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COMMENTS

LABOR RELATIONS — FREE SPEECH FOR WHOM?

INTRODUCTION

The First Amendment to the United States Constitution prohibits Congress from enacting any law which abridges the freedom of speech.[1] Furthermore, the United States Supreme Court has held that the right of free speech is an *absolute* one, and that a *prior* restraint may not be made in the absence of a "clear and present danger."[2] The speaker may, however, find himself liable, civilly or criminally, for the consequences of his utterance,[3] as, for example, when his statement is slanderous,[4] offensive,[5] treasonous,[6] or prejudicial to military security.[7]

A relatively new branch of the law of free speech has been created by the expansion of Labor Law into a major legal battleground.[8] This branch is concerned with the limitations which either the courts or the legislature[9]

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1. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

2. The "clear and present danger" doctrine was enunciated by Justice Holmes in the famous case, Schenck v. United States, 249 U.S. 47, 52 (1919), in the following language:

> The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater, and causing a panic . . . . The question in every case is whether the words used are used in such circumstances as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.

3. The Florida Constitution specifically provides that the speaker shall be liable for the abuse of his free speech right. See note 119 *infra.*

4. Beauharnais v. Illinois, 343 U.S. 250 (1952); Anderson v. Hearst Publishing Co., 120 F. Supp. 850 (S.D. Cal. 1954); Emde v. San Joaquin County Central Labor Council, 132 P.2d 279 (Cal. 1942).

5. Beauharnais v. Illinois, *supra* note 4; State v. Chaplinsky, 91 N.H. 310, 18 A.2d 754 (1941); People *on complaint of* Gould v. Vogt, 178 Misc. 446, 34 N.Y.S.2d 968 (1942).

6. Gilbert v. Minnesota, 254 U.S. 325 (1920); Abrams v. United States, 250 U.S. 616 (1919); Dunne v. United States, 138 F.2d 137 (8th Cir. 1943) *cert. denied,* 320 U.S. 790 (1943).

7. Dennis v. United States, 341 U.S. 494 (1951); Gilbert v. Minnesota, *supra* note 6; United States v. Pierce, 252 U.S. 239 (1919); Abrams v. United States, *supra* note 6; Schenck v. United States, 249 U.S. 47 (1919); Hickson v. United States, 258 Fed. 867 (4th Cir. 1919); Fraina v. United States, 255 Fed. 28 (2d Cir. 1918).

8. This statement hardly needs support, but it is interesting to compare the approximate number of pages in successive issues of the *Decennial Digests* devoted to labor problems. The *Third Decennial* (1916 to 1926) had 18 pages, compared with 32 pages in the *Fourth Decennial,* and 104 pages in the *Fifth Decennial.* The topic *Labor Relations* was not listed as such until 1952 in volume 15 of the *General Digest.* In addition to the continually increasing case law, we must not overlook the numerous state and federal acts which have been passed during the past twenty-five years, nor the prodigious bulk of Administrative Law which has evolved during this period.

9. For examples of legislative controls upon labor controversies which were held violative of the constitutional guarantee of free speech, see Carlson v. People, 310 U.S. 106 (1939); People v. Gidaly, 93 P.2d 660 (Cal. 1939); People v. Harris, 104 Colo. 386, 91 P.2d 989 (1939).

may impose upon the free speech of the parties to a labor dispute. Possibly because such disputes have led to utterances of the most reprehensible sort,[10] Congress, acting through the National Labor Relations Board, *has,* in effect, placed prior restraints on the speech of the parties through the use of its "cease and desist" orders.

It is the purpose of this comment to analyze and evaluate the changing trends in this field of law, with particular emphasis on the free speech rights of employers.

HISTORICAL

Until the enactment of the National Labor Relations Act in 1935, (hereinafter referred to as the Wagner Act) the rights of both employees and employers in labor disputes were determined almost exclusively by state law.[11] At least one case under the Railway Labor Act[12] may be found in which the issue of free speech was determined, [13] and several cases[14] appear under the ill-fated National Recovery Act.[15]

The Wagner Act brought about a forceful codification of a labor "Bill of Rights", guaranteeing for the first time many of the rights and privileges for which labor unions had long agitated.[16] While the scope of the Act was

10. Many cases may be found in which either an employer or union agitators have resorted to threats of physical violence, extortion, loss of employment, damage to property, etc. While such threats may give rise to an ordinary tort action, they have become a problem peculiar to labor law, and are most frequently handled as such. See Milk Wagon Drivers Union of Chicago v. Meadowmoor Dairies Inc., 312 U.S. 287 (1941); American Steel Industries v. Tri-City General Trades Council, 257 U.S. 184 (1921); N.L.R.B. v. International Union of Operating Engineers, AFL, 216 F.2d 161 (8th Cir. 1954); N.L.R.B. v. Longshoremen's & Warehousemen's Union, 210 F.2d 581 (9th Cir. 1954); Pacific American Shipowners Ass'n, 98 N.L.R.B. 582 (1952); Tiny Town Togs, 7 N.L.R.B. 54 (1938); Mitnick v. Furniture Workers Union, 124 N.J. Eq. 147, 200 Atl. 553 (1938); Busch Jewelry Inc., v. United Retail Employees Union, 281 N.Y. 150, 22 N.E.2d 320 (1939).

11. Eg., H.B. Rosenthal-Ettlinger Co. v. Schlossberg, 149 Misc. 210, 266 N.Y.S. 762 (1933) (employer may not induce employees to resign from unions by threats, false statements, or intimidation); Esco Operating Corporating Corp. v. Kaplan, 144 Misc. 646, 258 N.Y.S. 303 (1932) (picketing may be enjoined if misleading signs, false statements, or veiled threats are used).

12. 44 STAT. 577 (1926), as amended, 45 U.S.C. §§ 151-163, 181-188 (1952).

13. *E.g.,* Texas and New Orleans R.R. v. Brotherhood of Railway and Steamship Clerks, 281 U.S. 548, 568 (1930), in which the Supreme Court interpreted the Railway Labor Act (44 STAT. 577, 45 U.S.C. § 152) which provided ". . . representatives shall be designated without interference, influence, or coercion exercised by either party . . . ." The Court remarked that this clause was "not to be taken as interdicting the normal communications which are a part of all friendly intercourse, albeit between employer and employee."

14. Fryus v. Fair Lawn Fur Dressing Co., 114 N.J. Eq. 462, 168 Atl. 862 (1933) (employer violated National Recovery Act §§ 4(a), 7(a) by coercing employees to join one union rather than another) Fine Rough Hat Co., 1 N.L.R.B. Case No. 361 (1935); Berger Manufacturing Co., 1 N.L.R.B. Case No. 349 (1935); Proctor and Gamble Co., 1 N.L.R.B. Case No. 221 (1935); Shuter Gaio Co., 1 N.L.R.B. Case No. 207 (1934); Globe Gabbe Co., 1 N.L.R.B. Case No. 206 (1934).

15. 48 STAT. 195 (1933), 15 U.S.C. § 701 (1934).

