



1961

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Recommended Citation

Robert J. Affeldt, *The Right of Association and Labor Law*, 7 Vill. L. Rev. 27 (1961).

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FALL 1961]

THE RIGHT OF ASSOCIATION AND LABOR LAW

ROBERT J. AFFELDT†

I.

INTRODUCTION.

IT IS BECOMING PAINFULLY evident to the majority of Americans that they no longer are living in a society of atomistic individuals but within a society of highly organized institutions. Within the short span of a little more than 40 years America has been transformed from a mercantile society of small farms into an industrial society of corporate empires. This new society with its new institutions has shattered the simple framework of the old society and has shifted the battle for personal freedom from the public, political arena to the private, industrial arena.

This change of venue for freedom demands more than the adoption of the simple formulation of rights between man and man, and between man and the state of the old society, for within this new society, interposed between the individual and the state, stand groups, all with distinct and conflicting values. The quest for personal freedom within this type of institutional power society calls for a re-formulation of the rights of the person to the institution and to the state. Unfortunately, however, the resolution of this problem of freedom is not simple, for within the community there are segments which deny that any such problem exists. The unrealistic approach of denying that economic invasions of personality are taking place within the industrial arena has obscured and hindered the solution to the principal crisis of our times — the conflict between personal and institutional freedoms.

Labor law, more than any other branch of the law, mirrors this societal conflict. The law of labor relations is actually a misnomer because this subject is concerned not only with the conflicts between labor and management but also with the impact upon other institutions. Its drama is unfolded upon a broad panoramic screen portraying in every conflict between labor and management the social repercussions upon the values of at least three other major participants — the employee, the community, the state — plus other religious, social and

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educational institutions. Society can no longer afford to tolerate the adage of the mercantile society that the law of labor relations is a private affair.

In terms of freedom and order, the intervention of the law into the industrial arena has not been a successful venture. Labor law today borders on chaos; it is riddled with basic inconsistencies and inherent contradictions which travel to the very heart of the National Labor Relations Act. It can be said with little exaggeration that the National Labor Relations Board and the courts have written not in crooked lines, but in circular lines. To some degree this confusion is understandable when one reflects that at least five different formal tribunals are administering the law. But to a great degree this confusion is caused not by the number of tribunals but by the mercantile viewpoints of the decision makers sitting on these tribunals. For the most part, they continue to view the law of labor relations as a conflict between management and labor within a private contractual social process. This attempt to force three-edged social problems into two-edged legal holes cannot possibly succeed, for the abstractions of the legal process cannot contain the social momentum of the social process. The social energies generated by the new group society have the peculiar ability of outstripping the legal syllogism.

This criticism is not meant to imply that the law should not enter the industrial arena; on the contrary, it is necessary that the law should intervene in order to insure the co-existence of personal and institutional freedom. However, the law should re-enter, armed with three-edged trilateral tools which are designed for a group society and which are capable of resolving the complex relationship of the person to the institution and to the state.

Fortunately, within the body of our constitutional and common law, we possess these tools — the concept of relational interests, the foremost of which is the right of association. Both the Supreme Court and the common law courts have recognized and applied these tools. Congress, too, in the Wagner Act, realizing that the individual was impotent within an institutionalized society, granted him in the right of association a relational interest to union support. It is the contention of this article that, in the most sensitive and bitter phase of labor relations, the organizational stage, both the administrative and judicial process, by transforming the right of association from a relational interest having three dimensions into a bilateral interest having two dimensions, have perverted the policy of the National Labor Relations Act, permitting enterprise to invade economically the personality of the employee on three fronts.

II.

THE WAGNER DAYS — THE GOLDEN DAYS.

A. Early Wagner Days — 1935-1941.

In this second half of the twentieth century, it is a common practice for labor scholars to criticize the early National Labor Relations Board for having been too pro-union and too anti-employer. Most of this criticism is understandable, for there is convincing evidence that if the early Board committed the sin of administrative activism, it sinned against employers not against unions. But history, it is believed, will not indict this Board for having harbored any particular economic theology; instead it will note that its error was one of unsophistication, rather than one of indoctrination.

For it must be remembered that the years 1935-1941 were years of political upheaval, that an old order based upon individualism had broken down and that a new order based on groupism was struggling to be recognized. The principal dilemma which confronted the American nation in the thirties was the quest for a social structure which would contain and preserve both personal and institutional freedom, and at the same time promote efficient technical production and distribution. State authority — fascism and communism — the nation rejected. In this way by the social ethic replacing the protestant ethic, with personal freedom and institutional freedom protected from governmental domination, was the democratic system preserved. The profound social and legal implications of this change were that the group replaced the individual as the fundamental unit of our society.¹

The rationale for the adoption of this social or group ethic policy was that the government felt that the ills of the country were caused by the concentration of too much economic power in the hands of the few with the result that there was too little purchasing power in the hands of the many. Congress recognized that the efforts of the many to acquire benefits from the few resulted in strikes, interfering with the national interests. It also recognized that the employee of the twentieth century was no longer the employee of the eighteenth century, that no longer could he appeal to his employer's personal conscience, but now could only appeal to the corporate conscience. The corporate conscience, however, was no longer the employer's — it was part of an organization. The employer had become institutionalized.

1. Miller, *The Constitutional Law of the "Security States"*, 10 STAN. L. REV. 620, 631 (1958).

Governmental policy accordingly proceeded not in the direction of dissolving the large corporations, but of encouraging counter-defensive strategy. It encouraged isolated individuals to institutionalize, to form and join labor unions in order to answer the corporation's metallic voice with an iron voice of its own. In this manner, by encouraging the countervailing power of private groups, the economy would, the government hoped, gradually achieve economic balance. The future would be secure, for the economic state formerly controlled by one institution, would now be replaced by the collectivist economic state, controlled by two institutions — capital and labor.

This governmental philosophy was incorporated into the National Labor Relations Act. This act encouraged group formation, group treaty-making and group war. It explicitly prohibited employer institutional interference with unionization, although it implicitly permitted employer personal persuasion. It is at this point that the early Board, perhaps in excesses of zealotry, sometimes confused the employer's two separate statuses.

The Board's task in administering the Act, however, was an extremely difficult one, for the National Labor Relations Act, perhaps more than any other New Deal measure, mirrored the deep structural changes of the new society. At this stage, however, the implications of this silent revolution were not understood by most. And others, who understood its implications only too well, rallied and closed their ranks for class resistance. The Board's function during these early days became one not only of legal enforcement, but also one of public enlightenment.

Regardless of the times, regardless of the ferment, the Board felt that it had received an unmistakable and clear mandate from Congress to protect the right of association (organization) and the right to association (collective bargaining) from employer invasion. This mandate was explicitly contained in a statement of congressional policy:

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.²

2. National Labor Relations Act (Wagner Act) § 1, 49 Stat. 449 (1935), 29 U.S.C. § 151 (1958).

In section 7 Congress implemented this policy by stating "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 . . ." ³ And in Section 8 Congress declared that "it shall be an unfair labor practice for an employer (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7." ⁴

The National Labor Relations Act was silent on the matter of employer free speech, but the Board felt that since speech was a form of interference and that Congress *meant* no interference when it *said* no interference, a strict policy of employer containment should dominate its interpretation of the Act. Its policy thereupon became one of interpreting the Act within its confines, of resolving close conflicts between employer free speech and unionization in favor of the latter, leaving any administrative abuses of employer rights to the constitutional review of the circuit courts. ⁵

The spirit of this employer neutrality doctrine of the early Board was caught by at least one circuit court when it said:

The employer has no more right to intrude himself into the employees' efforts to organize and select their representatives to represent them in collective bargaining than the employee would have to intrude himself into a stockholder's meeting to interfere with the election of the company's directors who are after all, representatives of the stockholders for the purpose of collective bargaining for the stockholders in all transactions relating to the company's business. ⁶

In this embryonic period of labor relations the Board had little or no opportunity to refine its thinking on employer speech invasions of the right of association. For during this period, at least up to 1939, very few cases containing pure or isolated free speech issues marched before the Board. ⁷ The majority of free speech issues were carried up in extreme cases shattered by company unionism, discriminatory discharges and refusals to bargain. The Board's attitude, however,

3. 49 Stat. 449 (1935), 29 U.S.C. § 157 (1958).

4. 49 Stat. 449 (1935), 29 U.S.C. § 158 (1958).

5. MILLIS & BROWN, *FROM THE WAGNER ACT TO TAFT-HARTLEY* 175 (1950).

6. NLRB v. W. A. Jones Foundary & Machine Co., 123 F.2d 552, 555 (7th Cir. 1941).

7. Morgan, *Employer's Freedom of Speech and the Wagner Act*, 20 TUL. L. REV. 469 478 (1946). Reynard, *Free Speech Problems in Organizational Activities*, 36 TEXAS L. REV. 908 (1958).

toward employer speech was unequivocally expressed in its first annual report,⁸ where it asserted that the superior economic status of the employer as an institution had a tendency to make his slightest suggestions coercive and that, although he had a constitutional right to speak to his employees as a person in a persuasional vein, he must in exercising this right revert to his status as a person. Since this legal conundrum, this changing of masks, was a feat few employers could manage, the majority chose silence as the wisest course.

For the most part, the circuit courts, although aware of the free speech constitutional problem, saw no invasion of the employer's constitutional right of free speech in being condemned to virtual silence in the face of the employee's right of association. Typical of this judicial attitude was Justice Learned Hand's classic comment in *Federbush v. NLRB*.⁹

No doubt an employer is as free as anyone else in general to broadcast any argument he chooses against trade-unions; but it does not follow that he may do so to all audiences. The privilege of free speech, like other privileges is not absolute; it has its seasons; a democratic society has an acute interest in its protection and cannot indeed live without it; but it is an interest measured by its purpose. The purpose is to enable others to make an informed judgment as to what concerns them, and ends so far as the utterances do not contribute to the result. Language may serve to enlighten the hearer, though it also betrays the speaker's feelings and desires, but the light it sheds will be in some degree clouded, if the hearer is in his power. Arguments by an employer directed to his employees have such an ambivalent character; they are legitimate enough as such, and pro tanto the privilege of 'free speech' protects them; but so far as they also disclose his wishes, as they generally do, they have a force independent of persuasion. The Board is vested with power to measure these two factors against each other, a power whose exercise does not trench upon the First Amendment.

A few like the Sixth Circuit disagreed, holding that employer speech is privileged even in an environment of unfair labor practices.¹⁰ These circuit court attempts to break the neutrality barrier, however, did not succeed for the Board generally ignored these type of decisions and continued to apply its economic status theory.

8. 1 NLRB ANN. REP. 73 (1936) "Apart from discrimination, 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 to them that the employers are antagonistic to unions, and are prepared to make this antagonism effective."

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

10. *NLRB v. Ford Motor Co.*, 114 F.2d 905 (6th Cir. 1940).

In these, the early, unsophisticated years, the Board placed no emphasis upon circumstances, preferring to strike down employer speeches to assembled employees in the name of coercion and hostility rather than in the more subtle name of "captive audience."¹¹

Soon after its enactment, legal scholars and decision makers began to sense the social group dynamics contained in the Act. Before the statute was passed, labor problems following the individualistic conceptual cast of common law, were always presented to the courts as two-dimensional problems, representing bilateral conflicts between individuals or bilateral conflicts between an individual and an institution. Now, for the first time, legal conflicts began to take on the added dimension of tri-lateral relationships, involving not only the private right of a person to be free from injury, but also his right not to have his interest in a third party or institution injured. The Board, realizing that the right of association was only negatively protected by the prevention of employer free speech invasion, also recognized, almost immediately, the positive relational interest of the employees to information concerning their organizational rights from the union. For only by this double-barrelled protection, the Board reasoned, could the right of association be adequately protected.

This new group relational interest, union access to company employees on company premises, collided with a valued right of the old order — the constitutional right of absolute control over property. The question was posed in a series of cases: "Did an employer have a constitutional right to prevent union organizers from trespassing upon his property?"

In *Harlan Fuel Company*,¹² the employer, owner of a company town, evicted union organizers as trespassers when they attempted to influence his employees within the town. The company defended its action by asserting that it had a constitutional right to protect its property. The Board held that the right of association included not only the right to be free from employer interference but also included "full freedom to receive aid, advice, and information from others concerning those rights and their enjoyment."¹³ In thus equating the right of association with the right to receive information, the Board recognized a new dimension of protection. Accordingly, in this case it found that the company by evicting the organizers interfered with the

11. *Triplett Electrical Instrument Co.*, 5 N.L.R.B. 835 (1938); *Indianapolis Glove Co.*, 5 N.L.R.B. 231 (1938); *Nebel Knitting Co., Inc.*, 6 N.L.R.B. 284 (1938); *Harrisburg Children's Dress Co.*, 2 N.L.R.B. 1058 (1937):

12. 8 N.L.R.B. 25 (1938).

