rested in part. However, their opinion is ambiguous on this point. Both majority and dissent agree that isolated, casual and very inconsequential questioning is not a violation. The majority holds that a systematic interrogation of employees on their union status in order to determine whether a union represents a majority of employees may not be an unfair labor practice where there are no circumstances or history indicating that the questioning has a coercive effect. They also hold that motive is one of the material circumstances in making this determination. The position of the dissenters appears to be that any such systematic interrogation is *per se* an unfair labor practice, regardless of the employer's motive. The dissenters also emphasize that an employer may find out by other means whether a union represents a majority.

B. The authorities.

The majority and the dissent agree that the test is whether the employees on their union status is not *per se* an unfair labor practice is supported by the decision of the Tenth Circuit in *Atlas Life Insurance Co. v. N.L.R.B.*,⁶⁴ where an employer orally asked his employees whether they were union members in order to discover the union's status, and by the opinion of the Ninth Circuit in *Wayside Press, Inc. v. N.L.R.B.*,⁶⁵ where an employer's employment application blank asked whether the applicant belonged to a union. Both of these decisions are inconsistent with the position of the dissent in the *Blue Flash* case. The majority's opinion is also supported by the language of several other recent decisions to the effect that whether questioning is unlawful is an

⁶³ Speech before the Cleveland Bar Association, March 16, 1955, reported at 35 L.R.R. 407.

⁶⁴ 195 F. 2d 136 (10th Cir. 1952).

⁶⁵ 206 F. 2d 862 (9th Cir. 1953).

issue of fact; but these other decisions did not involve systematic interrogation and could have been distinguished on this ground.⁶⁶ Although the courts of appeal in many cases had sustained the Board in basing an unfair labor practice charge on interrogation, the dissenters could not cite appellate authority for the proposition that all systematic interrogation is *per se* an unfair labor practice.

In summary, there was adequate judicial support for the Board's decision in the *Blue Flash* case. However, since the precise issue was not settled in many circuits, the Board was not compelled to reverse its previous position without arguing the issue in other circuits and attempting to obtain Supreme Court review. The Board no doubt changed its position and the shift was immediately caused by a change in Board personnel, but in view of the state of the law in the courts of appeal, abandonment of the *Standard-Coosa-Thatcher* doctrine was not surprising. However, the essentials of the new doctrine are not entirely clear.

The Board's rejection of the view that interrogation *per se* interferes with the employees' right of privacy as spelled out in the *Standard-Coosa-Thatcher* case is a change of considerable significance. However, perhaps a more significant aspect of the decision is the holding that motive is a material factor in determining whether interrogation violates the act. Unfortunately the majority opinion does not specify exactly what role motive plays in resolving this issue.

The facts of the *Blue Flash* case show that the employer wanted to ascertain the union's strength in order to decide how to respond to its demand for recognition. Although he revealed this motive to the questioned employees, some of them were so apprehensive that they did not answer truthfully. The Board majority did not regard this evidence as controlling, apparently because they thought that the employees' reaction under the circumstances was unreasonable. This part of the opinion suggests that systematic interrogation does not produce an illegal effect unless the General Counsel proves that the questioning instilled fear in the employees and that their reaction was reasonable. However, this is a doubtful interpretation. The subjective reactions of particular employees to their employer's conduct have not generally been decisive in section 8(a)(1) cases. It seems more likely that the position of the Board majority simply is that the fact that some employees were apprehensive about the interrogation is no more important than the fact that some others were not. Moreover, whether interrogation is an unfair labor practice should not turn on whether the questioned employees were truthful in their

⁶⁶ *Sax v. NLRB*, 171 F. 2d 769 (7th Cir. 1948); *NLRB v. Winer*, 194 F. 2d 370 (7th Cir. 1952); *NLRB v. England Bros.*, 201 F. 2d 395 (1st Cir. 1953); *NLRB v. Tennessee Coach*, 191 F. 2d 546 (6th Cir. 1951); *NLRB v. Montgomery Ward*, 192 F. 2d 160 (2d Cir. 1951); *NLRB v. Associated Dry Goods Corp.*, 209 F. 2d 593 (2d Cir. 1954); *NLRB v. Reynolds & Manley Lumber Co.*, 212 F. 2d 1555 (5th Cir. 1954).

answers, for if it did an employer could never tell in advance whether his conduct was permissible.

If this analysis is sound, the controlling test is the vague one of reasonableness. Except the cases where the interrogation is set in a context of unfair labor practices (and perhaps even there, since it may be inferred from such a context that the purpose of the interrogation was to interfere with the exercise of employee rights), the fact that emerges as decisive in determining whether, "under all of the circumstances," the interrogation "reasonably tends" to restrain or interfere with employees in the exercise of their section 7 rights is the employer's motive, established by his statements, his conduct before, during, and after the interrogation, and the use he made of the information gleaned. What motives justify interrogation, whether proof of a bad motive is part of the General Counsel's case or proof of a good motive is part of the employer's defense, or whether the employer, assuming that he has a proper motive, must reveal it at the time of the interrogation, are matters for speculation.