16. For example, legal recognition of a particular union as the exclusive bargaining representative for the workers (Section 9(a)), the right to form a closed shop (Section 8(3)), prohibition of certain kinds of employer discrimination and coercion (Sections 7 and 8), plus the establishment of elaborate administrative machinery for the settlement of labor disputes (Sections 10 and 11).

constitutionally limited by the commerce clause,[17] its coverage became extremely broad as a result of the Supreme Court's liberal construction of the "affecting commerce" doctrine.[18]

The specific clause in the Wagner Act which raised the issue of employer free speech was Section 8(1), prohibiting the employer from interfering with, or coercing his employees in their right of self-organization. The newly-founded National Labor Relations Board, armed with this clause, quickly held unfair *any express* threats or promises of benefit on the part of the employer, whether or not accompanied by action.[19] Furthermore, under the rationale that the employer utterances might carry an *implied* threat to those who are potential victims of his economic power, in a series of rulings, the National Labor Relations Board struck down as unfair virtually every statement made by an employer on the subject of organized labor, no matter how innocuous or moderately phrased.[20]

Perhaps the philosophy of the Board at that time was best summed up in the words of Mr. Justice Douglas, speaking in *International Association of Machinists v. N.L.R.B.*[21]

> For slight suggestions as to the employer's choice between unions may have telling effect among men who know the consequences of incurring that employer's strong displeasure.[22]

In 1944, the United States Supreme Court, though strongly liberal in its economic philosophy, perhaps recognized the lengths to which this "implied threat" doctrine had been carried, and in *Thomas v. Collins*[23] stated, by way of dicta:

> Accordingly, decision here has recognized that employer's attempts to persuade to action with respect to joining or not joining unions are within the First Amendment guaranty.[24]

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17. U.S. CONST. Art. I, § 8.
18. N.L.R.B. v. Fainblatt, 306 U.S. 601 (1939); Santa Cruz Fruit Packing Company v. N.L.R.B., 303 U.S. 453 (1938); N.L.R.B. v. Friedman-Harry Marks Clothing Co., 301 U.S. 58 (1937); N.L.R.B. v. Fruehauf Trailer Co., 301 U.S. 49 (1937); N.L.R.B. v. Jones and Laughlin Steel Corp., 301 U.S. 1 (1937).
19. National Casket Co., 1 N.L.R.B. 963 (1936); Smith Cabinet & Mfg. Co., 1 N.L.R.B. 950 (1936); Brown Shoe Co., 1 N.L.R.B. 803 (1936); Washington, Virginia, and Maryland Coal Co., 1 N.L.R.B. 769 (1936); Friedman-Harry Marks Clothing Co., 1 N.L.R.B. 411 (1936); The Timken Silent Automatic Co., 1 N.L.R.B. 335 (1936).
20. Columbia Enameling & Stamping Co., 1 N.L.R.B. 181 (1936); Ingram Mfg. Co., 5 N.L.R.B. 908 (1938); Hoover Co., 6 N.L.R.B. 688 (1938); Proximity Print Works, 7 N.L.R.B. 803 (1938); Virginia Ferry Co. v. N.L.R.B., 8 N.L.R.B. 730 (1938), *order enforced*, 101 F.2d 103 (4th Cir. 1939); Picker X-ray Corp., 12 N.L.R.B. 1384 (1939); Oregon Worsted Co., 14 N.L.R.B. 37 (1938); Steward Die Casting Co., 14 N.L.R.B. 113 (1939); Maryland Nut and Bolt Co., 14 N.L.R.B. 707 (1939); Wickwire Brothers, 16 N.L.R.B. 316 (1939); Rockford Mitten and Hosiery Co., 16 N.L.R.B. 501 (1939); Cleveland Cliffs Iron Co., 30 N.L.R.B. 1093 (1941); Germain Seed and Plant Co., 37 N.L.R.B. 1090 (1941); Columbian Powder Co., 40 N.L.R.B. 227 (1942); Sport Wear Hosiery Mills, 41 N.L.R.B. 668 (1942).
21. 311 U.S. 72 (1940).
22. *Id.* at 78.
23. 323 U.S. 516 (1944). See also the remarks of L. Hand, J., in N.L.R.B. v. Federbush Company, 121 F.2d 954 (2d Cir. 1941).
24. 323 U.S. at 527.

A square holding to this effect may be found in *N.L.R.B. v. American Tube Bending Co.*,[25] a case which, however, along with the *Thomas* case, seemingly wielded little influence upon subsequent Board rulings. In the words of the Senate Committee on Public Welfare:[26]

> The Board has placed a limited construction upon these decisions by holding such speeches by employers to be coercive if the employer was found guilty of some other unfair labor practice, even though severable or unrelated . . . or if the speech was made in the plant on working time . . . . The Committee believes these decisions are too restrictive . . . .[27]

The framers of the Labor-Management Relations Act,[28] (hereinafter referred to as the Taft-Hartley Act) under the guidance of the late Senator Robert A. Taft, sought, by legislative fiat, to correct the constitutionally and morally questionable rulings of the National Labor Relations Board in this area, which apparently were otherwise to remain immune from judicial review. Accordingly, Section 8(c)[29] was incorporated into the new Act, guaranteeing to *each* side freedom to express its views if no threat of reprisal or promise of benefit be made. This section has since been construed in a number of Board rulings and court decisions with the overall effect of restoring, to a great measure at least, the benefits of the First Amendment to employers.[30]

We shall now discuss the specific problems which arise when the employer or the employees make pro- or anti-union utterances, and the extent to which such activities are constitutionally protected.

THE EMPLOYER'S PREMISES AS A FORUM FOR PRO- OR ANTI-UNION ACTIVITIES

The landmark case upholding the right of a labor union to solicit employees on the employer's property is *Republic Aviation Company v. N.L.R.B.*,[31] where it was held that an employer could not prohibit such activity, even though it did *not* appear that the union would have no other

25. 134 F.2d 933 (2d Cir. 1943).
26. Senate Report No. 105, 80th Congress, 1st Session, p. 23.
27. The Committee referred to Monumental Life Insurance Company (69 N.L.R.B. 247 (1946) in which the "totality of conduct" doctrine was applied regarding employer utterances. See p. 46 *infra* for a further discussion of this doctrine.
28. 61 STAT. 136 (1947), as amended, 29 U.S.C. §§ 141-188 (1952).
29. "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or promise of benefit."
30. N.L.R.B. v. F.W. Woolworth Co., 214 F.2d 78 (6th Cir. 1954); Indiana Metal Products Corp. v. N.L.R.B., 202 F.2d 613 (7th Cir. 1953); N.L.R.B. v. Ray Smith Transportation Corp., 193 F.2d 142 (5th Cir. 1951); Pittsburgh Steamship Co. v. N.L.R.B. 180 F.2d 731 (6th Cir. 1950); N.L.R.B. v. O'Keefe & Merritt Mfg. Co., 178 F.2d 445 (9th Cir. 1949); National Furniture Mfg. Co., 106 N.L.R.B. 228 (1953); Union Carbide and Carbon Corp., 100 N.L.R.B. 689 (1952); Crowley's Milk Co., 88 N.L.R.B. 1049 (1950); United Aircraft Corp., 85 N.L.R.B. 183 (1949); Macon Textiles, 80 N.L.R.B. 1525 (1948).
31. 324 U.S. 793 (1945).

opportunity to contact the workers.[32] This decision has been followed without substantial modification even after the enactment of the Taft-Hartley Act. The only significant limitation to the *Republic* holding has been *May Department Stores*,[33] a pre-Taft-Hartley decision which held that the management of a retail store could properly prohibit union solicitation on its selling floors. The decision was made on a purely practical basis, namely, that a chaotic condition might result in the store if union solicitors and customers were each to compete for the attention of the sales clerks.[34]

While the right of employees and union representatives to use the employer's premises as a forum seems fairly well settled, not so is the right of the employer to use his *own* premises for that purpose. If the employer attempts to express his views on the question of unionization, he will find himself sharply limited by the rules which have been established by the National Labor Relations Board and by the courts regarding coercive utterances.[35] These will be discussed later. Furthermore, if he decides to air his views *orally* during working hours (rather than via the plant bulletin board, or by leaflet distribution) he will run headlong into an additional legal entanglement known as the *captive audience* doctrine.