13. *Id.* at 32.

employees' right under Section 7 and committed an unfair labor practice under Section 8(1).

The Board reaffirmed this slight dislocation of property rights in other cases of the period.¹⁴ For instance in *Cities Service Oil Company*¹⁵ the Board said that slight invasions of property rights springing from the right of association were "damnum absque injuria".

It is quite evident from these cases that the Board felt Congress meant the right of association to be much more than a sterile right, much more than the mere right to join a union, which was already protected before the enactment of the Act. The agency took notice that the Act encouraged unionization and placed no restrictions on the union as an institution as it did upon the employer as an institution. It cited congressional records indicating this congressional intent.¹⁶

The Board also took administrative notice of the fact that the vast majority of the unorganized were, as the National Association of Manufacturers so aptly phrased it, "inarticulate".¹⁷ For this class to make an intelligent choice concerning unionization, knowledge and information concerning their rights and the benefits of unionization were indispensable. Therefore, within this new group society where the institution was beginning to supersede the individual, the Board and Congress stumblingly created and hazily recognized a new right — an institutional relational interest — the right to receive information concerning union activities from a group. Although the Board did not specifically categorize or identify this employee right to information from the union as a relational interest, it did recognize the right and protected it, because it felt that the right of association would be a spurious right unless it was given institutional insulation. This concept of relational interests is not a novel concept in the common law. As Dean Greene has pointed out, the common law courts have been protecting these rights for a long period of time under the guise of property rights.¹⁸

It makes little difference as to the ultimate outcome but there is convincing evidence that the union had an independent statutory right of communication to provide information to employees. It is true that Section 7 specifically refers only to employees, but the history and spirit of Section 7 is not the history and spirit of personal and private

14. *Weyerhaeuser Timber Co.*, 31 N.L.R.B. 258 (1941); *American Cyanamid Co.*, 37 N.L.R.B. 578 (1941); *West Kentucky Coal Co.*, 10 N.L.R.B. 88 (1930).

15. 25 N.L.R.B. 36 (1940).

16. *Harlan Fuel Co.*, 8 N.L.R.B. 25 (1938) (see 79 CONG. REC. 7648-60, 7667-70 (1935); H.R. REP. NO. 1147, 74th Cong., 1st Sess. 16 (1935)).

17. NATIONAL ASSOCIATION OF MANUFACTURERS, *THE CHALLENGE AND THE ANSWER* 3 (1947).

18. Green, *Relational Interests*, 29 ILL. L. REV. 460, 462-64 (1935).

rights, but the history and spirit of institutional rights. In any event, at the end of the Wagner days, the Board recognized two rights radiating from the Section 7 right of association — the right to be free *from* employer interference and the right *to* receive information from the union. Its spirit was that the avenues of communication must be kept open so that employees could be enlightened as to their rights and so make an intelligent choice concerning unionization.

B. Late Wagner Days — 1941-1947.

In the early forties, it became apparent that the pragmatic New Deal program had lost its intellectual momentum and was coasting on the prestige of its former glory. Perhaps more than any other institution, the Supreme Court reflected this faded glory. The early New Deal years were easy years for the Court, for it had little difficulty in supporting legislative leveling measures directed at corporate institutions and in protecting political and civil rights from state invasions. It had no difficulty in subscribing to the rule of the majority over the rule of the minority.

The New Deal was but of temporary help to the Court. More of a crusade than a philosophy, more against than for, it lent support to the decisions of the Court in the late thirties when the times called for political and economic leveling, for paring down unfavorable interests. During this stage the Court acted as a unit in protecting ill-favored interests, in upholding state and national legislation, in guarding civil liberties. The minority opinions of Holmes and Brandeis became the majority opinions. These years were easy years; these problems were easy problems. But once this leveling stage passed, trouble came.

New problems of a societal rather than of a partisan sweep marched before the Court, mixed problems carrying conflicts between values, between freedom and authority, such as the right of disobeying the state in the matter of flag saluting, and the right to picket as an element of free speech. All these and many others appeared before a court without a jurisprudence, without a notion of its function in a democratic society. Subtly they sprang from a new society which cropped up overnight, an aftermath of the New Deal. In this society it is not so easy to distinguish the oppressor and the oppressed. Not in the opinions of Holmes, not in the opinions of Brandeis were the answers to be found. Without precedent, the Court faced these problems. With precedent the Court divided on these problems.¹⁹

19. See Affeldt, *The Labor Bill of Rights; A Bill of Protest in* SYMPOSIUM ON LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959 (Slovenko, ed. 1961).

It was a new society the court faced at the dawn of the forties, no longer dominated by one economic institution, but by many institutions, the strongest of which was labor and management. The Economic Man had succumbed to the Sociological Man. Multi-group tensions and conflicts involving the freedom of the person and of the institution were the new social problems awaiting resolution. The greatest threat to personal freedom was not the obvious state or political invasions of personality, but the much more subtle economic invasions of personality by labor and management. The times called for a reformulation of the relationship between the person and the institution. They called for a new political philosophy which defined and protected the rights of the minority from the rule of the majority.

The Supreme Court, however, was ill-equipped to solve this problem. After attempting and failing in *Thornhill v. Alabama*²⁰ to solve this institutional-personal right conflict with the outmoded legal tools framed for an individualistic order, it turned its attention to the classic case of *NLRB v. Virginia Electric & Power Co.*²¹ This case involved a direct conflict between employer free speech and employee right of association. The Board found an employer guilty of an unfair labor practice when he had posted an anti-union bulletin and had made several uncoercive speeches to his employees. The employer in appealing to the court invoked his constitutional right of free speech.

The Court could have agreed with the Board that these types of industrial conflicts were not free speech conflicts involving the Constitution. It could have endorsed the Board's neutrality doctrine that the employer had no legitimate interest in concerning himself with the employee's choice of a bargaining representative, that institutional free speech was coercive by its very nature, and even in those instances where it was not coercive, it still constituted interference which the Act specifically prohibited. Instead, Mr. Justice Murphy, speaking for the Court, ignored these distinctions and held that an employer as an institution had an absolute constitutional right to interfere with unionization through the medium of persuasive free speech. "Neither the Act nor the Board's order here enjoins the employer from expressing its views on labor policies or problems The employer . . . is as free now as ever to take any side it may choose on this controversial issue."²²

The Court conceded, however, that persuasion may easily melt into coercion when such speech occurs in a context of other unfair labor

20. *Thornhill v. Alabama*, 310 U.S. 88 (1940).

21. *NLRB v. Virginia Elec. & Power Co.*, 314 U.S. 469 (1941).

22. *Id.* at 469, 477.

practices or in a hostile environment. In those instances speech loses its privilege of communication and becomes a verbal act, forbidden by the statute. "The mere fact that language merges into a course of conduct does not put that whole course without the range of otherwise applicable administrative power. In determining whether the Company actually interfered with, restrained, and coerced its employees, the Board has a right to look at what the Company has said, as well as what it has done."²³

This decision, ambiguous and doctrinaire in its legal rationale, has suffered much in the ensuing years. Its antiseptic legal prose fails to hide the poor legal craftsmanship, which failed to show the application of its rationale to the social order. The consensus of opinion today is that Mr. Justice Murphy and the Supreme Court failed to legally filter this opinion.²⁴

A strong argument could be made the Supreme Court did not decide the case on a constitutional reading, but rather upon a statutory reading, or more accurately a statutory *misreading*. Section 8(1) of the National Labor Relations Act reads: "It shall be an unfair labor practice for an employer (1) to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7."²⁵ In reference to this section, however, the United States Supreme Court said: "In determining whether the company actually interfered with, restrained, and coerced its employees, the Board has a right to look at what the company has said as well as what it has done."²⁶

By substituting the judicial conjunction "*and*" for the Congressional correlative "*or*", by demanding an act plus the speech, the Court not only changed the language of the Act, but also its policy. By assuming without discussion that all institutions and persons have a constitutional right to free speech in any context, by failing to evaluate the reasons why Congress was legally incompetent to restrict employer speech when that speech corroded rights which the nation in a national emergency deemed imperative, the Court lost a glorious opportunity to define the relationship of the person to the institution — a legal and social problem which still continues to haunt democratic freedom to the present day.

It was also unfortunate that this decision, because of its ambiguity, created such a division of viewpoints between the Board and

23. *Id.* at 478.

24. Cox, *Mr. Justice Murphy and Labor Law*, 48 MICH. L. REV. 767, 787 (1950).

25. 49 Stat. 449 (1935), 29 U.S.C. § 158 (1958) [Emphasis added].

26. NLRB v. Virginia Electric & Power Co., 314 U.S. 469, 478 [Emphasis added].

the circuit courts. Some circuits refused to enforce the Board decisions.²⁷ Even the circuits themselves differed in their interpretation of the case. Judge Hand of the Second Circuit thought that the employer now possessed an absolute right of free speech;²⁸ other Circuits, such as the Third, did not agree:

By referring to the Virginia case, Judge Hand pointed out that the employer had specifically claimed the privilege of freedom of speech guaranteed by the First Amendment. He concluded, therefore, that the Supreme Court in the Virginia case has sustained that privilege as absolute . . . We do not so contrive the Supreme Court's decision. We are of the opinion that the Supreme Court intended to indicate and did indicate that communications from the employer to the employee might amount to coercion but that it was not clear that the Board had found the existence of coercion on sufficient evidence in the cited case.²⁹

This clash among the decision makers over the meaning of the *Virginia Electric* decision was more than a clash of statutory interpretation; it was a clash in the basic principles of jurisprudence. It was here at this point in the crossroads that the proponents of the new order advocating the inherent right of association closed ranks against the proponents of the old order advocating the inherent right of employer speech. Both camps read their own values into the decision.

The Board, temporarily disconcerted by the new totality test, quickly abandoned its neutrality test with an assist from the Second Circuit.³⁰ It announced that anti-union statements not coercive on their face were unfair labor practices only when they were part of a coercive pattern.³¹ In a remarkable display of ingenuity, it adapted the vague totality doctrine to the facts of industrial life. By a liberal interpretation of circumstances, by skillfully examining the texture and skein of the speech for its tonal quality and for any discords of coercion, the agency warned employers that it was not so much the innocuous content of the speech that mattered, but the impression that the

27. *NLRB v. West Kentucky Coal Co.*, 152 F.2d 198 (6th Cir. 1945); *NLRB v. J. L. Brandeis & Sons*, 145 F.2d 556 (8th Cir. 1944); *NLRB v. American Tube Bending Co.*, 134 F.2d 993 (2d Cir. 1943).

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

29. *NLRB v. M. E. Blatt Co.*, 143 F.2d 268 (3d Cir. 1944), *cert. denied*, 323 U.S. 774 (1944).

30. *NLRB v. American Tube Bending Co.*, 134 F.2d 993 (2d Cir. 1943), *cert. denied*, 320 U.S. 774 (1944).

31. 11 *NLRB ANN. REP.* 34 (1946); 10 *NLRB ANN. REP.* 37 (1945); 9 *NLRB ANN. REP.* 37-38 (1944); 8 *NLRB ANN. REP.* 29-30 (1943); 7 *NLRB ANN. REP.* 43 (1942).

speech tended to create in the minds of the employees. The result of this approach, of course, was that the Board still continued to protect the employee according to its subjective norm — the reaction of the statements upon the mind of the employee. Since the Board was on the firing line, it found that it was a relatively simple matter, in the majority of cases, to discover a hostile or discriminatory employer act and by combining the act with the speech the Board continued to protect employees from employer economic invasions.⁸² This administrative approach drew the intense criticism from many quarters that the Board was actually applying its neutrality doctrine under a barrage of different words.⁸³ The Board, however, continued to find non-coercive speech an unfair labor practice when disfavored circumstances either preceded⁸⁴ or followed the speech,⁸⁵ basing its rationale on the theory that the molecular structure of the speech had been disarranged by exterior influences.

Perhaps no other Board in the history of the National Labor Relations Act has been persecuted as the Board of the late Wagner days. Its opponents have attempted to depict it as a menacing agency devoted to the destruction of employer civil liberties. The evidence does not support this accusation. "The supposed gag of the Wagner Act is largely an illusion."⁸⁶ The Board during this period committed itself to the policy of protecting employee free choice and in conformity with the *Virginia Electric* decision (unlike the earlier Board which equated institutional persuasion with coercion) permitted unrestricted employer interference through the medium of persuasion.

