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The Employer and the First Amendment

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request to the Board of Directors, and failing this, he must request the Superintendent of Insurance to intervene. Then if the provisions of Article 6 of the General Corporation Law apply to him, he must supply security for expenses, if he does not hold five per cent of the outstanding policies or if his interest does not exceed fifty thousand dollars. Therefore, if the right of a policyholder to bring a derivative action exists, it is so limited that it is of little practical value under the present state of our law.

ANDREW L. HUGHES.

THE EMPLOYER AND THE FIRST AMENDMENT

Equality of opportunity and freedom of action are inherent rights of individuals under any socio-economic system such as our own democracy. Unlimited freedom of action permitted to one group, however, will inevitably infringe upon the goal of equality of opportunity, toward which all strive. The reason for this is apparent: just as the law of physics states, as a fundamental precept, that every action has an equal and opposite reaction, so we find in economics that in any given field where two or more persons have their individual interests, the actions of one taken in his own behalf, will prove correspondingly detrimental to the others. The struggle between labor and management gives perhaps the greatest example of the conflict.

The relationship of employer and employee necessarily results in the economic dominance of the employer over the employee, and this in turn leads to the imposition, to at least some extent, of the will of the employer upon that of the employee. In the words of the National Labor Relations Board: "In the normal relationship between employer and employee, almost any expression of opinion by the employer indicating to those who depend upon his continued good will for their livelihood an unequivocal disapproval of their forming or joining a labor organization characteristically carries home to employees an implied threat of unlawful discrimination for noncompliance with the employer's desires." [1] We find here, therefore, an instance wherein we are compelled in the interest of society to restrict the freedom of activity of one group, the employers, so that another group, the employees, may achieve the desired goal of equality of opportunity. But what is the nature of this restriction, and what limitation is placed upon it by the Constitutional guaranty of freedom of speech? [2]

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[1] Southern Colorado Power Co., 13 N. L. R. B. 699 (1939).

[2] U. S. CONST. AMEND. I. Congress shall make no law respecting an es-

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Ushering in the era of modern labor legislation, the National Labor Relations Act[3] became law on July 5, 1935, thus becoming the first attempt by the Federal Government to bring about equality of bargaining power between employer and employee. In no section of the Wagner Act is specific mention made of the right of free speech, or the restriction thereof. Expressly condemned by the Act, however, is any effort by the employer to interfere with, restrain, or coerce employees in the exercise of their rights as guaranteed by the Act.[4] As stated in the Act: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection." [5]

Following the establishment of the constitutionality of the Act,[6] and in order to fulfill its intent and purposes, it became manifestly necessary for judicial interpretation to allow the imposition of restrictions upon the employer's right of self-expression. Fully considering the mandate of the Constitution, the courts were naturally reluctant to abridge free speech in any way. Conceding the right of workers to organize to be a natural right of equal rank with the great right of free speech, an extremely practical solution to the problem was found. Granted that the employer has every right to express himself as he sees fit. But certainly the constitutional guaranty of free speech does not extend to him unlimited license to violate the rights of others. Thus, where by coercion, threats, or intimidation the employer imposes his will upon another, to restrict these actions cannot be called an abridgment of a constitutional right. It follows, therefore, that an employer may express his opinion on any topic he may choose, whether involving labor unions or not, so long as his expressions do not in any way contribute to, or constitute acts or threats of discrimination, coercion or intimidation, in denial of the employee's free exercise of those rights guaranteed him by the Wagner Act.[7]

To effectuate the policies of the Act the National Labor Relations Board was created. In accordance with established principles

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tablishment 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.

[3] 49 STAT. 449 (1935), 29 U. S. C. §§ 151-166 (1940).

[4] 49 STAT. 452 (1935), 29 U. S. C. § 158 (1940). It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.

[5] 49 STAT. 452 (1935), 29 U. S. C. § 157 (1940).

[6] N. L. R. B. v. Jones & Laughlin Steel Corp., 301 U. S. 1, 81 L. ed. 893 (1937).