The captive audience doctrine was enunciated in *Clark Brothers*,[36] a leading pre-Taft-Hartley decision, which, as might be expected, held that it was unfair for an employer to exercise the control of his employees during working hours for the purpose of delivering an anti-union speech. The Board disregarded the fact that the employees were actually free to leave if they did not care to hear the speech,[37] (and were undoubtedly less "captive" than if they were listening to a pro-union speech at the union hall, under the surveillance of union agitators).

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32. The Court quoted, with approval, the following excerpts from the Board's ruling (51 N.L.R.B. 1186, 1195):

> The respondent's employees . . . . were entirely deprived of their normal right to 'full freedom of association' in the plant on their own time, the very time and place uniquely appropriate and almost solely available . . . . Inconvenience or even some dislocation of property rights, may be necessary to safeguard the right to collective bargaining.

33. 154 F.2d 533 (8th Cir. 1946), *affirming with modifications* May Department Stores Co., 59 N.L.R.B. 976 (1944).

34. ". . . the solicitation if carried on on the selling floor, where customers are normally present, might conceivably be disruptive of the respondent's business." (59 N.L.R.B. at 981).

35. In spite of the enactment of Section 8(c) of the Taft-Hartley Act, the employer must still be careful not to step into the prohibited area of coercion—an area by no means clearly defined. *See and compare* N.L.R.B. v. Protein Blenders, 215 F.2d 749 (8th Cir. 1954); N.L.R.B. v. Associated Dry Goods Corp., 209 F.2d 593 (2d Cir. 1954); N.L.R.B. v. Ray Smith Transport Co., *supra* note 30; N.L.R.B. v. O'Keefe & Merritt Mfg. Co., *supra* note 30; N.L.R.B. v. West Ohio Gas Co., 172 F.2d 685 (8th Cir. 1949); Protein Blenders, 105 N.L.R.B. 890 (1953); Cary Lumber Co., 102 N.L.R.B. 406 (1953); Farmers Cooperative Co., 102 N.L.R.B. 144 (1953); Corning Glass Works, 100 N.L.R.B. 444 (1952); Long-Lewis Hardware Co., 90 N.L.R.B. 1403 (1950).

36. 163 F.2d 373 (2d Cir. 1947), *enforcing*, 70 N.L.R.B. 802 (1946).

37. Even though the workers were being paid to listen to the anti-union speech, it is nowhere suggested in the Board's opinion that the employees were actually restrained. See 70 N.L.R.B. at 804.

After the Taft-Hartley Act went into effect, *Clark Brothers* was expressly repudiated in *Babcock and Wilcox*,[38] a 1948 ruling. The Board concluded that the new section, 8(c), gave the employer the right to address his employees concerning labor problems, regardless of the time or place. This interpretation of section 8(c) was reaffirmed in *S & S Corrugated Paper Machinery Co., Inc.*[39] on essentially the same facts. However, in 1951, the National Labor Relations Board reversed itself again, by overruling *Babcock & Wilcox* in the famous *Bonwit Teller*[40] case, and was upheld by United States Court of Appeals for the Second Circuit.[41] Because of its significance, the *Bonwit Teller* case merits fuller discussion at this point.

Bonwit Teller, a well-known New York retail store, enforced a rule which prohibited union solicitation on its selling floors during working hours. It will be recalled that, under the *May Department Stores* decision,[42] such a "no-solicitation" rule is valid. A management representative of Bonwit Teller made a so-called "captive audience" speech to the employees during working hours, and then refused to provide equal time during working hours for a union rebuttal. The Board held that the employer's speech was coercive, but this finding was set aside by the court. The significant part of the decision lies in its holding that, where a no-solicitation rule was in effect, it was unfair for the employer not "to abstain from campaigning on the same premises to which the union was denied access."[43] Swan, J., dissented on the grounds that the act contains no suggestion that a similar opportunity must be accorded the union whenever the employer exercises his free speech privilege guaranteed by section 8(c).[44]

In 1953, a similar situation arose in *N.L.R.B. v. American Tube Bending Company*,[45] (note that this is *not* the same case referred to in note 25) where the employer made an anti-union speech during working hours, and at the same time imposed a no-solicitation rule during both *working and non-working* hours. The court struck down the no-solicitation rule on the authority of the *Republic* decision,[46] and went on to hold that the employer's speech, made while such a rule was in force, constituted

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38. 77 N.L.R.B. 577 (1948). *Compare* Merry Brothers Tile & Brick Co., 75 N.L.R.B. 136 (1947) which ruled that a captive audience speech *would* be unlawful if a similar opportunity were not afforded the union organizers.
39. 89 N.L.R.B. 1363 (1950).
40. Bonwit Teller Inc., 96 N.L.R.B. 608 (1951), *order enforced with modifications*, 197 F.2d 640 (2d Cir. 1952), *cert. denied*, 345 U.S. 905 (1953).
41. The majority opinion in this case was written by Augustus J. Hand, J.
42. See note 30 *supra*, and the related text.
43. 197 F.2d at 645.
44. *Id.* at 646.
45. 205 F.2d 45 (2d Cir. 1953) *affirming* American Tube Bending Co., 102 N.L.R.B. 735 (1953).
46. See note 31 *supra*.

an "added unfair practice."[47] An important distinction between this case and *Bonwit Teller*, of course, is that here the employer had been enforcing the no-solicitation rule at *all* times, rather than just during working hours.

To further unsettle this entire aspect of the free speech problem, a recent (1954) decision of the United States Court of Appeals for the Sixth Circuit, *N.L.R.B. v. F. W. Woolworth Co.*,[48] has added *another* overruling to the above sequence of overrulings by overruling *Bonwit Teller*. The facts of the *Woolworth* case were practically identical to those in *Bonwit Teller*; Woolworth is also a retail store, a no-solicitation rule was in effect, and the employer, after making a "captive audience" speech, refused to accede to the union's demand for equal time during working hours to deliver a pro-union speech. The union charged the company with committing an unfair labor practice, and secured a restraining order from the National Labor Relations Board. On petition for enforcement, the Court of Appeals held that the employer's conduct was protected by section 8(c), and the petition was denied, McAllister, J., dissenting.