The Board in its hierarchy of values held that the right of association was an inherent right, not to be invaded under the pretense of any economic justification or economic excuse. Predictions of possible economic consequences following unionization were prohibited because of the possible threat to that right.⁸⁷ The Board confined employer activities to appeals to the intellect, not to the will, *i.e.* "So long as the reasoning power of the employee and not his fear is appealed to."⁸⁸ The

32. *Kopman-Worachek Shoe Mfg. Co.*, 66 N.L.R.B. 789 (1946); *Kalamazoo Stationary Co.*, 66 N.L.R.B. 930 (1946); *Montgomery Ward & Co.*, 64 N.L.R.B. 432 (1945); *American Laundry Machine Co.*, 57 N.L.R.B. 25 (1944); *J. L. Brandeis & Sons*, 54 N.L.R.B. 880 (1944); *West Kentucky Coal Co.*, 57 N.L.R.B. 89 (1944); 11 NLRB ANN. REP. 34 (1946).

33. *Kovar, Re-Appraisal of Employer Free Speech*, 3 DE PAUL L. REV. 184, 188, 189 (1954).

34. *Matter of Famous-Barr Co.*, 61 N.L.R.B. 258 (1945); *Matter of Famous-Barr Co.*, 59 N.L.R.B. 976 (1944); *Matter of General Fireproofing Co.*, 59 N.L.R.B. 375 (1944); *Matter of Thompson Products, Inc.*, 57 N.L.R.B. 925 (1944).

35. *Matter of Anderson Mfg. Co.*, 58 N.L.R.B. 1511 (1944).

36. *Morgan*, *supra* note 7, at 469.

37. *Matter of A. J. Showalter Co.*, 64 N.L.R.B. 574 (1945).

38. *NLRB v. J. L. Brandeis & Sons*, 145 F.2d 556 (8th Cir. 1944).

employer during an organization campaign was confined to the sidelines where he could influence; he was not allowed in its midst where he could control.³⁹

No limits were placed upon the employer in his endeavor to enlighten. Offensively, he could intellectually appeal to his employees by stating facts;⁴⁰ giving his opinion,⁴¹ recording past benefits.⁴² Defensively, he could reply to questions or any false charges.⁴³ His manner, however, at all times had to be dispassionate, not vitriolic.⁴⁴

It would now seem quite clear that, under the law in 1946, if an employer avoids acts of coercion, domination, discrimination and restraint apart from his oral or written speech; if he avoids threats, actual or implied, of those types of future action on his part; if he sees that his supervisors and any others who might be acting for him do likewise; if he states the right of self-organization clearly and unequivocally, and promises that there will be no reprisals if it is exercised; and if he confines himself to the truth, without passion or prejudice, to clear statements of his opinion; he can say almost anything he chooses about the unions or union leaders and can advise his employees, either generally or in specific detail. This statement of the rule does contain big ifs, the compliance with some of which may be difficult to insure, but by making certain that his own heart is clean and that the attitude of his entire management group is spotless in the matter of the rights of the workers under them, it would appear that he can do as much talking and honest selling as he cares to.⁴⁵

It was during this period, the dying days of the Wagner Act, that the Board decided the celebrated case of *Clark Brothers Company*⁴⁶ from which sprung the "captive audience" doctrine. The Board held that it was a per se violation of Section 8(1) for an employer to address his employees on company time and property. It asserted that employee freedom of choice contained in Section 7 was the heart of the Act. To economically compel employees to attend an anti-union speech violated this freedom, this right not to receive information and so constituted an economic invasion of their personality which the Act meant to prevent.

39. *Wennonah Cotton Mills Co.*, 63 N.L.R.B. 143 (1945).

40. See generally, Daykin, *The Employers' Right of Free Speech under the Taft-Hartley Act*, 37 IOWA L. REV. 212 (1952).

41. *Barber Mfg. Co.*, 60 N.L.R.B. 235 (1945).

42. Daykin, *The Employer's Right of Free Speech in Industry under the National Labor Relations Act*, 40 ILL. L. REV. 185 (1945).

43. *Id.*

44. *Agar Packing and Provision Corp.*, 58 N.L.R.B. 738 (1944).

45. Morgan, *supra* note 7, at 521, 522.

46. *Clark Bros. Co.*, 70 N.L.R.B. 802 (1946).

Also during this period the right of employee communication concerning union activities came into conflict with the property rights of the employer to control his plant. This clash of plant police powers with the right of association met in the *Peyton Packing Company* case.⁴⁷ The company promulgated and enforced a broad no-solicitation rule against its employees "while on the property of this company, or while working on company time."⁴⁸ The Board, overruling the trial examiner who found for the company, held that this type of no-solicitation rule was invalid. Looking to future conflicts, the agency laid down guides following the line of general assumptions; (1) The employer must justify any restriction infringing upon the employees' right of association even during working hours. (2) While there is a presumption in favor of any no-solicitation rule during working hours, there is also a presumption against any no-solicitation rule during non-working hours. (3) Any attempt to evade these presumptions by the enactment of an invalid no-solicitation rule is an unfair labor practice under Section 8(1).

This administrative philosophy of presumptions was applied in the *Republic Aviation Corporation*⁴⁹ and *LeTourneau Company*⁵⁰ cases, where the companies in defiance of the Board's evaluation suggestions, applied broad no-solicitation and no-distribution rules on company property, respectively. The Board ordered the companies to rescind these rules.

Most circuit courts upheld these no-solicitation rules. The judicial rationale, though solidly based on the priority of constitutional property rights and plant police powers, was legally encased in such phrases as "employer business motive,"⁵¹ "plant efficiency"⁵² and "lack of any discriminatory motive."⁵³

In *Republic Aviation Corporation v. NLRB*,⁵⁴ the United States Supreme Court upheld the presumption philosophy of the Board, rather than the constitutional philosophy of the circuit courts. It held that plant rules outlawing solicitation and distribution of literature by employees on company premises during non-working time is a direct violation of Section 8(1). It unequivocally rejected the company's anti-discriminatory motive defense — that the no-solicitation rules had

47. 49 N.L.R.B. 828 (1943).

48. *Id.*

49. *Republic Aviation Corp.*, 51 N.L.R.B. 1186 (1943).

50. *LeTourneau Co.*, 54 N.L.R.B. 1253 (1944).

51. *Midland Steel Products Co. v. NLRB*, 113 F.2d 800 (6th Cir. 1940).

52. *Boeing Airplane Co., Wichita Division v. NLRB*, 1140 F.2d 423 (10th Cir. 1944). *Wyman-Gordon Co. v. NLRB*, 153 F.2d 480 (7th Cir. 1946).

53. *NLRB v. Hudson Motor Car Co.*, 128 F.2d 528 (6th Cir. 1942).

54. 324 U.S. 793 (1945), *reversing* 143 F.2d 67 (5th Cir. 1944) *and enforcing* 54 N.L.R.B. 1253 (1944).

always been in existence and were uniformly applied to all organizations. It also rejected the company's argument that no showing was made in the record by the employees that the rules interfered with employee communication. On the contrary, the Court, taking a cue from the Board, in placing a higher value upon the *inherent* right of association over mere inconvenience to property control, placed the burden of proof for nullifying the rule upon the employer. Of significance in these decisions is the fact that the Court deferred to the superior knowledge of the Board in evaluating the proper channels of industrial relations communication. It recognized that the Board must apply the Act "in the light of the infinite combinations of events which might be charged."⁵⁵

In two other important cases, the Supreme Court upheld the Board in its recognition and protection of employee institutional relational interests. In *Stowe Spinning Company*⁵⁶ the Board ordered the company, the owner of a company town, to allow a union organizer the use of its meeting hall. A lodge to whom the company loaned the building had consented to its use by the union but revoked its promise upon company order. The union, unable to find other accommodations, protested against this discriminatory treatment. The Board and the Supreme Court agreed with the union.⁵⁷

In *Lake Superior Lumber Company*,⁵⁸ the employer permitted the union to visit the employees in the camp hall at stated times. The union, feeling this was ineffective, asked the company for permission to visit the men in the bunkhouse. The company refused. The Board relied upon the Supreme Court dictum in *Republic-LeTourneau* where the Court said that access must be permitted where "union organization must proceed upon the employer's premises or be seriously handicapped."⁵⁹ The Supreme Court in this decision upheld the Board.⁶⁰

III.

THE TAFT-HARTLEY ACT.

After World War II a rash of serious strikes rocked the major industries in America. In 1947 the national temper was short; its mood extravagantly hostile toward labor. Clamors for a return to individualism, to freedom of contract for employees and freedom of

55. *Id.*

56. 70 N.L.R.B. 614 (1946).

57. NLRB v. Stowe Spinning Co., 336 U.S. 226 (1949).

58. 70 N.L.R.B. 179 (1946).

59. Republic Aviation Corp. v. NLRB, 324 U.S. 793, 799.

60. 336 U.S. 226 (1942).

enterprise for employers unfettered by the restraints of collective bargaining rented the Washington scene. Industrial spokesmen argued that since labor had become a powerful private government seriously competing on equal terms of power with industry, it should assume equal obligations and responsibilities before the law. At no time since the early twenties was the national mood so conducive to the passing of legislation protecting the employer and the public from the ravages of labor organizations.

The 80th Congress, dissatisfied with the Board's application of its subjective-totality test, began in 1946 to amend the Act. The House of Representatives, favoring a contextual test, passed a resolution which provided that no employer speech would be evidence of an unfair labor practice unless the speech contained "by its own terms"⁶¹ a threat of force or economic reprisal. The Senate bill attempting to deep-freeze *Virginia Electric* said that no unfair labor practice would result "if such statement contains under all the circumstances no threat."⁶² It made no reference to rules of evidence.

Compromise was finally reached in conference⁶³ when the phrase "by its terms" was deleted from the House bill and the phrase "promises of benefit," a part of the Senate bill, was added. The final version, Section 8(c) read:

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.⁶⁴

This free speech provision, apart from the exclusionary evidence rules, does not appear, at least from its language, to differ much from the substance of the *Virginia Electric* decision. It is clear that Congress placed its imprimatur upon persuasive speech, allowing the employer to express his views, arguments and opinions. It is also clear from the legislative history that Congress swept away the Board's neutrality and captive audience doctrines. But apart from this, very little is clear. The language and legislative history of Section 8(c) obscure and confuse rather than clarify.⁶⁵

61. H.R. REP. No. 3020, 80th Cong., 1st Sess: 8 (d) (1947).

62. S. REP. No. 1126, 80th Cong., 1st Sess. § 8 (c) (1947).

63. H.R. REP. No. 510, 80th Cong., 1st Sess. 45 (1957).

64. 29 U.S.C.A. § 158(c) (1956).

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

Professor Cox, one of the leading authorities in labor law, at the time of the Act's enactment predicted that Section 8(c) would neither change the scope of employer speech nor the Board's totality doctrine.

The amendment will not require any substantial change in the Board's present policy on the free speech question. . . . But with these exceptions, Section 8(c) merely supplies a statutory foundation for current practice and prevents a return to the former view. The sponsors of the provision recognized this in the debate.⁶⁶

Although there is considerable ambiguity, it would seem that the Board should continue to apply this doctrine, at least in a limited form. Section 8(c) itself contains nothing to suggest that in determining the presence of a threat or promise the Board is to shut its eyes to extrinsic circumstances and look only to the naked words. In the labor field, as elsewhere, language takes on its meaning from its context. Thus, if a mill superintendent made a speech to employees stressing the disadvantages of union membership and expressing the hope that a majority would refuse to join, his words would contain only the minimum, ineradicable impression that he might use his power favorably to those who accepted his views and unfavorably to those who rejected them. But if the superintendent had just discharged the two most ardent supporters of the union, he would be understood by almost everyone at the meeting to be threatening further reprisals.⁶⁷

He felt, however, that the exclusionary evidence provision contained in Section 8(c), which prevented the Board from considering an employer's speech as evidence of an unfair labor practice, would have the most damaging effect on labor relations.⁶⁸

In many cases the employer's state of mind is the determinative factor, for here, as often in the law, the privilege to engage in conduct crossing the interests of others depends on the purpose for which the conduct is undertaken. In such cases expressions, desire or opinion will often indicate the motive of otherwise ambiguous acts, and normal rules of evidence permit proof of the actor's declarations to show his state of mind. For example, testimony that a plant manager made vituperative attacks on a local union and expressed the hope that the plant would never be organized, shortly before discharging two experienced workers who had become its president and vice-president, would be evidence of his state of mind, and if admitted, would sustain, if it

66. *Id.* at 16.

67. *Id.* at 16, 17.