The Board's position may be that systematic interrogation impairs the free exercise of the rights of section 7 but is privileged where it is undertaken for a business purpose which the Board recognizes as proper. Under this view the Board's judgment in respect to the usual effect of systematic interrogation remains unchanged but a limited area of employer privilege is recognized. If this is the correct interpretation of the *Blue Flash* decision, it had support in the opinions of the courts of appeals.⁶⁷

On the other hand, *Blue Flash* may be read to mean that systematic interrogation does not tend to restrain or coerce unless the employer undertook it for that purpose. Under this view interrogation cases will be disposed of by applying the test which is used in situations where an employer increases wages shortly before an election. The Board's position in these cases is that the employer's conduct interferes with the employees' free exercise of the rights of section 7 and violates section 8(a)(1) where the conduct, its timing, and other circumstances establish that he intended such interference.⁶⁸ If this is what the *Blue Flash* decision means, it represents a major change in Board policy because it recognizes that an employer has as legitimate an interest in discovering his employees' attitudes about trade unionism as he has in running his business affairs. Under this interpretation, systematic interrogation is not a violation unless the General Counsel proves that the employer wanted the information for the purpose of defeating the union.^{68a}

⁶⁷ See *NLRB v. Kingston*, 172 F. 2d 771 (6th Cir. 1949).

⁶⁸ *Hudson Hosiery Co.*, 72 N.L.R.B. 1434 (1947). Cf. *Radio Officer's Union v. NLRB*, 347 U.S. 17 (1954), discussing the requirements for proof of motive and effect in discrimination cases under section 8(a)(3).

^{68a} This position is supported, at least inferentially, by the court's opinion in *Wayside Press, Inc. v. NLRB*, 206 F. 2d 862 (9th Cir. 1953) (Interrogation not unlawful unless evidence of a background of union hostility or of attempts to use information so garnered to restrain or coerce).

III. SURVEILLANCE AND ESPIONAGE

The Board has continually held that an employer violates section 8(a)(1) where he engages in espionage or surveillance of union activities, or intentionally creates the appearance of surveillance. Such espionage or surveillance tends to cause employees who engage in union activities to be apprehensive of their job security and thus to restrain and interfere with organizational activity. Indeed espionage and surveillance were among the evils to which the original Wagner Act was directed, and a substantial proportion of the cases in the Board's early years involved charges of espionage and surveillance. The Board has been so consistent in holding that espionage and surveillance constitute unfair labor practices that the number of cases raising the issue is much fewer now than formerly, and the items of surveillance involved in these cases are often inconsequential or isolated. Although there have been slight changes in the Board's policy in minor borderline situations,⁶⁹ the main rules have continued unchanged. Indeed, the great majority of the current charges of unlawful interrogation or surveillance are decided pretty much as they always have been. The violations now presented to the Board appear less flagrant than those of the 1930's, but they continue to exist and they continue to form the basis of unfair labor practice findings.⁷⁰

It is arguable, however, that the decision in *Blue Flash* will have some influence on the disposition of these cases. Surveillance and espionage, like interrogation, are methods for gathering information. Successfully concealed surveillance or espionage can hardly be said to restrain or coerce. Decisions holding that such conduct violates section 8(a)(1) rest upon the notion that this type of employer intrusion into the field of union activity which the act exclusively reserves to his employees is an "interfering with" under section 8(a)(1) and hence an unfair labor practice.⁷¹ Having apparently rejected this rationale in the *Blue Flash* case, the Board may re-examine the cases involving successfully concealed surveillance and espionage.

When surveillance is known to the employees, it is like interrogation. Such surveillance tends to restrain or coerce, even though some of the

⁶⁹ For example in the situation where an employer instructs a supervisor to engage in surveillance and the instruction is never carried out, see the following sequence of decisions: J. A. Booker, 78 N.L.R.B. 553, 554 (1948) (not unfair labor practice); H. N. Thayer Company, 99 N.L.R.B. 1122, 1125 (1952) (statement that such an instruction is itself unfair labor practice); Florida Builders, Inc., 111 N.L.R.B. No. 130 (1955) (not unfair labor practice).