The majority opinion in the *Woolworth* case, after reviewing the facts and the contentions of each side, gave a brief history of free speech in the field of labor law, citing, among others, the *Clark, Babcock and Wilcox,* and *Bonwit Teller* decisions. The *Bonwit Teller* case, of course, represented a big hurdle to be overcome, and while we may or may not agree with the *Woolworth* decision, it does seem to be built on somewhat shaky ground. The opinion appears weak in that it attempts to distinguish the *Bonwit Teller* case on its facts, but for good measure squarely repudiates its holding anyway—unnecessarily, of course, if the distinction were really valid. The factual distinction made was that the employer's speech in the *Bonwit* case was supposedly coercive, unlike that made by the Woolworth employer.[49] This distinction falls down when we recall that in the *Bonwit Teller* case, the Board's finding of coercion was expressly rejected by the Court of Appeals.[50]

A good portion of the majority opinion is devoted to a consideration of the many arguments of authorities offered by the Board in its brief.[51] The court had little difficulty in disposing of these since, with the exception of *Bonwit Teller*, none of the Board's cases was too closely on point, and

47. 205 F.2d at 46.
48. 214 F.2d 78 (6th Cir. 1954). Noted in 29 Tul. L. Rev. 359 (1955).
49. *Id.* at 81.
50. "The conclusion of the Board that the speeches [of the employer] involved promises of benefit or threats or reprisal seems to us to have been erroneous." (197 F.2d at 644).
51. The Board argued that the address of the Woolworth store manager "removed all doubt concerning the employer's position on the question of representation." Also, that the employer violated his own no-solicitation rule by conferring with his employees about their proposed unionization, and that the adequacy of the facilities available to the union was immaterial. The weakness in each of these contentions made was clear by Judge Allen who pointed out that the whole purpose of section 8(c) would be defeated by the Board's interpretation, and that no case law could be found to support the Board's arguments.

many were pre-Taft-Hartley decisions.[52] The Board at one point even went so far afield as to rely on a provision in the Federal Communications Act[53] which provides that broadcasting stations must provide equal air time to opposing political candidates.[54] The court dismissed this questionable analogy in fittingly few words.[55]

From the standpoint of logic, rather than authority, however, the majority opinion is more convincing. It pointed out that the whole purpose of section 8(c) would be frustrated if the employer, on exercising his newly-affirmed freedom of speech, were forced to turn over *his own* facilities to have his words promptly contradicted. This particular union, it was noted, had adequate facilities and opportunities for contacting the employees, both while they were entering and leaving the employer's premises, and in the nearby union hall, one and one-half blocks away. A contrary holding, the court decided, would impair the employer's constitutional and statutory right of free speech.

Judge Miller's concurring opinion expressed an interesting and basically sound viewpoint. He conceded that the employer's action *was* discriminatory as to the union, but he did not believe that it should be considered *unfair*, any more than should a refusal on the part of the union to provide equal time for the employer to speak at its union hall.[56] Rather, he reasoned, such conduct should be regarded as part of the permissible area of discriminatory action recognized by society as the inevitable concomitant of conflicting social and economic interests.[57] Judge Miller quoted with approval the following rather pungent passage from *Livingstone Shirt Corp.*:[58]

The Board resuscitated the time-honored "economic power" argument in its attempt to prove that its ruling was justified on the basis of the superior economic power of the employer compared to that of the workers. Judge Allen made the following heartening remark (214 F.2d at 83):

> Freedom of speech is guaranteed under the Constitution alike to the weak and the powerful. The Board is not authorized by construction and implication to limit the freedom of speech established in the Constitution and re-emphasized in Section 8(c).
>
> The petition for enforcement is denied.

52. *E.g.*, Republic Aviation Corp. v. N.L.R.B., 324 U.S. 793 (1945); International Association of Machinists v. N.L.R.B., 311 U.S. 72 (1940); N.L.R.B. v. Waterman Steamship Corporation, 309 U.S. 206 (1939). The court called attention in its opinion to the defunct nature of the Board's authorities (214 F.2d at 82).

53. 48 Stat. 1064 (1934), as amended, 47 U.S.C. §§ 8 - 609 (1952).

54. 48 Stat. 1088 (1934), as amended, 47 U.S.C. § 315(a) (1952).

55. "This analogy is not pertinent." (214 F.2d at 79).

56. 214 F.2d at 83.

57. Judge Miller remarked as follows (214 F.2d at 83):

> Conceding the finding that respondent [employer] discriminatorily applied its rule prohibiting union activity on its premises to be correct, I do not think it follows that respondent thereby violated Sec. 8(a)(1) of the Act . . . . In any contest between management and labor, each side uses the facilities which are available to it, and nothing in the Act calls for a sharing of those facilities or resources with the other . . . . The Act recognizes certain permissible anti-union activities, such as those included in Sec. 8(c).

58. 107 N.L.R.B. 400 (1953).

> . . . we do not think one party must be so strangely open-hearted as to underwrite the campaign of the other . . . . It [equality of opportunity] is not to be realistically achieved by attempting, as was done in the Bonwit Teller case, to make the facilities of one available to the other.

The dissenting opinion of Judge McAllister relies, with one exception, (the *Bonwit Teller* case) on Wagner Act vintage decisions,[59] which seem fatally defective when invoked in the Taft-Hartley era. However, quite apart from the defunct authority cited, the dissent seems weak in that it is devoted almost entirely to the reiteration of one argument, namely that it is unfair for the employer to speak during working hours, while the union is forbidden to do so.[60]

Two recent National Labor Relations Board rulings have been issued since the hearing in the *Woolworth* case, (though prior to the date of the *Woolworth* decision) which are of further interest. *Livingstone Shirt Corp.*,[61] anticipated the *Woolworth* decision by a few months, and, on essentially the same facts, held that no unfair labor practice had taken place. The Board expressly rejected the *Bonwit Teller* doctrine, and upheld the employer's conduct "in the absence of either an unlawful broad no-solicitation rule (prohibiting union access to the [employer's] premises on other than working time) or a privileged no-solicitation rule (broad, but not unlawful because of the character of the business)."[62] *Peerless Plywood*,[63] a decision issued on the same day as *Livingstone Shirt Corp.*, differs factually from the *Livingstone Shirt* case in that no no-solicitation rule was in effect, and that the employer's speech was delivered a few hours prior to a representation election. The Board set the election aside, and in doing so, announced a new rule. Henceforth, said the Board, no speeches may be made on company time to massed assemblies of employees during the twenty-four hour period immediately preceding a representation election.[64] This rule is to be applied with equal force to employers and employees.

An Analysis of Board Rulings and Court Decisions on Violations of Section 8(c).

a) By the Employer.

Section 8(c), the free speech clause of the Taft-Hartley Act, and section 8(a), the employer unfair labor practice clause, complement each

59. *E.g.*, Marsh v. Alabama, 326 U.S. 501 (1946); Republic Aviation Corp. v. N.L.R.B., 324 U.S. 793 (1945); International Association of Machinists v. N.L.R.B., 311 U.S. 72 (1940); N.L.R.B. v. Lake Superior Lumber Corp., 167 F.2d 147 (6th Cir. 1948); N.L.R.B. v. American Furnace Co., 158 F.2d 376 (7th Cir. 1946).