68. *Id.* at 15.

did not compel, a finding that he made the discharges in order to rid the plant of active union men. But Section 8(c) reverses the familiar rules and forbids the Board to admit the testimony.⁶⁹

There was one predominate theme running throughout the Taft-Hartley hearings; one theme which appeared and reappeared, in point and counterpoint, from the halls of Congress to the borders of the nation, and that was the theme of "equality of obligation."⁷⁰ It was a new cry in a new era, for this was the first time that Congress was called upon to democratize and equalize the relations between institutions.⁷¹

In essence, then, Section 8(c) was a defensive measure. Congress, irked at institutional freedom of speech upon the part of unions and alleged institutional restrictions upon the part of employers, sought to equalize this relationship by providing employers with an equal right of free speech. After the enactment of the Taft-Hartley amendment, the employer had a right of free speech, Section 8(c), commensurate with that of the union, Sections 7 and 8(a)(1).

IV.

EARLY TAFT-HARTLEY—1947-1953.

The first problem to be resolved by the Board after the passage of the Taft-Hartley Act was whether Section 8(c) had changed the test for the determination of an employer unfair labor practice from the subjective test (the reaction of the speech upon the minds of the employees) to the objective test (the mechanical examination of the speech, apart from its context). Three possible theories revolved around the question of whether the Board could consider prior acts of the employer in determining whether his technically uncoercive speech was in reality coercive.⁷²

The mechanical-term theory holds that since Congress forbade the Board to use a non-coercive speech as evidence for judging the purpose of another unrelated act the Board must employ the same rationale in determining the nature of speech itself. A speech is coercive only if the barbs of coercion are contained within its own

69. *Id.* at 19.

70. MILLIS & BROWN, *FROM THE WAGNER ACT TO TAFT-HARTLEY* 288-296 (1950).

71. *Id.* at 655; Daykin, *The Employers' Right of Free Speech under the Taft-Hartley Act*, 37 *IOWA L. REV.* 212 (1952).

72. 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. . . ." 13 *NLRB ANN. REP.* 40 (1948)

terms. Circumstances shedding light upon the words which may reveal coercive signals are to be ignored. The legislative history of Section 8(c) does not seem to support this theory since the House draft containing the language "by its own terms" was rejected by Congress.

The course of conduct theory is broader than the mechanical-term theory and narrower than the totality theory. It regards a non-coercive speech as an unfair labor practice when the speech and act fuse together, approaching a state of identity. "Words and conduct may be so intertwined as to be considered a single coercive act."⁷³ The Board illustrated this course of conduct theory by referring to an employer anti-union speech immediately followed by a poll asking the employees whether he, the employer, should "step out completely and let the business go on its own power."⁷⁴ The Board held that the speech and the poll constituted a threat that the employer would close down his business if the employees voted for the union.

The totality doctrine considers all the circumstances, the employer's anti-union predispositions, his labor record, plant environment, etc., in determining the effect of an employer's speech upon his employees. Its norm is subjective, mirroring the employees' reactions rather than objective, mirroring the mechanical purity of the words.

The Board, in initially approaching Section 8(c), adopted the objective test, fluctuating between the first two theories. It refused to consider non-coercive statements as violations of the Act because the employer at other times had committed other unfair labor practices.⁷⁵ Eventually, however, it resorted to a modified subjective test. In *J. S. Abercrombie Company*, it said: "The substance and context of the statement, and the position of the speaker in relation to his audience, are equally, if not more significant factors in determining whether a statement is free from any threat of reprisal or promise of benefit."⁷⁶

Professor Daykin summed up the Board's modified totality doctrine during these years:

While the Board has modified the totality of conduct doctrine much weight in determining interference is placed upon the circumstances under which speeches are made or letters distributed to the employees. The Board has stated that it would be impossible to appraise fairly and adequately the acts of employers without viewing the entire situation. Consequently in

73. *Id.*

74. *Alliance Rubber Co.*, 76 N.L.R.B. 514 (1948).

75. *Tygart Sportswear Co.*, 77 N.L.R.B. 613 (1948).

76. *J. S. Abercrombie Co.*, 83 N.L.R.B. 524, 530 (1949).

determining the legality of speeches, the Board focuses attention upon such factors as the substance and context of the statements, the position of the speaker in relation to his audience, the objectivity in approach and moderateness of the language of the speech, the timing of the speech, the isolated character of the remarks, the absence of additional acts of interference, and the anti-union context in which a promise or a threat is made in a speech.⁷⁷

Perhaps this change in Board approach was influenced by the circuit courts who refused to accept the narrow approach.⁷⁸ Some held that only unrelated speech could not be used as evidence, while others saw no change at all affected by Section 8(c),⁷⁹ holding that it was no more than a "restatement of the principles embodied in the First Amendment."⁸⁰

The Seventh Circuit, realizing that a literal application of the mechanical term test or a narrow application of the course of conduct test would not only contradict but destroy the corresponding rights of association in Section 7 and protected by Section 8(a)(1) said:

It also seems clear to us that in considering whether such statements or expressions are protected by 8(c), they cannot be considered as isolated words cut off from any relevant circumstances. . . . When . . . we consider the relation of the parties, . . . related statements and events and the background of the employer's actions, we may find that the statement is a part of a general pattern which discloses action by the employer so coercive as to entirely destroy the employees' freedom of choice and action.

To hold otherwise would nullify the guarantee of employees' freedom of action and choice which Section 7 of the Act expressly provides. Congress in enacting 8(c) could not have intended that result.⁸¹

In respect to the second problem posed by Section 8(c), *i.e.*, whether non-coercive statements could be used as evidence of subsequent unfair labor practices, the Board was fairly consistent in refusing to admit them. In cases where motive was in issue, the Board refused to admit the employer's non-coercive statements as evidence.⁸²

77. Daykin, *The Employers' Right of Free Speech under the Taft-Hartley Act*, 37 IOWA L. REV. 212, 240 (1952).

78. NLRB v. Kropp Forge Co., 178 F.2d 822 (7th Cir. 1949), *cert. denied*, 340 U.S. 810 (1950); NLRB v. Fulton Bag & Cotton Mills Co., 175 F.2d 675 (5th Cir. 1949); NLRB v. Gate City Cotton Mills, 167 F.2d 647 (5th Cir. 1948).

79. Indiana Metal Products Corp. v. NLRB, 202 F.2d 613 (7th Cir. 1953); Pittsburg S.S. Co. v. NLRB, 180 F.2d 731 (6th Cir. 1950), *aff'd*, 340 U.S. 498 (1951).

80. NLRB v. LaSalle Steel Co., 178 F.2d 829 (7th Cir. 1949).

81. NLRB v. Kropp Forge Co., 178 F.2d 822, 828, 829 (7th Cir. 1949).

82. Consumers Co-op. Refinery Ass'n. 77 N.L.R.B. 528 (1948); Carpenter Steel Co., 76 N.L.R.B. 670 (1948); 13 N.L.R.B. ANN. REP. 40-50 (1948)

Even the National Association of Manufacturers, commenting upon this question of evidence, admitted that a literal construction "obviously would impose a harsher rule of evidence even than existed under common law rules in criminal cases."⁸³ In certain instances, however, where the speech and conduct were temporarily related, the Board and courts admitted employer non-coercive speech as evidence of anti-union conduct.⁸⁴

Our labor relations statutes reflect to a great extent the consistently bitter conflict between the two institutions of labor and management for control of the individual person. One institution offers him security, the other, freedom; one appeals to his sense of justice, the other to his sense of loyalty. The Wagner Act was based upon the underlying thesis that the interests of the union and unorganized employees were identical or at least similar. The Taft-Hartley Act through Sections 8(c) and 8(b)(1) rejected this identity of interest theory.⁸⁵ It released the employee from the legal embrace of the union and made him a legal orphan. Congress thus gave the two institutions an equal opportunity to convince the employee that he should adopt it as his legal stepfather. "The employee is now . . . in the position of a customer about to buy an article with both the union and the employer competing for his allegiance, trade, and support."⁸⁶

This new congressional doctrine — that unionization was now a part of company affairs — the Board accepted. It privileged many statements which would have been illegal under the rationale of pre-Taft-Hartley days. It resulted in the emancipation of the employer from his position on the side lines offering persuasive suggestions and comments during a union campaign and propelled him into its midst as an active candidate. He now was at liberty to do more than influence; he could take sides and attempt to control. He could argue that a vote for the union was a vote against the company,⁸⁷ that the employer's and the employees' welfare would best be served by a vote against the union,⁸⁸ and that he opposed unions and collective bargaining⁸⁹ because unions courted economic disaster⁹⁰ and endangered

83. National Association of Manufacturers Law Digest 66 (1947).

84. *Indiana Metal Products Corp. v. NLRB*, 202 F.2d 613 (7th Cir. 1953); *Southern Desk Co.*, 116 N.L.R.B. 1168 (1956); *Long-Lewis Hardware Co.*, 90 N.L.R.B. 1403 (1950).

85. Cox, *Some Aspects of the Labor Management Relations Act*, 1947, 61 HARV. L. REV. 1, 45 (1947).

86. *Id.* at 46.

87. *Meier & Frank Co.*, 89 N.L.R.B. 1016 (1950).

88. *Tennessee Coach Co.*, 84 N.L.R.B. 703 (1949); *Wrought Iron Range Co.*, 77 N.L.R.B. 487 (1948).

89. *Sunray Oil Corp.*, 82 N.L.R.B. 942 (1949); *Bailey Co.*, 75 N.L.R.B. 941 (1948).

90. *Cleveland Veneer Co.*, 80 N.L.R.B. 617 (1950).

job security.⁹¹ Also the Board allowed the tone of the election campaign to change, permitting the company to disparage unions and profane their leaders.⁹²

With the exception of these employer inroads upon the right of association, explicitly dictated by the Act, the early Taft-Hartley Board continued to administer the Act in much the same policy vein as the previous Board. It continued, although more liberally, to confine employer interference with unionization to persuasion. Also, it continued to apply its modified subjective test in determining whether the content of the employer's speech was coercive. The tendency of the employer's statements to arouse fear or promise of benefit was the legal barometer for measuring coerciveness, not the employer's motive in delivering the speech nor the employees' actual response to it. The Board refused to tolerate invasion of the right of association based upon economic motivation tests or upon other hierarchal theories of justification or excuse because it regarded the right of association as an inherent right.

The test of interference is not the employer's motive or whether the coercion succeeded or failed to materialize its objective; the test is whether the employer engaged in behavior which may reasonably be interpreted to coerce or have a tendency to coerce employees in their self-organizational rights. The Board has considered it illegal per se to question employees about their union activities and views. Because such questioning is illegal per se the legality of such behavior is not determined by motivation.⁹³

The Board in the interests of truth and objectivity allowed the employer to predict or prophesy that the impact of unionization upon his company would be detrimental to its future existence. In this area, however, where it was extremely difficult to distinguish between employer economic motives and employer anti-union motives, between economic predictions and veiled threats, there existed a strong Board presumption that employer predictions were employer threats.⁹⁴ The employer could overcome this presumption by proving from the circumstances, the substance and context of his speech, his relationship to his employees, and other environmental factors that his motive was based on economic facts and not on anti-unionism. The Board found interference where the employer predicted that if the union won

91. Tennessee Valley Broadcasting Co., 83 N.L.R.B. 895 (1949); Russell Mfg. Co., 82 N.L.R.B. 1081 (1949); Morristown Knitting Mills, Inc., 86 N.L.R.B. 342 (1949).

92. Daykin, *supra* note 77, at 239.

93. *Id.* at 240.

94. See *supra* note 76.

the election, he would sell his business,⁹⁵ discontinue it,⁹⁶ or that he would be unable to carry out his projected expansion plan because he would be unduly hindered by the union.⁹⁷

The Board emphasized matter above form; it closely scrutinized all implied or veiled threats. When an employer asserted that it would be less costly to close his plant than to bargain with a union,⁹⁸ the Board held it to be a threat to close down his plant. In another instance, where an employer stated that if the union won, he would be less zealous in securing additional work, the Board held that he threatened his employees with less work and less pay.⁹⁹

The granting or promising of benefits by an employer to his employees in "the normal course of business" was permissible. However, at no time could an employer grant or promise to grant benefits in order to defeat unionization.¹⁰⁰ He could not justify interference by alleging that he acted in the name of higher business or economic motives. For instance, he could not justify raising his employees' wages to the same level as that promised by the union on the basis of meeting competitive conditions.¹⁰¹ There existed a broad presumption that any benefits promised or granted during a union campaign or on the eve of an election were promised or granted to defeat unionization.¹⁰²

The Board entertained a very liberal and flexible policy in regard to the laws of agency. Its underlying thesis was one of fixing responsibility on the employer for the acts of his agents notwithstanding the employer's absence of knowledge or his protest that the agent had disobeyed his instructions. The Board, applying the principle of apparent agency, held that the employer could only escape liability by proving that he had exercised his affirmative duties by attempting to halt and disavow the illegal behavior.