[7] Jefferson Electric Co. v. N. L. R. B., 102 F. 2d 949 (C. C. A. 7th 1939); Edward G. Budd Mfg. Co. v. N. L. R. B., 142 F. 2d 922 (C. C. A. 3d 1944).

of administrative law, the N. L. R. B. is considered a body possessing judicial functions and powers, and so having authority to decide questions of fact upon the evidence, and to make findings which, if found to be supported by substantial evidence, are conclusive upon the reviewing court.[8]

Coercion of the employee having been made an unfair labor practice by the Act, the Board's immediate task was to arrive at a workable norm for the determination of the existence of coercion. The policy adopted is aptly expressed in the Board's own words: "In many instances, the coercive element is inherent in the statement itself or may be readily inferred from the context in which it is made. Typical of this class of statements which are *per se* violative of Section 8(1) are those containing actual, implied, or veiled threats of economic reprisal. Equally violative of the Act are those statements which bespeak a determination not to bargain collectively with a labor organization even if it should attain majority status. Other statements, which on their face appear to be unobjectionable, nevertheless may be coercive, and therefore a violation of the Act, when viewed in the light of other unfair labor practices committed by the employer. This is so where the statement is an inseparable and integral part of a course of conduct which in its 'totality' amounts to coercion within the meaning of the Act." [9]

A comprehensive study of decisions results in several broad classifications into which any given set of facts may be placed. The determination of the question of whether or not a statement is violative of Section 8(1) can therefore be made through the process of placing the facts of the particular case into the proper category.

The first and most obvious category is that which includes statements of the employer [10] which by their very wording coerce the employee (*i.e.*, are coercive *per se*). Typical of this group are the following:

> Where supervisor told employees "I've heard quite a bit about your talking Union around here. . . . You keep your nose clear or out you go"; [11] or, "I want you fellows to realize there is some Union talk going on around here and if it is not stopped somebody is going to lose their job"; [12] or, where manager asked

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[8] Jacksonville Paper Co. v. N. L. R. B., 137 F. 2d 148 (C. C. A. 5th 1943); Continental Box Co. v. N. L. R. B., 113 F. 2d 93 (C. C. A. 5th 1940).

[9] N. L. R. B. v. Virginia Power Co., 314 U. S. 469, 86 L. ed. 348 (1941).

[10] In N. L. R. B. v. Glenn L. Martin-Nebraska Co., 141 F. 2d 371 (C. C. A. 8th 1944), it was held that the term "employer" signifies both the employer himself and those acting in a supervisory capacity while in his employ. "The test of corporate responsibility for the acts of its officers and agents is whether the agent in doing the thing complained of was engaged in employing the corporate powers actually authorized for the benefit of the corporation while acting within the scope of his employment."

[11] N. L. R. B. v. Glenn L. Martin-Nebraska Co., 141 F. 2d 371 (C. C. A. 8th 1944).

[12] *Ibid.*

those employees to resign who had refused to withdraw their applications, because of their union membership;[13] or, where manager told employee "As far as the Union is concerned . . . we can find enough on practically any man in the office to get rid of him";[14] or, where the president learned that in one department only the supervisory employees would sign an anti-union pledge, he commented: "The first thing to do would be to get rid of them"—referring to the non-signers who were discharged the next day;[15] or, where plant superintendent said that if employees struck, they would be through at petitioner's place forever, and where plant manager told union foreman that if he wanted to join the union, to go ahead and join, but to "get the hell out of" petitioner's shop.[16]

With the above examples as guideposts, any objective analyst can readily identify statements which are coercive *per se*.

Greater complications arise, however, when statements are encountered which are not overtly coercive. A threat, no matter how veiled, remains a threat though the coercive element may only be implied therefrom and is nowhere expressed therein. In this classification fall the following situations:

Manager having authority over employees' jobs and wages stated to his men that if they join the union they are "sticking their necks out," and where he directed them to return from the union meeting with a "changed mind."[17]

Where supervisors told employees: "You will find if unions get in it will be worse than it is," and that the employer "could not pay any more, they were paying as much as they could already and would have to close the doors," and that "if the union gets in here we will all be walking the streets."[18]

Foreman told employees: "I hear you fellows are going to tell about me up there (before the Board hearing). You hadn't better or it's going to be too bad."[19]

Company President said to an employee: "I don't want that damned union. I would sooner have my own union. I would

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[13] N. L. R. B. v. East Texas Motor Freight Lines, 140 F. 2d 404 (C. C. A. 5th 1944).

[14] N. L. R. B. v. Monumental Life Insurance Co., 12 CCH LAB. LAW SERV. § 63,800 (C. C. A. 6th 1947).

[15] N. L. R. B. v. Vail Mfg. Co., 158 F. 2d 664 (C. C. A. 7th 1947).