60. The dissent cited, with approval, 61 Yale L.J. 1066 (1952), which pointed out the possible hardship toward the workers in denying them the employer's facilities for pro-union activities.

61. 107 N.L.R.B. 400 (1953).

62. 107 N.L.R.B. at 409.

63. 107 N.L.R.B. 427 (1953).

64. 107 N.L.R.B. at 429.

other and must be considered together in analyzing employer free speech problems. That is to say, an expression of opinion by the employer which is coercive or which contains a threat of reprisal or promise of benefit not only fails to come within the protection of section 8(c), but in addition violates 8(a) and may be considered an unfair labor practice. Conversely, an expression which may have the effect of interfering, restraining, or coercing the employees in their right of self-organization, violates the interdiction of section 8(a), and further more, cannot be justified as a "privileged" utterance under section 8(c). An added complication has been introduced by the *Peerless Plywood* case,[65] which introduced the 24-hour pre-election speech ban. Under the rule announced in this case, section 8(c) may not be used to justify utterances made within the 24-hour period, but such utterances do not *per se* constitute an *unfair labor practice.* Rather, the effect of speech-making on company time within the prohibited period is merely to void the results of the representation election.[66] An analagous theory was announced in *Metropolitan Life Insurance Co.*,[67] and *General Shoe Corporation*,[68] where it was held that an election might be set aside if the employer's utterances were such as to preclude the possibility of a fair election, even though the utterance could not be declared unfair under section 8(c).

Prior to the enactment of the Taft-Hartley Act, an important limitation on employer utterances was the so-called *totality of conduct* doctrine, introduced by the famous case *N.L.R.B. v. Virginia Electric & Power Company*,[69] which still exists today in a somewhat watered-down form. Under this doctrine, an employer utterance, even though not coercive when viewed by itself, might be considered coercive in view of the employer's "total conduct."[70] The doctrine was applied in subsequent Board rulings with a harshness[71] that later became the subject of severe Congressional

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65. *Ibid.*
66. Sparkletts Drinking Water Corp., 107 N.L.R.B. 293 (1954).
67. 90 N.L.R.B. 935 (1950).
68. 77 N.L.R.B. 124 (1948).
69. 314 U.S. 469 (1941), *reversing* Virginia Electric & Power, 20 N.L.R.B. 911 (1940). On remand (40 N.L.R.B. 297) the Board ruled in accord with its original ruling, and was affirmed by the United States Circuit Court of Appeals, Virginia Electric & Power Co. v. N.L.R.B. 132 F.2d 390 (4th Cir. 1942). The "totality of conduct" doctrine was expressed most clearly by Justice Murphy in the following words (314 U.S. at 477):

> If the total activities of an employer restrain or coerce his employees in their free choice, then those employees are entitled to the protection of the Act. And in determining whether a course of conduct amounts to restraint or coercion, pressure exerted vocally by the employer may no more be disregarded than pressure in other ways.

70. See note 69 *supra.*
71. Monumental Life Insurance Co., 69 N.L.R.B. 247 (1946) and Clark Brothers, 70 N.L.R.B. 802 (1946) are examples which drew the particular attention of the Senate (Senate Report No. 105, 80th Congress, 1st Session, p. 23). Other examples, to name but a few, are Virginia Electric & Power Co., *supra* note 69; N.L.R.B. v. Winona Knitting Mills, 163 F.2d 156 (8th Cir. 1947); N.L.R.B. v. Gatke Corporation, 162 F.2d 252 (7th Cir. 1947); N.L.R.B. v. Bird Machine Co, 161 F.2d 589 (1st Cir. 1947); R.R. Donnelly & Sons Co., v. N.L.R.B., 156 F.2d 416 (7th Cir. 1946); Keystone Steel and

scrutiny,[72] and eventual legislative reform.[73] The totality of conduct doctrine, as such, died with the enactment of section 8(c) of the Taft-Hartley Act.[74] However, its ghost is still with us in the form of a *context* rule which has been applied in several Board rulings and court decisions.[75] The rule is to the effect that employer utterances must be studied in their *context* to determine whether or not they violate sections 8(a)(1) or 8(c).[76] If the term "context" were confined to its usual meaning, *i.e.*, the language preceding or following the disputed utterance, the rule would not be unusual or even noteworthy. However, the term "context" has been used in these cases to include *conduct*[77] on the part of the employer. Thus, a line of cases may be found in which the restrictive totality of conduct doctrine has been partially revived.[78] Fortunately, at least one decision[79] appears to have rejected the new "context" rule, in favor of a stricter enforcement of the rights guaranteed by section 8(c).

From the multitude of cases and court decisions in which a particular expression of an employer was considered, and held to be either privileged or non-privileged under section 8(c), it is difficult to extract many general

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Wire Co., v. N.L.R.B., 155 F.2d 553 (7th Cir. 1946); American National Bank of St. Paul v. N.L.R.B., 144 F.2d 268 (8th Cir. 1944); N.L.R.B. v. Fairmont Creamery Co., 144 F.2d 128 (10th Cir. 1944); N.L.R.B. v. Lettie Lee, 140 F.2d 243 (9th Cir. 1944); N.L.R.B. v. John Engelhorn & Sons, 134 F.2d 553 (3d Cir. 1943).

72. The Conference report, House Report 510, 80th Congress, page 45, stated:
"The practice which the Board has had in the past of using speeches and publications of employers concerning labor organizations and collective bargaining arrangements as evidence, no matter how immaterial or irrelevant, that some later act of the employer had an illegal purpose gave rise to the necessity for this change in the law."

73. The enactment of Section 8(c) represented a major reform in the federal labor legislation in this area.

74. In the words of the court in Pittsburgh Steamship Co., v. N.L.R.B., 180 F.2d 731, 735 (6th Cir. 1950), ". . . Section 8(c) of the Taft-Hartley Act was specifically intended to prevent the Board from using unrelated non-coercive expressions of opinion on union matters as evidence of a general course of unfair labor conduct." See also Mylan-Sparta Co., Inc., 78 N.L.R.B. 1144 (1948); Tygart Sportswear Co., 77 N.L.R.B. 613 (1948).

75. N.L.R.B. v. Protein Blenders, 215 F.2d 749 (8th Cir. 1954); N.L.R.B. v. Kropp Forge Co., 178 F2d 822 (7th Cir. 1949); N.L.R.B. v. O'Keefe and Merritt Mfg. Co., 178 F.2d 445, 448 (9th Cir. 1949)(". . . we realize the words are not to be looked at in a vacuum, but in the light of all the circumstances surrounding their utterance."); N.L.R.B. v. Fulton Bag and Cotton Mills, 175 F.2d 675 (5th Cir. 1949); N.L.R.B. v. West Ohio Gas Co., 172 F.2d 685 (1949) (dicta); Cary Lumber Co., 102 N.L.R.B. 406 (1953); Superior Coach Corp., 102 N.L.R.B. 87 (1953); Parker Brothers & Co., 101 N.L.R.B. 872 (1952); Apex Toledo Corp., 101 N.L.R.B. 807 (1952); Corning Glass Works, 100 N.L.R.B. 444 (1952).