The Board found the employer liable for illegal activity when his supervisors circulated anti-union petitions,¹⁰³ questioned employees about union affairs,¹⁰⁴ and threatened employees with loss of jobs,¹⁰⁵ even though the employer was not aware of his supervisors' actions.

95. Peoples Motor Express, Inc., 74 N.L.R.B. 1597 (1947).

96. NLRB v. Hoppes Mfg. Co., 170 F.2d 962 (6th Cir. 1948).

97. NLRB v. Beatrice Foods Co., 183 F.2d 726 (10th Cir. 1950).

98. Goodyear Footwear Corp., 80 N.L.R.B. 800 (1948).

99. Dinion Coil Co., 96 N.L.R.B. No. 215 (1951); B & Z Hosiery Products Co., 85 N.L.R.B. 633 (1949).

100. Macon Textiles, Inc., 80 N.L.R.B. 1525 (1948).

101. Mathews Lumber Co., Inc., 96 N.L.R.B. 322 (1951).

102. D. H. Holmes Ltd., 81 N.L.R.B. 753 (1949). See also Daykin, *supra* note 77, at 227.

103. Kentucky Util. Co., 76 N.L.R.B. 845 (1948).

104. Lily-Tulip Cup Corp., 88 N.L.R.B. 892 (1950).

105. Fairchild Cafeteria, 92 N.L.R.B. 801 (1950).

Employers were also held responsible when their foremen¹⁰⁶ and workleaders¹⁰⁷ engaged in this activity.

It was also possible for an employer to be liable for his employees' illegal actions. When a non-supervisory employee attempted to influence another employee to sign an illegal anti-union petition in the presence of the employer, and the employer did not disavow his employee's action, the Board found the employer responsible.¹⁰⁸ The Board reached the same result when an employer, aware that an employee originated a rumor that the company intended to move from the locality upon the advent of the union, took no action to disassociate himself from the authority of the employee's forecasts.¹⁰⁹

Ordinarily, an employer was not responsible for anti-union conduct upon the part of interested factions within the community.¹¹⁰ If, however, he was aware that certain groups, such as businessmen and newspapers,¹¹¹ were engaging in such conduct on behalf of himself, he had to immediately disengage himself from such conduct by disavowing it.

In the interval between the Board's decision in the *Clark Brothers* case, in which it denounced captive audiences as per se violations of the Act, and the Second Circuit's review of that decision, Congress passed the Taft-Hartley Act. Perhaps influenced by the Act, the Court disagreed with the Board's holding that an employer had no right under any conditions to speak to his assembled employees during working hours. The Court suggested that perhaps the employer did not have an absolute right to speak, but he had a conditional right which was satisfied by granting the union's request for a reply to his speech. "An employer has an interest in presenting his views on labor relations to his employees. We should hesitate to hold that he may not do this on company time and pay, provided a similar opportunity to address them were accorded representatives of the union."¹¹²

The Board, however, now that the Taft-Hartley Act was law, ignored this suggestion, abandoned its captive audience doctrine (now permitting the employer to address his employees without union participation) and retreated from this area of conflict for the next

106. Chamberlain Corp., 75 N.L.R.B. 1188 (1948).

107. Efficient Tool & Die Co., 79 N.L.R.B. 170 (1948).

108. E. B. Law & Son, 92 N.L.R.B. 826 (1950).

109. Bibb Mfg. Co., 82 N.L.R.B. 338 (1949).

110. Empire Pencil Co., 86 N.L.R.B. 1187 (1949).

111. Wayline, Inc., 81 N.L.R.B. 511 (1949).

112. NLRB v. Clark Bros. Co., 163 F.2d 373 (2d Cir. 1947).

four years.¹¹³ Only in *General Shoe Corporation*,¹¹⁴ concerning the matter of elections, did the Board show signs of militancy. In that case it declared, since it had exclusive control over election procedures, that the technical 8(c) rules governing unfair labor practices would not pertain to elections, but that more liberal rules protecting employee free choice would prevail. Critics contended with much merit that this Board maneuver flouted the congressional will as expressed in Section 8(c), but no one seriously contended that the Board could not legally take this position.

In 1951, the Board, without warning, suddenly resurrected the equal time suggestion thrown out by the Second Circuit Court in the *Clark Brothers* case. In *Bonwit-Teller, Incorporated*,¹¹⁵ the employer, a department store, enforced a privileged no-solicitation rule which prohibited all solicitation upon the selling floor during working and non-working hours. This type of rule was legally permissible because of the nature of the business, *i.e.* a retail store. The employer, however, taking advantage of this rule, made an anti-union speech to his assembled employees during working time six days before a scheduled election and refused the union's request for a reply. The Board voided the election and found the employer guilty of an unfair labor practice upon two grounds: first, upon the narrow rationale that he had discriminatorily applied the rule in favor of himself, a candidate in the election; and second, upon the broader rationale that he had violated the rights of the employees under Section 7 of the Act — their right to hear both sides of the story before exercising their freedom of choice.

The *Bonwit-Teller* rule would have been of little significance to labor relations if it had been confined to its facts and its narrow rationale. But in the very next case,¹¹⁶ involving an employer of an industrial concern who had made a captive audience speech in the absence of any no-solicitation rules, the Board held that the principle of equal time applies to all arenas, regardless of the existence or non-existence of no-solicitation rules. It was now obvious to all that the Board intended to rely upon its broad rationale and that the *Bonwit-Teller* rule had now become the *Bonwit-Teller* doctrine.

The Board's philosophy was centered on the fact that it regarded employee freedom of choice concerning unionization to be the matrix of the Act. Before that choice could be intelligently exercised, it was

113. S & S Corrugated Paper Machinery Co., 89 N.L.R.B. 1363 (1950); Babcock & Wilcox, 77 N.L.R.B. 577 (1948).

114. 77 N.L.R.B. 124 (1948).

115. *Bonwit Teller, Inc.*, 96 N.L.R.B. 608 (1951).

116. *Biltmore Mfg. Co.*, 97 N.L.R.B. 905 (1951).

necessary that the individual employee be enlightened as to the advantages and disadvantages of unionization by both the union and the employer. Since the thrust of the Act was directed to this freedom of persuasive communication and away from coercive communication, the Board protected the employees' right to union information as an institutional relational interest. It also protected the employer's right to convince employees of the disadvantages of unionism, but the Board originally disfavored speeches before a captive audience because it felt that the employer had overstepped the bounds of persuasion and violated the Act's policy by taking advantage of his superior economic position in order to force employees to listen to speeches which ran against their right of free choice as protected by Section 7. After the enactment of the Taft-Hartley Act, however, with its legislative history clearly indicating congressional disapproval of the Board's captive audience doctrine, the Board, in order to preserve and effectuate the policy of the Act, which had not been amended, reversed its position from that of requiring that an employee had a right of receiving *no* information to that of requiring that he had an obligation under Section 7 to receive *all* information.¹¹⁷

Its policy therefore became one of according both the union and the company an equal opportunity for freedom of speech. It regarded both as conditional, interdependent rights, both inextricably connected to each other. Its function as a board, it felt, was to maintain this delicate balance, to prevent one right from becoming absolute so as to destroy the other right and hence to pervert the Act's policy. It translated this policy of equal communication to the factory community by directing that these commensurate rights use the same industrial microphone — the plant forum during working hours.

Our finding is supported . . . by the realities to be found in union organization campaigns. Thus, it is apparent that printed materials and individual solicitations neither reach the full audience that the employer can insure by his control over working time nor do they approach the persuasive power of an employer's oral presentation. Soliciting employees on the employer's premises, even when not precluded by a no-solicitation rule, cannot substitute for the systematic arguments presented orally to an employee assembly. Soliciting employees off the premises can seldom be extensive, due to both time limitations and geographical diffusion of employees.¹¹⁸

117. Mittenthal, *Employer Speech — A Life Cycle*, 5 LAB. L.J. 101 (1954); Note, *Limitation upon an Employer's Right of Non-coercive Free Speech*, 38 VA. L. REV. 1037 (1952). See also Chanin, *Development of a Free-Speech Policy in Industrial Relations*, 9 LAB. L.J. 14 (1958).

118. Metropolitan Auto Parts, 102 N.L.R.B. 1634, 1636 (1953).

The *Bonwit-Teller* doctrine did not fare well in the circuits. The Second Circuit upheld the narrow rationale but rejected the broad rationale.

If *Bonwit-Teller* were to abandon that [no-solicitation] rule, we do not think it would then be required to accord the Union a similar opportunity to address the employees each time [the employer] Rudolph made an anti-union speech. Nothing in the Act, nor in reason compels such 'an eye for an eye, a tooth for a tooth' result so long as the avenues of communication are kept open to both sides.¹¹⁹

Justice Swan, in dissent, prophesied the future when he held that the employer had an absolute right to non-coercive speech by virtue of Section 8(c). This right, he said, was privileged and unconditional and always applied notwithstanding the breadth of any no-solicitation rules.

The Board, however, continued to apply the *Bonwit-Teller* doctrine "despite any dicta or views to the contrary which may be found in the decision of the court of appeals in the *Bonwit-Teller* case."¹²⁰ When the Second Circuit again warned the Board to discard its broad rationale, it became apparent that dark clouds were drawing in knots for the inevitable storm.

It soon became evident that the Board was beginning to have second thoughts concerning the invalidity of no-distribution rules. A hint of this shift in attitude came in *Newport News Children's Dress Company*,¹²¹ where the Board upheld a no-distribution parking lot rule, distinguishing it from *LeTourneau* on the basis that the rule did not interfere with the relational interest of communication because distribution was possible elsewhere. In *Monolith Portland Cement Company*,¹²² the Board acknowledged that the presumption once favoring the right of association over property control had now shifted to one favoring plant cleanliness and order over distribution. In this case the Board upheld a company no-distribution "in-plant" rule, saying that distribution was possible in the parking lot.

It had now become evident that the presumption theory of the *Peyton Packing Company* case concerning the invalidity of no-distribution rules during non-working time had been reversed by the Board. Now it was incumbent upon the union to carry the burden of

119. *Bonwit Teller, Inc. v. NLRB*, 197 F.2d 640, 646 (2d Cir. 1952), cert. denied 345 U.S. 905 (1952).

120. *Metropolitan Auto Parts*, 102 N.L.R.B. 1634, 1635 (1953).

121. 91 N.L.R.B. 1521 (1950).

122. 94 N.L.R.B. 1358 (1951).

proof, to show unusual conditions or insuperable obstacles to communication in order to nullify such a rule.¹²³

A highly important case of first instance came before the Board during these years. In *Marshall Field & Company*,¹²⁴ the Board held that union organizers had the right of access to the non-selling closed areas of the store. The Board realized that the geographical obstacles were not comparable to lumber camps or company towns, but felt that because of the privileged no-solicitation rule and the irregular relief periods, a sufficient impediment existed so as to seriously interfere with communication. In the first decision of its kind, the Board recognized that the union right of access was not simply a derivative right proceeding from the employees' relational interest of information, but an *independent* right of its own.

The Seventh Circuit, feeling that solicitation was not sufficiently impeded overruled the Board.¹²⁵ The court also did not agree with the Board in terming the union right of access as an independent right, for it distinguished the rights of employees from the rights of non-employee union organizers.

V.

TAFT-HARTLEY TODAY—1953-1961.

In 1953 under the impact of a new administration in Washington, the Board experienced the most radical change in personnel and philosophy since its inception.¹²⁶ The new "Farmer Board," after voicing its discontent with the previous Board's policy approach,¹²⁷ proceeded to "reinterpret" the Act, sometimes subtly, sometimes brutally, in a spirit strongly reminiscent of pre-Wagner days.

It became apparent from the beginning that the new Board differed from its predecessor not only technically but philosophically, in interpretation of basic policy and the hierarchy of values which went to the inner fabric of the Act. The Wagner and early Taft-Hartley Boards, interpreting the Act within its confines, viewed the right of association as the primary right in the scale of values. The Farmer Board, interpreting the Act from without its confines, stretching toward the Constitution, viewed employer free speech and property

123. Hanley, *Union Organization on Company Property — A Discussion of Property Rights*, 47 *Geo. L.J.* 266, 288 (1958).

124. 98 N.L.R.B. 88 (1952).