[16] R. R. Donnelley & Sons Co. v. N. L. R. B., 156 F. 2d 416 (C. C. A. 7th 1946).

[17] N. L. R. B. v. Peterson, 157 F. 2d 514 (C. C. A. 6th 1946).

[18] N. L. R. B. v. Kopman-Woracek Shoe Mfg. Co., 158 F. 2d 103 (C. C. A. 8th 1946).

[19] Elastic Stop Nut Corp. v. N. L. R. B., 142 F. 2d 371 (C. C. A. 8th 1944).

sooner have my own money in my own pocket." Assistant Superintendent said, referring to previous abortive attempt to organize: "You know what happened the other time. The thing was ironed out and a lot of fellows lost their jobs and were left holding the bag. The same thing might happen this time." Also in speaking to an employee who had previously voted for the union, he said that the employee "should be careful how he voted, otherwise he would be on the outside looking in again." [20] Foreman told employees: "If they don't stop bringing in the union, we will have a lot more machines in." A letter was also written to employees during a strike mentioning that: "It would be futile to resume operations except under conditions that will make impossible a repetition of Monday's walkout or any other suspension of operations." [21]

There are some statements which neither express nor imply coercion, but which, when considered in the light of all surrounding facts and circumstances, constitute a direct violation of Section 8(1). In the words of the court in the leading case of *N. L. R. B. v. Virginia Power Co.*,[22] "Certainly conduct, though evidenced in part by speech, may amount in connection with other circumstances to coercion within the meaning of the Act. If the total activities of the 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 exerted other ways." Typical of the cases in this category are:

Company had long history of hostility to unions, including the employment of labor spies. In a bulletin the company told its employees to deal directly with them and not through an "outside" union. An employee who protested against forming an "independent" union was discharged, as was one who belonged to an "outside" union and who refused to join the independent.[23]

After employees joined union, company foreman went around with union-resignation blanks for them to sign. An employee testified that he was given to understand that "if I did not sign it, I might as well look for another job." One employee asked by a company official to sign a resignation from the union refused and was forced to resign. A company official refused to help union members, who explained: "since we were still members of the union . . . he couldn't possibly help us in so far as

[20] N. L. R. B. v. Pick Mfg. Co., 135 F. 2d 329 (C. C. A. 7th 1943).
[21] N. L. R. B. v. Mt. Clemons Pottery Co., 147 F. 2d 262 (C. C. A. 6th 1945).
[22] 314 U. S. 469, 86 L. ed. 348 (1941).
[23] *Ibid.*

he would be going against the policy of the company which he led." [24]

Respondent had a past record of violent anti-labor acts. Respondent had been ordered by the N. L. R. B. to cease and desist from certain unfair labor practices and to post a notice in the usual form.[25] Coincidental with the posting of the Board's notice, the employer posted his own notice, referring to the "past happy relationship of mutual confidence and understanding with each other," and which also stated that "there is no law which requires, or is intended to compel, you to pay dues to any organization." Several weeks later, a second notice was posted, stating: "It has come to our attention that a group of our employees have met to form an organization for the purpose of collective bargaining and we wish to repeat that it is not necessary for any employee to join any organization or to pay dues to any organization in order to continue in our employ." [26]

General manager told employees that the union officials were a bunch of shysters who were not "out to help" the employees and who could do them no good. He warned the employees that the union would "stuff this place full of cutters and keep you fellows from getting all the work you should," and that he would "never sign a union contract" and that he would "sooner close up this place than operate under a bunch of shysters." These statements were coupled with such anti-union history as continuous opposition and resistance to collective bargaining, and where this unlawful refusal to bargain collectively caused a strike, which the company prolonged by failure to reinstate the strikers upon the union's demand, thus violating employee's rights under Section 7 of the Act.[27]

At this point it may seem that the constitutional guarantee of free speech afforded little protection to the employer under the Wagner Act. But a search into case history shows that this is not so, in as much as the employer is protected to the fullest extent as to any matters upon which he wishes to express an opinion, so long as his expressions do not constitute coercion. Statements which were neutral expressions of fact or opinion, or which were informative or appeals to reason, comprise the first classification of permissible speech by the employer. Examples of this are:

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[24] N. L. R. B. v. Chicago Apparatus Co., 116 F. 2d 753 (C. C. A. 7th 1940).

[25] To the effect that "respondent would not engage in the conduct from which it was ordered to desist, that it would take the affirmative action required by the order, that its employees were free to become or remain members of the union, and that it would not discriminate against any employee because of membership in, or activity on behalf of, the union."