76. N.L.R.B. v. Protein Blenders, *supra* note 75, at page 750, ". . . if the setting, the conditions, the methods, the incidents, the purpose, or other probative context of the particular situation can be appraised, in reasonable probability, as having had the effect of restraining or coercing the employees." Cary Lumber Co., *supra* note 75, was decided upon ". . . the context of the statements, and the position of the speaker in relation to his audience—factors which [the] Board has regarded as significant in determining whether statement is free of any threat of reprisal or promise of benefit." (102 N.L.R.B. at 409). Also see the other cases cited in note 75 *supra*.

77. *Ibid*.

78. See note 75 *supra*.

79. N.L.R.B. v. Corning Glass Works, 204 F.2d 422 (1st Cir. 1953).

rules. Often, the cases turn on elaborate findings of fact[80] and probably represent unique holdings which are not likely to be duplicated.

The following rulings seem to be of particular interest. A single threat or coercive statement by the employer will not constitute a violation of the Act.[81] Apparently the *de minimus* doctrine was the basis for this line of authority.[82] A "back-to-work" appeal which contains no threat of reprisal or promise of benefit is privileged under section 8(c),[83] but the National Labor Relations Board seems to apply a rather strict standard of conduct in such cases, and is inclined to resolve any doubt against the employer.[84] Questioning of the employees about their union membership or their pro-union activities was a violation of the Act[85] until 1954 when the Board held in *Blue Flash Express*[86] that such interrogation was not *per se* unlawful. A recent ruling, *Graber Manufacturing Company*,[87] limited the *Blue Flash* holding by declaring that the employer's inquiries must be confined to information about the strength of the union in the plant, and not be directed to information about the pro-union activities of individual employees or activities of the union leaders. This view is in conformity with the pre-*Blue Flash* cases, *Dixie Terminal Company*,[88] and *N.L.R.B. v. Minnesota Mining and Manufacturing Company*.[89] It further appears that the employer must be careful to avoid *repeated* interrogations which might be construed as intimidation or coercion of the employees.[90] A statement by the employer that, even if the union is certified, he will never bargain with it has been held not within the protection of section 8(c),[91] though it is difficult to see how such a statement

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80. *E.g.*, Cary Lumber Co., 102 N.L.R.B. 406 (1953); Holme & Seifert, 102 N.L.R.B. 347 (1953).

81. N.L.R.B. v. Borchert, 188 F.2d 474 (4th Cir. 1951); Commercial Printing Co., 99 N.L.R.B. 469 (1952); Boston & Lockport Block Co., 98 N.L.R.B. 686 (1952); Peerless Woolen Mills, 86 N.L.R.B. 82 (1949); Hewgley, *d.b.a.* Louisville Title Agency, 85 N.L.R.B. 1344 (1949); Sunray Oil Corp., 82 N.L.R.B. 942 (1949); Rice-Stix of Arkansas, 79 N.L.R.B. 1333 (1948); Goldblatt Bros., 77 N.L.R.B. 1262 (1948).

82. See Goldblatt Bros., note 81 *supra*, at 1264.

83. Rugin Bros. Footwear v. N.L.R.B., 203 F.2d 486 (5th Cir. 1953); Jordan Bus Co., 107 N.L.R.B. 148 (1954); Administrative Decision of N.L.R.B. General Counsel, Case No. 892 (1954).

84. Efco Mfg., 108 N.L.R.B. 52 (1954); Cincinnati Steel Casting Co., 86 N.L.R.B. 592 (1949); Cathey Lumber Co., 86 N.L.R.B. 157 (1949); Samuel Bingham Sons Mfg. Co., 80 N.L.R.B. 1612 (1948).

85. Such questioning was ruled unlawful *per se* in Waterman Industries Inc., 91 N.L.R.B. 1041 (1950); Atlanta Broadcasting Co., 90 N.L.R.B. 808 (1950); Standard-Coosa-Thatcher, 85 N.L.R.B. 1358 (1949). The Sixteenth Annual Report, N.L.R.B., (1951) placed questions about the following topics within the prohibited category:

> ". . . employees' union membership and activities. Their attitude toward the union, or their desire for union representation. Their voting intentions in a scheduled Board election. Whether they had received solicitation letters from a union."

86. 109 N.L.R.B. 591 (1954).

87. 111 N.L.R.B. No. 20 (1955).

88. 102 N.L.R.B. 1452 (1953).

89. 179 F.2d 323 (8th Cir. 1950).

90. A. L. Gilbert Co., 110 N.L.R.B. No. 231 (1954).

91. Lima Electric Products, 104 N.L.R.B. 344 (1953); F. W. Woolworth Co., 101 N.L.R.B. 1457 (1952).

could be considered coercive. However, the employer's statement that the union can "get you nowhere until negotiations are completed and a contract signed" was held not in violation of the Act.[92] Employers must also be careful in stating predictions about the future results of unionization. In one case[93] a prediction by the employer that if the union were successful working hours would be reduced was considered a "threat" of loss of pay, without regard to the accuracy of such a prediction. Opposed to this holding, however, is *A. L. Gilbert Co.*,[94] in which the Board ruled that such a statement was merely a prediction, and drew particular attention to the fact that any reduction in working hours would be brought about by the *union* rather than by management. In contrast with the above, a statement by the employer that the employees were free to leave whenever they wished, since he could replace them at any time, and that if the employees destroyed their jobs by unionization, it would be their own fault, was ruled not to "contain any threat of reprisal or promise of benefit."[95] Circulation of anti-union petitions has been held a violation of section 8(c)[96] as were statements by the employer which tended to discredit the certified bargaining representative.[97] Presumably, similar conduct on the part of the union, however, would not be a violation.[98] Statements by the employer that he preferred individual bargaining to collective bargaining,[99] or that he preferred one union to another[100] have been held privileged under section 8(c).

b) By Labor Organizations.

One of the most significant reforms brought about by the Taft-Hartley Act was to create, for the first time, a legal responsibility on the part of

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92. Mike Persia Chevrolet Co., 107 N.L.R.B. No. 82 (1953). *Accord*, Evans & Sons, 81 N.L.R.B. 161 (1949).

93. N.L.R.B. v. McCatron, 216 F.2d 212 (9th Cir. 1954). *Accord*, N.L.R.B. v. Beatrice Foods Co., 183 F.2d 726 (10th Cir. 1950); N.L.R.B. v. J. S. Abercrombie Co., 180 F.2d 578 (5th Cir. 1950); Jefferson Co., 110 N.L.R.B. No. 113 (1954); Alma Piston Co., 110 N.L.R.B. No. 51 (1954); Farmer's Cooperative Co., 102 N.L.R.B. 144 (1953); Westinghouse Pacific Coast Brake Co., 89 N.L.R.B. 145 (1950); Goodall Co., 86 N.L.R.B. 814 (1949).

94. 110 N.L.R.B. No. 231 (1954). *Accord*, Chicopee Mfg. Corp., 107 N.L.R.B. 106 (1953); Sylvania Electric Products, 106 N.L.R.B. 1210 (1953); Agar Packing and Provision Corp., 81 N.L.R.B. 1262 (1949); Mylan-Sparta Co., Inc., 78 N.L.R.B. 1144 (1948).