125. *Marshall Field v. NLRB*, 200 F.2d 375 (7th Cir. 1952).

126. Wirtz, *The New National Labor Relations Board; Herein of "Employer Persuasion,"* 49 *Nw. U.L. Rev.* 594 (1954).

127. See Address of Chairman Farmer at the University of Tennessee, Nov. 6, 1953, in 33 *LAB. REL. REP.* 53 (1953).

rights as the primary rights, relegating the right of association to a secondary position in its scale of values.

The Board articulated this shift in its hierarchy of values by proclaiming that it considered free speech and property rights as absolute rights, not conditional rights. It discontinued the prior Board's practice of balancing these rights against each other. It now evaluated them, giving a legal presumption of validity to plant police powers.

This change of Board policy also effectuated a radical change in the nature of the test employed in determining an unfair labor practice. The Wagner Board in ascertaining whether an employer speech breached employee rights relied upon a subjective test, emphasizing the tendency of the speech to influence the employees' free choice. The Taft-Hartley Board, while allowing more employer latitude of expression, adopted the middle "course of conduct" rule, a modified subjective test. The Board of 1953 discarded the subjective test and adopted the objective test. In determining whether an employer speech was an unfair labor practice, the new Board regarded the reaction of the employees as irrelevant. Under this new test, it was only necessary to isolate the employer's statements from their context and if they contained no direct or explicit threats or promises of benefits, the speech was legitimate. The emphasis was now placed upon employer action, not employee reaction.¹²⁸

Today, eight years after the launching of the Farmer Board, a semi-sophisticated employer can frustrate his employees' free choice in many ways. He can appeal to their fears, avarice, ignorance, and prejudices. Through an unrealistic and technical application of the laws of agency, he can enlist the aid of employees, supervisors, and the community in accomplishing this objective. This state of affairs, to say the least, is confusing especially when one considers that Congress has not amended the policy of the Act, *i.e.* to protect employee freedom of determination in regard to their rights of association and collective bargaining.

Section 8(a)(1) guarantees employees "freedom from fear" in exercising their freedom of determination set forth in Sections 7 and 9(a). It is theoretically an unfair labor practice for an employer to take advantage of his economic power by threatening to remove his operations if employees form or join a union. In these cases, his anti-union motive is clear. The Board, however, following the previous Board's policy, has held that an employer has a right to predict or prophesy the economic consequences of unionization emanating from

128. B.M.C. Mfg. Corp., 113 N.L.R.B. 823 (1955).

impersonal market forces over which he has no control. Thus, he may freely predict that he will be compelled to move his business to another locality not because he personally opposes collective bargaining but because collective bargaining endangers his institutional competitive existence.¹²⁹ But here the resemblance in approach ends, for the Farmer Board has reversed the previous Board's presumption that employer predictions were employer threats. It now holds that it will resolve any doubts between predictions and threats in favor of employer good faith.¹³⁰

In *National Furniture Manufacturing Company*,¹³¹ the Board found no economic threat in two employer pre-election letters warning the employees that the company would be forced to move if it was forced to meet union demands.

In *Chicopee Manufacturing Corporation*,¹³² the employer threat "if the union [wins, we will] be forced to move the plant" was found by the Board to be a "prediction of the possible impact of wage demands upon the employer's business." In addition the Board stated 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."¹³³

Today, an employer may "predict" that voting for a union will mean less overtime,¹³⁴ less hours,¹³⁵ less work,¹³⁶ higher apprentice standards,¹³⁷ mass layoffs,¹³⁸ and a rash of strikes,¹³⁹ without giving any reasons. He may prophesy that in event of a union victory, he would be less zealous in acquiring new orders.¹⁴⁰ In "prophesying" a relocation of the business he may cite a host of economic reasons ranging from inability to meet competitive prices¹⁴¹ to loss of necessary customers.¹⁴²

In those instances where these types of "predictions" or "prophecies" prove ineffective or it is not feasible for the employer to relocate

129. Murray Ohio Mfg. Co., 122 N.L.R.B. 1306 (1959); Neco Electrical Products Corp., 124 N.L.R.B. 481 (1959); Edmont Mfg. Co., 120 N.L.R.B. 525 (1958); Senorita Hosiery Mills, Inc., 115 N.L.R.B. 1304 (1956); Lanthier Machine Works, 116 N.L.R.B. 1029 (1956).

130. Senorita Hosiery Mills, Inc., 115 N.L.R.B. 1304 (1956).

131. 106 N.L.R.B. 1300 (1953).

132. 107 N.L.R.B. 106 (1953).

133. *Id.*

134. Sunset Lumber Products, 113 N.L.R.B. No. 115 (1955).

135. Gilbert Co., 110 N.L.R.B. 2067 (1954).

136. Avildson Tools & Machine, Inc., 112 N.L.R.B. 1021 (1955).

137. Crosby Chemicals, Inc., 121 N.L.R.B. 412 (1958).

138. Carolina Mirror Corp., 123 N.L.R.B. 1712 (1959).

139. Edmont Mfg. Co., 120 N.L.R.B. 525 (1958).

140. Walton Mfg. Co., 124 N.L.R.B. 1331 (1959).

141. Lanthier Machine Works, 116 N.L.R.B. 1029 (1956).

142. Neco Electrical Products Corp., 124 N.L.R.B. 481 (1959).

he may warn the employees that he will not bargain with the union, even if it is elected, until forced to do so by the courts.¹⁴³ The Board here finds no coercion or frustration of the Act but only an "expression of the employer's legal position," even though aware of the fact that it might take years for judicial clarification of the company's legal position.

This is a Board which stresses form over matter, which very rarely interferes with the master of the proper phrase. In case after case with the same background and the same values at stake, the Board has reached incompatible results.¹⁴⁴

This exaggerated legal parsing of employer speech, — this emphasis on denotation, not connotation, has, at times, led the Board to the edges of comedy. In grim seriousness the Board held that a company president's remark to his employees "I am prohibited by law from telling you that I will never sign a contract with the typographical union" was protected free speech under the umbrella of Section 8(c).¹⁴⁵

Professor Cox tells of an amusing incident in an unreported case which occurred in one of the New England fishing ports. Prior to an election in one of its processing plants, the company posted a notice stating:

The management has diverted the S.S. Cape Ann to another plant in Boston because it cannot afford to bring additional fish to this plant until the threat of labor unrest is removed." The employees took the hint and voted against the union but the election was set aside because the notice was threatening. Later a new election was held. Two days before the election the employer posted a notice the gist of which was you may wonder why a new election is being held so soon after the union was soundly beaten in a prior election. The explanation is that the first election was set aside by the NLRB because the company posted the following notice of management policy just prior to the election. Then followed the earlier notice. This time the ruling was that management had done nothing more than explain the legal situation.¹⁴⁶

Section 8(c) explicitly prohibits the employer from economically seducing his employees by appealing to their sense of avarice at the

143. *Esquire, Inc.*, 107 N.L.R.B. 1238 (1954).

144. *Senorita Hosiery Mills, Inc.*, 115 N.L.R.B. 1304 (1956); *Lanthier Mach. Works*, 116 N.L.R.B. 1029 (1956); *Lux Clock Mfg. Co.*, 113 N.L.R.B. 1194 (1955); *Sardis Luggage Co.*, 114 N.L.R.B. 446 (1955); *Diaper Jean Mfg. Co.*, 109 N.L.R.B. 1045 (1954).

145. *NLRB v. Sun Co.*, 215 F.2d 379 (9th Cir. 1954).

146. COX, *LAW AND THE NATIONAL LABOR POLICY* 43 (Institute of Industrial Relations, University of California, Los Angeles, 1960).

time of unionization. However, here, as in the case of threats, the Board has permitted the employer to take advantage of the economic motivation test to frustrate employee rights. In the interest of higher property and business values, the Board has permitted the employer to invade the employees' right of association. The fact that the benefit or the promise of benefit coincides with the union campaign, is now regarded by the Board as irrelevant. The employer may describe, before an election, his plan for improving wages and working conditions and defend his right to do so upon the rationale that the improvements are being made in "the normal course of business." He may grant benefits to correct inequities caused by the increase in the cost of living,¹⁴⁷ to conform to the law,¹⁴⁸ to assure the company's competitive position,¹⁴⁹ and to retain the company's skilled mechanics.¹⁵⁰ In short if an employer selects a proper business or economic motive, little restraint is placed upon his right to promise or grant benefits.

Without bothering to discuss the point, the Board reversed the presumption underlying the *General Shoe* doctrine, *i.e.* that employer speech in election campaigns was not entitled to the same liberality it enjoyed under Section 8(c). In reversing this doctrine the Board held that it would not void an election unless the speech was also an infraction of Section 8(c),¹⁵¹ and that in the future it would assume a *laissez-faire* attitude toward elections, allowing the contestants a wide latitude in the exchange of propaganda, insults and falsehoods.

The Board normally will not censor or police pre-election propaganda by parties to elections, absent threats or acts of violence . . . Exaggerations, inaccuracies, partial truths, name-calling, and falsehoods, while not condoned, may be exercised as legitimate propaganda, provided they are not so misleading as to prevent the exercise of a free choice by employees in the election of their bargaining representative.¹⁵²

This opening of the election gates to virtually unlicensed speech gave the employer a wide area in which to appeal to his employees' ignorance. No longer could the union request the Board to void an election because the employer interfered with the employees' free choice through misrepresentation and falsehoods. It was now incumbent upon the union to neutralize the effect of misstatements by

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

148. Ford Radio & Mica Corp., 115 N.L.R.B. 1046 (1956).

149. Blackstone Mills, Inc., 109 N.L.R.B. 772 (1954).

150. Taylor-O'Brien Corp., 112 N.L.R.B. 1 (1955).

151. National Furniture Mfg. Co., 106 N.L.R.B. 1300 (1953); Kent Plastic Corp., 107 N.L.R.B. 157 (1953); American Laundry Machinery Co., 107 N.L.R.B. 511 (1953).

152. Gummed Products Co., 112 N.L.R.B. 1092, 1093 (1955).

replying to them,¹⁵³ or, if that proved ineffective, by suing in libel and slander.¹⁵⁴

The Board has also condoned the employer practice of appealing to the employees' prejudices by stirring up emotions of class hatred. It treats appeals to racial prejudice under the category of persuasion, protected by the absolute right of free speech, rather than under the category of psychological coercion.

In *Westinghouse Electric Corporation*,¹⁵⁵ the Board skirted the issue on procedural grounds. In *Sharnay Hosiery Mills, Incorporated*,¹⁵⁶ the employer accused the union of being pro-integration, of contributing \$75,000 to the N.A.A.C.P., and of submitting a pro-integration brief to the Supreme Court. The Board found no violation because the statements were correct. In *Chock Full O' Nuts Company*,¹⁵⁷ the Board found that injection of the race issue by the employer was proper and that its discussion constituted no grounds for invalidating the election. Employer predictions that the advent of unionism brings equality — negro employees working side by side with white employees and sharing the same rest rooms¹⁵⁸ — do not constitute interference. The Board also failed to find a violation of the Act, when an employer directed a colored employee to sit in the president's chair as a prediction of things to come.¹⁵⁹

The narrow application of the common law rules of agency by the Board and the courts has permitted third parties to cooperate with the employer in coercing employees to reject unionization. He may directly request his employees to dissuade fellow employees from exercising their Section 7 rights, provided he does not threaten or promise to benefit.¹⁶⁰ He may sit back passively, aware that his employees are passing out anti-union petitions and not be responsible because he did not give specific directions for them to do so.¹⁶¹ He may even make a coercive remark to his supervisor in the presence of an employee, threatening to discharge anyone working for the union.¹⁶²

153. *Unity Mfg. Co.*, 107 N.L.R.B. 21 (1953).

154. *Geyer Mfg. Co.*, 120 N.L.R.B. 208 (1958); *Houston Shell & Concrete Div., McDonough Co.*, 118 N.L.R.B. 1511 (1957); *Wheelerweld Div., C. H. Wheeler Mfg. Co.*, 118 N.L.R.B. 698 (1957); *Tuttle & Kift, Inc.*, 118 N.L.R.B. 125 (1957); *Dallas City Packing Co.*, 116 N.L.R.B. 1609 (1956); *Chicopee Mfg. Corp.*, 116 N.L.R.B. 196 (1956); *Mason Can Co.*, 115 N.L.R.B. 1408 (1956); *Zeller Corp.*, 115 N.L.R.B. 762 (1956); *Dornback Furnace & Foundry Co.*, 115 N.L.R.B. 350 (1956); *Otis Elevator Co.*, 114 N.L.R.B. 1490 (1955); *Harder's Inc.*, 114 N.L.R.B. 751 (1955).