[26] N. L. R. B. v. M. E. Blatt Co., 143 F. 2d 268 (C. C. A. 3d 1944).

[27] N. L. R. B. v. Lettie Lee, Inc., 140 F. 2d 243 (C. C. A. 9th 1944).

The Board ordered the company to cease supporting a company dominated union and to post notices of its intention to comply with the order. Concurrently with the posting of the notices the company sent a letter to each employee, seeking to impress them with the fact that they were free to form a union of their own or to join an outside union. The letter emphasized the advantages of the "inside" union, and stated the belief that the Board's order to the company to withdraw support from that union was wrong, unfair, and contrary to the best interests of the employees.[28]

Letters and speeches by the employer made on the eve of a bargaining election stated that unionism would be against the employees' best interests; also argued was that the future prosperity of the company depended upon continuing operations as theretofore. The statement further said that the company would abide by the results of the election, though it preferred no union, and that there would be no reprisals against those thinking otherwise.[29]

Respondent distributed literature disparaging and criticizing the union, but containing no threat of discharge. Statements such as the following were made: "Figure it out for yourself. If you go into a union, they have got you, but what have you got?" . . . "If the union leaders are sincere, they should go into the business themselves." . . . "A little group of those who control both capital and labor will sit down in New York and settle prices, dividends, and wages." . . . "I have never sought to prevent our men from joining any association. . . . No one who believes in American freedom would do that." [30]

Employer stated that employees would gain nothing from joining the union. He further characterized the union as having been organized by racketeers.[31]

Other situations in which an employer may speak freely without violating Section 8(1) exist when he replies to the union's derogatory statements or to the union's statements misrepresenting the issues in controversy. It must be remembered, however, that the employer cannot take the offensive. Illustrating this category we have the following cases:

Union publication accused respondent and its officials of being unpatriotic, of fascism, of exploiting children, of maintaining

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[28] Edward G. Budd Mfg. Co. v. N. L. R. B., 142 F. 2d 922 (C. C. A. 3d 1944).

[29] N. L. R. B. v. American Tube Bend. Co., 134 F. 2d 993 (C. C. A. 2d 1943).

[30] N. L. R. B. v. Ford Motor Co., 114 F. 2d 905 (C. C. A. 6th 1940).

[31] Jacksonville Paper Co. v. N. L. R. B., 137 F. 2d 148 (C. C. A. 5th 1943).

rotten working conditions, and of using misguided employees for foul purposes, etc. The company retaliated by publishing statements denouncing the accusations, and accusing the union of defamation, and stating that suits for damages because of the libel have been commenced against the union. The court said: "The company is not required to stand mute in the face of Union attacks and has a right to defend its reputation and prove itself worthy of loyalty before its employees."[32]

Union attacked respondent for its "un-American" attitude; accused a company officer of having "slashed" a contract and of having "garbled" it to suit his own selfish desires; charged that the company paid a "low starvation wage," and that respondent continued to "rob the employees of their lunch and rest periods," etc. Respondent counterattacked, charging the union with adopting Hitlerian tactics in their tirades against the company. Many statements were made by the company and by the officers, generally in the nature of refutation of the union charges. The court upheld the right of the company to answer charges made against it.[33]

Respondent posted bulletins containing true statements of facts as to wages earned by the employees, and as to seniority arrangements. The bulletins also gave the company's view of events at the plants which had been described in unfavorable terms by the union on its radio broadcasts and in its publications. The company said the following with regard to union charges:

THE LIE—"We charge F. C. Crawford, president of Thompson products, as being un-American, subversive, pro-axis, and an enemy of our country."

THE TRUTH—This is a blackguard statement, arousing the resentment of employees, civic, educational and charitable leaders and high government officials who have first hand knowledge of Mr. Crawford's beliefs and achievements.

THE LIE—"The company . . . also indulges in the lowly chiseling thievery of short-changing your pay."

THE TRUTH—This scurrilous remark is a reflection on the honesty and character of each and every one of the hundreds of counters, timekeepers, and payroll clerks who make out the pay as well as the company.

The right of the company to publish these responses was upheld by the court.[34]

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[32] N. L. R. B. v. Montgomery Ward & Co., 157 F. 2d 486 (C. C. A. 8th 1946).

[33] N. L. R. B. v. J. L. Brandeis & Sons, 145 F. 2d 556 (C. C. A. 8th 1944).