95. Crowley's Milk Co., 88 N.L.R.B. 1049 (1950).

96. Red Rock Co., 187 F.2d 76 (5th Cir. 1951); Rubin Bros. Footwear, 91 N.L.R.B. 10 (1950); H & H Mfg. Co., 87 N.L.R.B. 1373 (1949); Dixie Culvert Mfg. Co., 87 N.L.R.B. 554 (1949).

97. N.L.R.B. v. Valley Broadcasting Co., 189 F.2d 582 (6th Cir. 1951); N.L.R.B. v. Union Mfg. Co., 179 F.2d 511 (5th Cir. 1950).

98. Administrative Decision of N.L.R.B. General Counsel, Case No. 971 (1954); Administrative Decision of N.L.R.B. General Counsel, Case No. 284 (1952).

99. Q-F Wholesalers, 87 N.L.R.B. 1085 (1949); Meyer & Welch, 85 N.L.R.B. 706 (1949); L.H. Butcher Co., 81 N.L.R.B. 1184 (1949); Hinde & Dauch Paper Co., 78 N.L.R.B. 488 (1948); Bailey Co., 75 N.L.R.B. 941 (1948).

100. N.L.R.B. v. Corning Glass Works, 204 F.2d 422 (1st Cir. 1953); Sterling Cabinet Corp., 109 N.L.R.B. 6 (1954); Joy Togs, 83 N.L.R.B. 1024 (1949).

labor unions for their unfair practices.[101] Furthermore, the Act specifically desginates certain union practices as unlawful, as for example, featherbedding,[102] the secondary boycott,[103] refusal to bargain,[104] excessive dues or initiation fees,[105] or the use of restraint or coercion against employees in their guaranteed right of self-organization.[106]

Section 8(c), the free speech clause, must be read in conjunction with these prohibitions to determine whether or not an utterance by a labor organization, or by an employee, is unlawful, just as the corresponding prohibitions against the employer must be so considered.[107] It appears to be well settled that expressions of opinion which are in furtherance of an illegal activity are not within the protection of section 8(c).[108] Even though the Act is a federal law, union activities which violate *state* laws also fall within its prohibition.[109] An exception to the foregoing rule appears if the state law is one which the court or the National Labor Relations Board feels is in *conflict* with the provisions of the federal Act.[110] Thus the *purpose* for which the expression of opinion is made becomes important when analyzing it under section 8(c), and it is to be noted that the same act may be held in one case illegal, and in another privileged as "free speech" depending on the end to be accomplished.[111] In spite of the Act's express prohibition against threats or coercive utterances, the National Labor Relations Board does not seem to regard abusive language or name-calling, a frequent practice of union organizers, as coercive, and union organizers are today free to address individuals

101. In addition to designating certain labor union practices as unfair, the Act sets up administrative process for the prevention of such practices, and makes labor organizations suable, as an entity, for damage caused by their unlawful acts. See §§ 8(b), 8(d)(4), 10(a), 301, 302, 303 and 313 of the Taft-Hartley Act.

102. Taft-Hartley Act, § 8(b)(6).

103. Taft-Hartley Act, § 8(b)(4).

104. Taft-Hartley Act, § 8(b)(3).

105. Taft-Hartley Act, § 8(b)(5).

106. Taft-Hartley Act, § 8(b)(1).

107. See page 45 *supra*.

108. N.L.R.B. v. Denver Building and Construction Trades Council, 341 U.S. 675 (1951); N.L.R.B. v. International Union of Operating Engineers, AFL, 216 F.2d 161 (8th Cir. 1954); N.L.R.B. v. Jarka Corp. of Philadelphia, 198 F.2d 618 (3d Cir. 1952); Slater v. Denver Building and Construction Trades Council, 175 F.2d 608 (10th Cir. 1949); Personal Products Corp., 108 N.L.R.B. 743 (1954); Fox Midwest Amusement Corp., 98 N.L.R.B. 699 (1952); Pacific American Shipowners Ass'n, 98 N.L.R.B. 582 (1952). *Cf.*, Pure Oil Co., 84 N.L.R.B. 315 (1949).

109. Hughes v. Superior Court of California, 339 U.S. 460 (1950); Gibonev v. Empire Storage and Ice Co., 336 U.S. 490 (1949); Lincoln Federal Union, AFL v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949). A pre-Taft-Hartley case to the same effect is the famous Carpenters and Joiners Union v. Ritter's Cafe, 315 U.S. 722 (1942). It should be noted here that § 14(b) of the Taft-Hartley Act specifically provides that state law is to govern in determining the legality of closed shop agreements.

110. Garner v. Teamsters Local, AFL, 346 U.S. 485 (1953); Amalgamated Ass'n of Street, Electric & Motor Coach Employees v. Wisconsin Employment Relations Board, 340 U.S. 383 (1951); International Union, CIO v. O'Brien, 339 U.S. 454 (1950); Hill v. Florida, 325 U.S. 538 (1945); Capital Service Inc., v. N.L.R.B., 204 F.2d 848 (9th Cir. 1953); Henderson *ex rel* Lee v. Florida, 65 So.2d 22 (Fla. 1953).

111. *Compare* Sperry v. Denver Building and Construction Trades Council, 77 F. Supp. 321 (D. Colo. 1948) *with* N.L.R.B. v. United Brotherhood of Carpenters and Joiners, 184 F.2d 60 (10th Cir. 1950).

as "scabs,"[112] "sons of bitches,"[113] and "bastards"[114] as they see fit. Fortunately, such practices are not looked upon favorably by *state* courts,[115] and are frequently enjoined.

A Summary of the Florida Law

The Florida legislature has acted, not vigorously, to govern the activities of both employers and labor organizations.[116] If the parties come within the jurisdiction of the Taft-Hartley Act, then the Florida statutes may or may not *also* apply depending on their conflict with the federal law. The problem of the preëmption of state laws by federal law is a study in itself,[117] and is beyond the scope of this article. At least one section of the Florida statutes has been stricken down as being repugnant to federal law.[118]

As far as free speech is concerned, the Florida legislature has spoken in two places:[119]

> Section 447.09. Franchise. No person shall interfere with or prevent the right of franchise of any member of a labor organization. Such right shall include . . . his right of free petition, lawful assemblage, and free speech.
>
> Section 447.13. All as specifically provided in this chapter, nothing herein shall be construed . . . as to invade unlawfully the right to freedom of speech.