155. 119 N.L.R.B. 117 (1957).

156. 120 N.L.R.B. 750 (1958).

157. 120 N.L.R.B. 1296 (1958).

158. *American Thread Co.*, 84 N.L.R.B. 593 (1949).

159. *Model Mill Co., Inc.*, 103 N.L.R.B. 1527 (1953).

160. *NLRB v. Reynold & Manley Lumber Co.*, 212 F.2d 155 (5th Cir. 1954).

161. *Armstrong Tire & Rubber Co.*, 111 N.L.R.B. 998 (1955).

162. *Pierce Industries, Inc.*, 46 L.R.R.M. 1522 (1960).

The practice of funneling community strength and leveling it at the unorganized is perhaps the most devastating single factor in defeating unionization.¹⁶³ The Board has permitted private institutions to cooperate with the employer in this practice. It is exceedingly difficult to prove that the employer has directly requested these institutions to aid him.¹⁶⁴ He has no duty to disavow police assistance directed at the right of association, even if it occurs in his presence and within his plant.¹⁶⁵ He has no duty to disavow illegal conduct upon the part of private groups within the community such as citizens committees¹⁶⁶ and local chambers of commerce.¹⁶⁷ At times he may even cooperate with these institutions in opposing unionism.¹⁶⁸ He may also bring pressure upon employees' families through letters and other conduct.¹⁶⁹

Another group within the community aiding the employer in his battle against organization are the decision makers. The Board, under a flexible "lack of substantial evidence" doctrine, very frequently reverses the trial examiners who reached their decisions at the scene of conflict.¹⁷⁰ Many times these decisions on free choice must, of necessity, be decisions of intuition rather than decisions of technicality, therefore it becomes an easy matter for the Board to substitute its version of the facts for that of the trial examiner. The circuit courts also employ this rule to protect the rights of employers, even though a step further removed from the scene. The Fifth Circuit in a violent outburst against the trial examiner said:

The wholesale resolution by the examiner in favor of the board's witnesses and the board's equally wholesale adoption of this resolution in a note to its opinion are as injudicious as they are unjudicial, as indefensible as they are surprising.¹⁷¹

It is not clear from the cases whether the Board in applying its doctrines of "prophecies and predictions," "normal course of business," "statement of legal position" and "lack of substantial evidence" is saying that indirect economic invasion of personality is permissible because of a privileged absolute right of free speech or whether it is

163. KATZ, *TAFT-HARTLEYISM IN SOUTHERN TEXTILES*.

164. *NLRB v. Plankinton Packing Co.*, 265 F.2d 638 (7th Cir. 1959).

165. *Star Brite Industries, Inc.*, 46 L.R.R.M. 1139 (1960).

166. *NLRB v. Armco Drainage & Metal Products, Inc.*, 220 F.2d 573 (6th Cir. 1955); *Stratford Furniture Corp.*, 116 N.L.R.B. 1751 (1956).

167. *Clarke Mills*, 109 N.L.R.B. 666 (1954).

168. *NLRB v. Armco Drainage & Metal Products, Inc.*, 220 F.2d 573 (6th Cir. 1955).

169. *Funke, Board Regulation of Pre-Election Conduct*, 36 TEXAS L. REV. 893, 900-1 (1958).

170. *Midstate Hauling Co.*, 47 L.R.R.M. 1150 (1960).

171. *NLRB v. Cosco Products Co.*, 280 F.2d 905, 908 (5th Cir. 1960).

denying that indirect economic invasion of personality is taking place at all. According to the former theory, an invasion takes place but it is justified by the pursuit of a higher value; according to the latter theory, no invasion or unfair labor practice takes place because the employer is under no duty to avoid indirect invasions of personality. In the practical order of affairs, it makes little difference which theory of justification the Board favors, for the result is the same. However the Board's decisions and proclamations seem to indicate adoption of the privileged rationale — the economic motivation test.

Recently, there has been a tendency upon the part of the Board to expand this economic motivation theory. In *Berg-Airlectric Products Company*,¹⁷² the Board held that an employer did not violate employee rights under Section 7 when he called a meeting of his employees and directed them to take a strike vote. The Board justified this extreme action upon the basis that the employer's primary motive was not interference with employee rights, but rather the understandable business motive of wanting to know if a strike was to take place in order to make preparations for it.

There has also been a tendency to justify interferences with the right of association not only in the name of economic and business motivations, but any type of motivation as long as it is not explicitly anti-union. This test shall be referred to as the "liberal motivation test." In *McFarland v. Hullinger*,¹⁷³ the Board held that direct threats by a superintendent, telling employees to stop "ganging up," that he "would fire the one responsible if there was any more ganging up," were justified because the superintendent's motive for these remarks was to protect his supervisory status, not to frustrate unionization. Other cases of unfair labor practices have been dismissed when the company proved motivations of curiosity,¹⁷⁴ anger,¹⁷⁵ and joking.¹⁷⁶

Another tool the Board employs to liberate an employer from an unfair labor practice is that of "excuse." In this type of case, one that involves an intentional violation of the right of association, the Board cannot make use of its economic motivation test. Instead, it makes use of a liberal circumstance test in which it considers all the circumstances surrounding the employer unfair practice and concludes that the employer act was too inconsequential to constitute a group threat.

It is ironic that the Board considers the employer's conduct in the light of all the circumstances in order to free him from the stigma of

172. 48 L.R.R.M. 1185 (1960).

173. 48 L.R.R.M. 1130 (1961).

174. *NLRB v. Falls City Creamery Co.*, 207 F.2d 820 (8th Cir. 1953).

175. *Atlanta Broadcasting Co.*, 79 N.L.R.B. 626 (1948).

176. *Geo. Byers Sons, Inc.*, 111 N.L.R.B. 304 (1955).

an unfair labor practice, while it refuses to consider the circumstance of an employer non-coercive speech as shedding light upon his conduct.

In *Morgantown Full Fashioned Hosiery Company*,¹⁷⁷ the "isolated instance doctrines," which the Board has employed frequently, was utilized to excuse two supervisors who threatened two employees with a plant shutdown if the union won the election. To Board Member Murdock's observation that the warning would undoubtedly spread throughout the plant, the Board said: ". . . [A]n employee mandate cannot lightly be set aside merely because the normal and expected plant discussion happens to include a few isolated threats by over zealous minor supervisory personnel."¹⁷⁸

The "understandable impulse" doctrine is used to excuse an employer who threatens his employees or the union in the course of bargaining. The Board assumes that threats to refuse to bargain or to close the plant are motivated by employer anger, not employer malice.¹⁷⁹

In 1953 the newly-composed Board overruled the *Bonwit-Teller* doctrine in the case of *Livingston Shirt Corporation*.¹⁸⁰ The employer, enforcing a no-solicitation rule during working hours, gave several non-coercive, anti-union speeches to his assembled workers during working hours and refused to give the union the right to reply. The Board, rejecting the rationale that Section 7 gave the employees the right to hear both sides under approximately equal conditions, held that, "in the absence of either an unlawful broad no-solicitation rule (prohibiting union access to company premises on other than working time) or a privileged no-solicitation rule (broad, but not unlawful because of the character of the business) an employer does not commit an unfair labor practice if he makes a preelection speech on company time and premises to his employees and denies the unions request for an opportunity to reply."¹⁸¹

The decision was not unanimous, and the majority camp itself split into factions over the very identification of the issue, one side viewing it as a free speech problem, the other, as having nothing to do with free speech. Chairman Farmer and member Rodgers voted for reversal of *Bonwit-Teller* because they felt that employer free speech and property rights were absolute rights, the exercise of which within the plant did not materially interfere with union-employee communication,

177. 107 N.L.R.B. 1534 (1954).

178. *Id.* at 1538.

179. *Atlanta Broadcasting Co.*, 79 N.L.R.B. 626 (1948).

180. 107 N.L.R.B. 400 (1953).

181. *Id.*

for the union still retained its time-honored and traditional means of in-plant communication. They regarded the conditional rights theory of the *Bonwit-Teller* doctrine as the "discredited *Clark Brothers* doctrine in scant disguise."¹⁸² To them Section 8(c) granted a privilege of free speech which "cannot be qualified by grafting upon it conditions which are tantamount to negation."¹⁸³ As to property rights they stated that there is "nothing in the statute which even hints at any congressional intent to restrict an employer in the use of his own premises for the purpose of airing his views."¹⁸⁴

Member Murdock in dissent argued that the decision's practical effect was to pervert the purpose of the Act by destroying equality of institutional speech.

In *Peerless Plywood Company*,¹⁸⁵ the Board modified its captive audience rule in holding that although the employer possessed an absolute right of free speech, the Board could in its control over election campaigns, restrict this right. It accordingly held that any speech to a captive audience during the twenty-four hour period immediately preceding an election was a per se interference which voided the election.

The Sixth Circuit Court of Appeals carried the absolute free speech rationale of the *Livingston Shirt* decision to its logical conclusion, by holding, on facts identical to those in *Bonwit-Teller*, that an employer had an absolute right to speak even though he violated his privileged no-solicitation rule and at the same time refused to grant the union the right to reply.¹⁸⁶ It appears, however, that the Board is not willing to go so far as to void the narrow *Bonwit-Teller* rule.¹⁸⁷

With the disposal of the captive audience doctrine, the Board turned its attention to the captive individual doctrine, *i.e.* interrogation of employees. Throughout its history, the Board had held that employer interest in eliciting union information was of insufficient importance to merit interference with the right of association. Professor Cox, discussing this problem, said:

Prior to 1947 and in some degree from 1947 to 1953, the Board's premise was that the employer, though he might be opposed to unions, had no legally cognizable interest in preventing the unionization of his plant. Since many specific issues arising in the administration of the Act turn upon the balance of conflicting interests, assigning a zero value to the employer's interest in breaking up an incipient union would frequently tip the scale in

182. *Id.* at 407.

183. *Id.* at 406.

184. *Id.* at 406.

185. 107 N.L.R.B. 427 (1953).

186. *NLRB v. F. W. Woolworth Co.*, 214 F.2d 78 (6th Cir. 1954).

187. *Johnston Lawn Mower Corp.*, 110 N.L.R.B. 1955 (1954).

the union's favor. A case in point is the former rule that interrogation of employees concerning union activities is an unfair labor practice per se, for although the degree of coercion may be very slight, the employer rarely has enough legitimate interest in the information to justify even the slight interference with freedom to organize.¹⁸⁸

Throughout the early Taft-Hartley days, the Board consistently applied the *Standard-Coosa-Thatcher* doctrine,¹⁸⁹ which condemned all systematic interrogation of employees as per se unfair labor practices. This doctrine rejected as irrelevant such defenses as employer motivation, although it excused extremely isolated and casual cases of interrogation.

In the *Blue Flash Express* case¹⁹⁰ an employer systematically interrogated his employees individually in his office in order to determine whether the union had a majority status. The Board promptly overruled the *Standard-Coosa-Thatcher* doctrine, and applied its objective economic motivation test, completely ignoring the subjective reaction of fear from the employees. Although the Board's rationale was based upon the hypothesis that doctrinaire rules should not apply in the sensitive conflicts of labor relations, — "the test is whether under all the circumstances, the interrogation tends to restrain or interfere with the employees in the exercise of rights guaranteed by the Act,"¹⁹¹ — it is obvious that such a vague litmus test as this serves no value except as a device by which the Board can justify its own predispositions and values. In this case, for instance, although it was evident from the record that the employees had lied about their union affiliations because of fear of reprisal from the employer, the Board obviously thought such fears were unreasonable. "The only reasonable inference from the *Blue Flash Express* case, despite insistence to the contrary in the majority opinion, is that the employer may safely question his employees about their union affiliations and activities so long as he is just a little careful about not coupling his interrogation with *specific* threats or promises tied in with the employees' future union activities."¹⁹²

One of the major problems presently confronting the Board is the formulation of a doctrine to prevent the widespread employer practice of visiting employees and their families at their homes, and of

188. Cox *op cit. supra* note 146, at 40.

189. *Standard-Coosa-Thatcher Co.*, 85 N.L.R.B. 1358 (1949).

190. 109 N.L.R.B. 591 (1954).

191. *Id.* at 593.

192. Wirtz, *The New National Labor Relations Board; Herein of "Employer Persuasion,"* 49 Nw. U.L. REV. 594, 599 (1954).

calling individual employees into company offices in order to persuade them to reject unionization.¹⁹³ Unfortunately, however, the Board appears to have lost all feeling and vision for the Act's policy, while becoming hopelessly entangled in a maze of legalities and technicalities. In attempting to follow the Board in making distinctions between office interrogation for research purposes¹⁹⁴ and for disclosure purposes,¹⁹⁵ between work-bench interrogation¹⁹⁶ and conference room interrogation¹⁹⁷ the mind reels.