⁷⁰ Nashua Mfg. Corp., 108 N.L.R.B. No. 117 (1954); Lewis Coal Co., 108 N.L.R.B. No. 125 (1954); Hunt Heater Corp., 108 N.L.R.B. No. 200 (1954); Hudson Hosiery Co., 109 N.L.R.B. No. 197 (1954); Wells Dairies Cooperative, 110 N.L.R.B. No. 142 (1954); News Printing Co., 110 N.L.R.B. No. 209 (1954); Idaho Egg Producers, 111 N.L.R.B. No. 12 (1955); Cornell-Dubilier Electric Corp., 111 N.L.R.B. No. 46 (1955).

⁷¹ Montgomery Ward & Co., 17 N.L.R.B. 191 (1940); H. N. Thayer Co., 99 N.L.R.B. 1122 (1952).

employees who were its victims continued their union activities.⁷² It is conceivable that the Board might apply its *Blue Flash* doctrine to cases involving open surveillance. If it does so, a major change in Board policy will be worked. Thus far, however, there is no evidence that the Board is applying the *Blue Flash* doctrine to such cases.

IV. CONCLUSIONS

While the NLRB has made many significant doctrinal changes during its 20-year life, the number of such changes is no greater than might be expected from an administrative agency working on a legal frontier under a statute that generally grants it a wide discretion in fashioning policy. Indeed, if one subtracts the policy changes which apparently have been reactions either to Congress or the courts, a rather stable pattern is revealed. So far as major changes in doctrine governing the issues we have examined are concerned, only the adoption of the *Bonwit Teller* doctrine and its subsequent replacement by the *Livingston Shirt* doctrine cannot be satisfactorily explained as Board responses to the compulsions of either statutory language or judicial opinions.

It is arguable that the abandonment of the *American Tube Bending* doctrine, in "captive audience" cases, the overruling of the decision in the *Clark Brothers* case, and the adoption of the *Blue Flash* doctrine should be added to this list. However, the argument is not entirely convincing.

It is true that the Board might have persisted in following the *American Tube Bending* doctrine even after the Second Circuit's refusal to enforce. However, that court's position was so plainly supported by the Supreme Court's decision in the *Virginia Electric & Power* case that the Board's choice seemingly was based on an accurate appraisal of the limits of its powers.⁷³ It is also true that the language of section 8(c) did not literally require overruling of the *Clark Brothers* doctrine, which did not regulate either the expression or dissemination of opinions as such but regulated a particular method of utterance. Indeed, section 8(c) has been held not to protect from regulation particular methods for uttering union speech, i.e., peaceful picketing.^{73a} However, the legislative history of that section of the Taft-Hartley amendments was sufficiently clear to make it likely that Board persistence in following the doctrine would have been interpreted by Congress as an act of defiance. It is also possible that adoption of the *Blue Flash* doctrine in interrogation cases may represent a change of policy that goes beyond anything

⁷² *Montgomery Ward & Co.*, 17 N.L.R.B. 191 (1940) (It is immaterial that the prescribed conduct does not produce the desired result); *Cf. Somerset Classics, Inc.*, 90 N.L.R.B. 1676 (1950).

⁷³ *See NLRB v. Montgomery Ward Co.*, 157 F. 2d 486 (8th Cir. 1946), *denying enforcement* of 64 N.L.R.B. 432 (1945).

^{73a} *IBEW v. NLRB*, 341 U.S. 694 (1951).

required by the courts of appeals. But until the full meaning of the *Blue Flash* case is revealed by subsequent decisions, this is suspicion rather than fact.

Even where Board changes cannot be satisfactorily explained either by the Taft-Hartley amendments or the opinions of the courts of appeal, there is little convincing evidence that they were caused by shifts of the political winds. The substitution of the *Livingston Shirt* doctrine for the *Bonwit Teller* doctrine was rather plainly related to changes in Board personnel, but it is certainly not clear that this shift in policy was motivated by a desire to favor management over labor. Indeed, the chairman of the predecessor Board had from time to time manifested his disapproval of the "broad" *Bonwit Teller* doctrine for reasons which conform substantially to those underlying the decision in the *Livingston Shirt* case.⁷⁴

Adoption of the *Blue Flash* doctrine may possibly be more disturbing. If it reflects a Board tolerance for all kinds of interrogation and surveillance except where an intention to interfere with the exercise of section 7 rights is proved, *Blue Flash* may fairly be said to reflect either a pro-management bias or an astonishing ignorance of the facts of industrial life. But it is by no means clear that the *Blue Flash* decision is intended to have such far-reaching implications.

In general, at least so far as the issues we have examined are concerned, the NLRB, while it has often been the subject of political pressures, seems to have resisted them well—better, perhaps, than one might have supposed *a priori*. The drift of doctrine has been in the general direction of greater tolerance for various forms of employer conduct. However, this trend, even where it has been given impetus by changes in Board personnel, e.g., the decision in the *Blue Flash* case, is explicable on grounds other than the paying off of political debts.

⁷⁴ See footnote 45, *supra*.