In interpreting these sections the Florida Supreme Court has followed the views of the National Labor Relations Board and the federal courts in upholding injunctions against any communication made in furtherance of an illegal activity.[120] While no cases appear in which expressions of opinion on the part of the employer are directly in issue, the court has

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112. *E.g.*, Perry Norvell Co., 80 N.L.R.B. 225 (1948).
113. *E.g.*, International Longshoremen's and Warehouseman's Union, 79 N.L.R.B. 1487 (1948).
114. *Id.* at 1493.
115. Lassiter v. Swift & Co., 204 Ga. 561, 50 S.E.2d 359 (1948); Boyd v. Deena Artware Inc., 239 S.W.2d 86 (Ky. 1951); Independent Taxi Service v. Teamsters Local, 23 L.R.R.M. 2138 (Pa. Cm. Pls. 1948); McWhorter v. Commonwealth, 191 Va. 857, 63 S.E.2d 20 (1951).
116. Fla. Stat. §§ 447.01 to 447.15 (1953).
117. See Forkosch, A Treatise on Labor Law § 205 (1st ed. 1953); Smith, *Taft-Hartley Act and State Jurisdiction*, 46 Mich. L. Rev. 593 (1948); *Note*, 3 Buff. L. Rev. 326 (1954).
118. In Hill v. Florida, 325 U.S. 538 (1945), §§ 447.04, 447.06 of the Florida Statutes (providing for the qualification and licensing of union business agents) were held in conflict with the federal law (Wagner Act) and thus void.
119. It should also be noted that the Florida Constitution, Declaration of Rights, Section 13, provides as follows:

> Every person may fully speak and write his sentiments on all subjects being responsible for the abuse of that right, and no laws shall be passed to restrain or abridge the liberty of speech, or of the press.

120. Miami Typographical Union v. Ormerod, 61 So.2d 753 (Fla. 1952); United Ass'n of Journeyman v. Robertson, 44 So.2d 899 (Fla. 1950); Moore v. City Dry Cleaners, 41 So.2d 865 (Fla. 1949); Retail Clerk's Union v. Lerner Shops of Florida, 140 Fla. 865, 193 So. 529 (1940).

by strong dicta[121] indicated its reluctance to enjoin expressions of opinion except in the most serious cases.

CONCLUSION

The *Woolworth* and *Livingstone Shirt* decisions, and possibly the *Peerless Plywood* decision, represent a considerably overdue correction to the attitude of the National Labor Relations Board and of the courts towards the employer's constitutional right of free speech. Whereas union conduct of the most reprehensible sort has frequently been condoned as an exercise of free speech,[122] the employer's freedom to speak his mind has been severely limited.[123] In spite of the strong efforts of Congress to remove the restrictions on employer free speech, the *Bonwit Teller* case, and the cases subsequently controlled by it, indicated that the resuscitation of the First Amendment by the Taft-Hartley Act was to be short-lived.

It does appear, however, while the correct result may have been reached in the *Woolworth* and *Livingstone Shirt* decisions, they were based too much on legal technicalities and refinements, and that broader constitutional principles should have been considered and enunciated. The right of any individual (even an employer!) to speak his mind *on his own premises* about a situation with which he is intimately concerned (being the potential object of union demands) seems to be a right which is guaranteed in the body of American constitutional law, rather than by a series of statutory interpretations.

A more practical reason for encouraging greater freedom of speech of employers is the revolutionary change in the economic and legal status of labor organizations during the past twenty years. In 1935 labor unions were of inconsequential strength as compared to 1953.[124] It might be

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121. In Moore v. City Dry Cleaners, *supra* note 120, the court said (at page 873):

> . . . we know of no lawful authority under which a court of equity may proceed to enjoin a free discussion of the facts surrounding such labor difficulty, even though the things said may prove to be unfavorable to the industrial or business establishment toward which the statements are directed . . . . In the absence of an express situation plainly requiring reasonable public regulation in the interest of human life and safety, the right [§ 13 FLA. CONST. D.R.] may not be denied or abridged.

122. Cafeteria Employees Union v. Angelos, 320 U.S. 293 (1943); Bakery & Pastry Drivers Union v. Wohl, 315 U.S. 769 (1942); AFL v. Swing, 312 U.S. 321 (1941); Whitney v. California, 274 U.S. 357 (1927); Washington *ex rel.* Lumber and Sawmill Workers v. Superior Court, 24 Wash.2d 314, 164 P.2d 662 (1945); Ted R. Cooper Co., Inc. v. Los Angeles Building Trades Council, 3 CCH Lab. Cas. ¶ 60235 (Cal. 1941). See Jones, *Picketing and the Communication of Ideas*, 2 U.C.L.A. L. REV. 212 (1955); *Note*, 4 BUFF. L. REV. 232 (1955).

123. See notes 19 and 20 *supra*. See also, Mittenthal, *Employer Speech—A Life Cycle*, 5 LAB. L.J. 101 (1954); Wirtz, *The New N.L.R.B.; Herein of Employer Persuasion*, 49 NW. U.L. REV. 594 (1954); Koretz-Barta, *Employer Free Speech under the Taft-Hartley Act*, 6 SYRACUSE L. REV. 82 (1954); *Note*, 38 VA. L. REV. 1037 (1950). *The N.L.R.B. under Republican* Administration, 55 COL. L. REV. 852, 882 (1955).

124. Total union membership in the United States in the year 1935 was 3,900,000, representing 7.7% of the nation's total working force. The corresponding figures for 1953 were 16,500,000 and 25.2%. See BLOOM AND NORTHRUP, ECONOMICS OF LABOR RELATIONS 23 (1st ed. 1954).

argued, with some degree of merit, that during the growth of labor unions (at a time when the country was in the throes of an economic depression) they should have been afforded a high degree of protection as against well-established and financially secure employers.[125] Today, however, even the smallest of the two nationally-known unions has net assets many times in excess of those of most American corporations,[126] and the need for protection seems to have been reversed.

An even more practical reason for the renunciation of the *Bonwit Teller* doctrine might be discerned by asking the following question, namely, just how much *are* employees influenced by the statements, speeches, leaflets, and so forth, of the employer? It has been the writer's experience[127] that most employees are extremely skeptical when they listen to the "boss's" views, and nine times out of ten will arbitrarily refuse to believe even the most truthful and sincere statements he may make. Furthermore, the employees are sophisticated enough to know that, even though no threats are made by the employer, that union membership automatically places them "on the other side of the fence" from management and that the employer will look elsewhere when considering promotions.

In review, it appears that the National Labor Relations Board, as well as the courts, have vacillated back and forth so many times on the issue of employer free speech that it seems quite impossible to anticipate what the next ruling will be. Perhaps a Supreme Court decision in the near future will settle this conflict in the existing case law, though it seems unlikely that in so doing it will rely on the reasoning herein expressed.[128]

JOHN C. WHITEHOUSE

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125. Actually the statistics on business failures during the depression years indicate questionable financial security.

126. In 1949, the American Federation of Labor, and its affiliates, possessed net assets of approximately $176,000,000.00. See, *What American Labor Unions are Worth in Dollars and Cents*, Business Week, Nov. 19, 1949, pp. 115-120. This article includes a detailed table, compiled from official sources, showing the membership and net assets of individual locals and affiliates. The total net assets of *all* American labor unions were in excess of $1,000,000,000.00. It is significant that these assets were held in a highly liquid form (when compared to the net assets of an industrial or manufacturing corporation) and would place the unions at a considerable advantage while waging their economic warfare.

127. While working as a non-union machinist.

128. The efforts of Congress to amend and clarify the Taft-Hartley Act in its provisions governing employer and employee free speech died in committee, when on May 7, 1954, the Senate voted 50 to 42 to recommit the Administration's bill to the Labor Committee. *See*, Proceedings of the Section of Labor Relations Law, American Bar Association, page 77 (August, 1954); Peck, *Proposed Revisions of the Taft-Hartley Act*, Lib. of Cong. Leg. Ref. Svc. p. 30 (1954).