[34] N. L. R. B. v. Thompson Products, Inc., 12 CCH LAB. LAW SERV. § 63,906 (C. C. A. 6th 1947).

II

Coercion of the employee by the employer remains forbidden by the terms of the most recent national labor legislation, the Labor Management Relations Act of 1947.[35] Section 8(c)[36] expressly protects the rights of the employer, however, to speak freely so long as his words in no way threaten reprisal. This provision should prove to be a codification rather than a change in the law as administered by the Board and by the courts prior to the passage of this legislation.

The year 1947, unlike 1935 at the enactment of the Wagner Act, finds labor on virtually an even plane with management in many sections of the country. Certainly this equality of status, along with the acceptance of unionism and the education of the worker, mean that the employee will not so easily be hampered in the free exercise of his own will by equivocal words or conduct on the part of the employer. Such conduct, which at one time would have been deemed coercive, might be considered today as mere forceful expressions of opinion, protected by the Constitution and by the express terms of the Taft-Hartley Act. As expressed by the court in *N. L. R. B. v. Montgomery Ward & Co.:*[37] "The First Amendment is intended to assure a privilege that in itself must be so actual and certain that fear and doubt are absent from the individual mind, or the freedom is but an abstraction. If the employer must hesitate before uttering his thoughts, if he must weigh and nicely balance every word so as to determine whether what he is about to say is permitted or forbidden, the guaranty tendered by the Constitution is little more than theoretical. He is 'wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning. Such a distinction offers no security for free discussion.'" These words seem to typify the mature outlook adopted by the courts during the past year or so to meet the changing conditions in the field of labor-management relations. It would not be rash to predict that many cases whose facts fall closely within the second and third categories (coercion by implication and coercion by "totality" of conduct) as enumerated in this note, would be found to be free of coercion if decided today. Certainly we can safely say today that the employer can express his hostility to a union with impunity, and in all probability his opinion of the union leaders may also be expressed. He has the right to inquire into the progress of the unions in their organizing activities, and he has the right to

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[35] 49 STAT. 449 (1935), 29 U. S. C. §§ 151-166 (1940), as amended, Pub. L. No. 101, 80th Cong., 1st Sess. (June 23, 1947).

[36] Pub. L. No. 101, 80th Cong., 1st Sess., § 8(c) (June 23, 1947). "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

[37] N. L. R. B. v. Montgomery Ward & Co., 157 F. 2d 486 (C. C. A. 8th 1946).

disparage the union so long as his words do not imply a threat of retaliation. He may express his opinion as to the benefits or lack of benefits to be obtained by the employees if they unionize, and he can probably make it known that he thinks that unionization might cause him to close down because of the increased costs, and that it might result in the adoption of a system of seniority, causing the discharge of new employees. In short, there is practically no limitation upon the topics upon which the employer may speak or write, so long as his expression contains no threat of reprisal or force or promise of benefit. All this presupposes, of course, that the employer's attitude and tone of voice while uttering these otherwise innocuous expressions, are not such as in themselves to be coercive.

Under no circumstances, however, can we forget that in many parts of the country the unions have made no deep inroads even today, and so the employer remains omnipotent so far as his employees are concerned. In such areas conditions are substantially those which caused the enactment of the Wagner Act, and which caused the Board to apply the term "coercion" rather freely. Wherever this is the case, the realization is unavoidable that the Board and the courts must remain ever alert to catch those subtle expressions of the employer which, by their tone or wording, imply that the employee had better be receptive, or else!

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LIABILITY OF OCCUPIER OF LAND TO UNDISCOVERED TRESPASSER

One has often heard the saying that a man's home is his castle. In not many other fields of the law is this adage more vividly illustrated than in the field of the law of negligence wherein it appears that an occupier of land is not liable for injury to an undiscovered trespasser.

It is a settled rule of law, that, generally speaking, an occupier of land is not subject to liability for an injury to a trespasser of whose presence the occupier was unaware.[1] By entering upon the property of another without being invited to do so, the trespasser violates the right of the possessor of the land to exclusive possession and control.

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[1] Prondecka v. Turner Falls Power & E. Co., 241 Mass. 100, 134 N. E. 352 (1922); Weitzmann v. Barber Asphalt Co., 190 N. Y. 452, 83 N. E. 477 (1908); Panunzio v. State, 266 App. Div. 9, 41 N. Y. S. 2d 587 (3d Dep't 1943).