The Board had always assumed that the employees had an institutional relational interest to information which permitted the union to enter the employer's premises during non-working hours to solicit and to distribute literature. Although it was true that the Board imposed harsher rules on distribution than it imposed on solicitation, it allowed the union to distribute its literature when it could show that off-plant distribution was difficult.¹⁹⁸ No distinction was drawn between employee and non-employee distribution, for this "would be a differentiation not only without substance but in clear defiance of the rationale given by the Board and the courts for permitting solicitation."¹⁹⁹

In 1954 a rash of identical cases appeared before the Board, all similar to the *Republic-LeTourneau* case except that the distributors of literature were non-employee union organizers rather than employees.²⁰⁰ These cases were decided in *NLRB v. Babcock-Wilcox*.²⁰¹ In the *Babcock-Wilcox Company* the Board held that the employer committed an unfair labor practice in refusing to permit non-employees to distribute literature in his parking lot when it was difficult for the union to distribute it off company property. The United States Supreme Court overruled the Board on the basis of status, distinguishing its decisions in *Republic-LeTourneau* on the ground that only "employees" were there involved, while here "non-employees"

193. Funke, *Board Regulation of Pre-Election Conduct*, 36 TEXAS L. REV. 893, 900-1, (1958).

194. *Blue Flash Express Inc.*, 109 N.L.R.B. 591 (1954).

195. *Ore-Ida Potato Products, Inc.*, 123 N.L.R.B. 1037 (1959). See also *NLRB v. Roberts Bros.*, 225 F.2d 58 (9th Cir. 1955); *NLRB v. Protein Blenders, Inc.*, 215 F.2d 749 (8th Cir. 1954).

196. *Mall Tool Co.*, 112 N.L.R.B. 1313 (1955); See also *Shick, Inc.*, 118 N.L.R.B. 1160 (1957); *The Bryant Elec. Co.*, 118 N.L.R.B. 232 (1957).

197. *People's Drug Store, Inc.*, 119 N.L.R.B. 634 (1957).

198. *Caldwell Furniture Co.*, 97 N.L.R.B. 1501 (1952); *Carolina Mills*, 92 N.L.R.B. 1141 (1950).

199. *Seamprufe, Inc.*, 109 N.L.R.B. 24 (1954).

200. *Seamprufe, Inc.*, 109 N.L.R.B. 24 (1954), *enforcement denied*, 222 F.2d 858 (10th Cir. 1955); *Ranco, Inc.*, 109 N.L.R.B. 998 (1954), *enforcement granted*, 222 F.2d 543 (6th Cir. 1955); *Babcock & Wilcox Co.*, 109 N.L.R.B. 485 (1954), *enforcement denied*, 222 F.2d 316 (5th Cir. 1955).

201. 351 U.S. 105 (1956).

were involved. This distinction, said the court, was "one of substance."²⁰²

The judicial philosophy regarding the problem of employee access to union information appears to be that the union does not possess an independent right of its own to provide information. The right stems from the employees' right of association and therefore, is derivative, not direct. The court recognizes, however, the existence of this institutional relational interest, and regards it as unconditional outside the premises and conditional within the premises.

If the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them, the employer must allow the union to approach his employees on his property. . . . When the inaccessibility of employees makes ineffective the reasonable attempt by non-employees to communicate with them through the usual channels, the right to exclude from property has been required to yield to the extent needed to permit communication of information on the right to organize.²⁰³

The result of this decision, favoring property rights and control over union access, is that the courts and the Board now entertain a strong presumption that the lines of industrial communication between the union and the employees are open outside the plant. It is necessary in order to rebut this presumption that the union and the Board convince the courts within the records, that a contrary situation exists. The court now passes on the facts, not the Board.

In *NLRB v. United Steelworkers* (the *Nutone* and *Avondale Mill* cases),²⁰⁴ the Supreme Court extended this absolute right of property concept by holding that employer plant rules are not limited by their originating reasons, such as efficiency and cleanliness, but only by the concept of private property itself. An employer, it was held, may breach his own rules by engaging in activity which he forbids to his employees.

In *Nutone*, the Court held that an employer did not commit an unfair labor practice when, during a pre-election campaign, he violated his own no-distribution rule which was allegedly based on plant cleanliness. In *Avondale* it was held that although the employer breached his no-solicitation rule by unfair labor practices the employees were not privileged to breach the rule.

It is evident from these Supreme Court cases that a radical change has taken place in the minds of the decision makers with re-

202. *Id.*

203. *Id.*

204. 357 U.S. 357 (1958).

spect to property rights and the right of association. During its earlier days, the Board had applied an industrial clear and present danger test in favor of the employee to any no-solicitation legislation emanating from the plant police powers. Plant legislation prohibiting solicitation even during working hours had to be justified in the name of higher industrial values such as production and efficiency. Today, however, under a new industrial "reasonable" test, there exists an irrebuttable presumption in favor of plant police powers. In the recent *Star Brite* case,²⁰⁵ the Board held that a no-solicitation rule covering working time was valid despite the fact that the employer initiated the rule during a union campaign, restricted it to union organizations, and made no showing that the rule was necessary to maintain plant production and efficiency. In *Midwestern Instruments, Incorporated*,²⁰⁶ the Board affirmed this decision, even though the employer had conceded that the main purpose of the rule was not related to production.

In the Board's recent *Star Brite* decision, the Board held that a rule which prohibits union activity during company time is not rendered invalid merely because its adoption coincides with the advent of the union, or because it fails to prohibit other types of outside activity. We also noted in that decision that to require an employer to establish that such rules are necessary for production and discipline would render the presumption of validity worthless

In a recent Fifth Circuit case,²⁰⁷ the court narrowed the rationale of the *Babcock-Wilcox* case by reversing a Board ruling that the employer, a retail chain store manager, violated Section 8 (a)(1) when he prevented solicitation during non-working time in non-public working areas by employees from other area stores belonging to the same chain and included in the same bargaining unit. The court gave as its reason the employer's difficulty in separating employees from the public.

VI.

NEW INDUSTRIAL SOCIETY REPLACES OLD MERCANTILE SOCIETY.

If it is true, as it is often said, that history writes in crooked lines, then it is equally true that the National Labor Relations Board writes in circular lines. It has spoken in two voices, one favoring administrative restraint, the other favoring administrative activism.

205. 46 L.R.R.M. 1139 (1960).

206. 48 L.R.R.M. 1189 (1961).

207. *NLRB v. Great A & P Tea Co.*, 277 F.2d 759 (5th Cir. 1960).

This division of administrative approach concerning the basic tenets of the Act has taken place despite the fact that the policy of the Act has neither been changed nor amended since its inception. It is not the purpose of this article to praise the pre-1953 Board for having been pro-labor, nor to condemn the post-1953 Board for having been pro-management but rather to criticize the Board for not having been pro-statute.

The National Labor Relations Act was more than a private standard between labor and management, more than a code defining the permissible limits of economic warfare between these institutions in their pursuit for greater control over the market and the individual. It was an official pronouncement upon the part of the nation that both institutional and personal freedom could co-exist within the boundaries of the new industrial society. Upon the success of this experiment involving profound institutional changes within the national structure, depended to a great extent the preservation of the democratic ethos in a world torn by conflicting ideologies.

The National Labor Relations Act was an institutional act based upon institutional rights; it rejected the economic and political assumptions of the mercantile society which stressed the predominance of individualistic institutions and individualistic rights. It recognized that the 18th and 19th centuries' symbol of success — the economic man — no longer fitted into the social pattern of the 20th century, that he was now superseded by the sociological man.

The citizen who lived in the pre-industrial society of the 18th and 19th centuries lived in an acquisitive society. His religious, philosophical, and social life were all subordinated to his economic life *i.e.* the pursuit of economic status. His political, social, and legal institutions were all acquisitively centered upon the same goal, the exploitation, production and distribution of the nation's resources. It was a society whose institutions were carefully designed for boom conditions.²⁰⁸

The political and theological temper of this mercantile society was shaped by the protestant ethic which emphasized the function of the individual rather than the function of the institution, the quest for the wealth value rather than the quest for the respect value, and the commercial virtues of thrift, work and independence rather than the theological virtues of faith, hope and charity. The social structure containing this economic theology was encased in the agricultural units of the farm, the town, the village and the store, all channeled toward

208. WEBB, *THE GREAT FRONTIER* 413 (1952).

the centuries' greatest social institution — the market. And standing detached, yet concerned, protecting this economic order stood the political community — the state — with its arsenal of acquisitive weapons, the legal tools of freedom of speech, contract, and property.

Yet, notwithstanding this sweeping subordination of all social life to economic life, but rather because of it, this pre-industrial society was an integrated society in which the individual had both status and function.²⁰⁹ In order for the individual to belong, he had to achieve status which was contingent upon the acquisition and control of property and since this society was an open society it was a relatively simple matter for a man to be a property owner and exercise property rights.

The economic reaping machine of the mercantile society functioned well in a period of growth. When, however, the American frontier could no longer provide the fuel for its outward growth and the open society was transformed into the closed society, the economic machine had to turn inward and feed upon the power centers of the American economy. At that stage it began to lose its sense of integrated rhythm. In 1929 the inevitable occurred — the economic man fell from his pedestal and with him fell the old order.

Almost overnight the American people, accustomed to a commercial society directed by commercial institutions, found themselves confronted by industrial problems arising from industrial institutions. The large corporation replaced the farm and the trading town; countervailing power and administered prices replaced the market and competition; and draftsmanship and mass production replaced craftsmanship and personal production. The individual no longer walked among the small mercantile institutions but now found himself within a pressure chamber, surrounded by big cities, big business, big labor unions and big government. The introduction of these new industrial institutions had a sweeping impact upon the social structure of the American economy. The new society when it changed its status symbol, replacing the aristocratic farmer who exercised his power as a result of his property rights, with the entrepreneur who exercised his power without property rights,²¹⁰ destroyed with one sweep the value structure of economic status of the old society. Unfortunately, however, having destroyed the individual's status and function in the old order, it prepared no place for him in the new society. By failing to integrate

209. DRUCKER, *THE FUTURE OF INDUSTRIAL MAN* 54 (1942).

210. *Id.* at 93. See also BERLE, *POWER WITHOUT PROPERTY; A NEW DEVELOPMENT IN AMERICAN POLITICAL ECONOMY* (1959).

him into the new industrial reality, it disenfranchised him and made him a displaced person within his own community.²¹¹

The dispossessed worker of the 20th century discovered that he could not function as an isolated individual in a hostile world of institutions. Persecuted by the corporation, ignored by the state, he gradually realized that freedom of contract in the 18th century meant freedom of coercion in the 20th century. He thereupon rejected the individualistic legal tools of freedom of speech, contract and property and created a new social institution to provide him with a power film of status necessary to counteract the new institutional power status. In unionizing, he surrendered his legal liberties to private industrial governments who now contracted status and respect for him. In so doing, 20th century man reversed Maine's famous dictum that progressive societies moved from status to contract.²¹² The movement which characterizes social and legal thinking in the 20th century is the movement from contract to status, and the 20th century medium which encases status is the institution — the group.

VII.

THE GROUP SUPERSEDES THE STATE, SOCIETY, AND THE INDIVIDUAL.

The complex governmental decision making process can no longer be adequately described in simple Austinian terms as a conflict between two participants, the individual and the state, within the political community. Today, both the individual and the state have been superseded by the group. Within the political order and the social order respectively, state sovereignty and individual sovereignty have given way to group sovereignty.²¹³

In this new power pluralistic society the state is but one of many groups which determines the national and international policy. Within the governmental process many unofficial pressure groups through action and interaction, compromise and alliance, exert tremendous pressure upon the state decision makers at Washington. Many critics have pointed out that this multi-group pressure endangers the democratic structure of government because it forces the state to place

211. DRUCKER, *op cit. supra* note 209, at 107.

212. MAINE, *ANCIENT LAW* 100 (Everyman ed. 1861).

213. BOULDING, *THE ORGANIZATIONAL REVOLUTION* (1953); DRUCKER, *THE NEW SOCIETY* (1950); FRIEDMAN, *LAW IN A CHANGING SOCIETY* (1959); GALBRITH, *AMERICAN CAPITALISM* (1952); HORN, *GROUPS AND THE CONSTITUTION* (1956); LATHAM, *THE GROUP BASIS OF POLITICS* (1952); SEIDENBERG, *POST-HISTORIC MAN* (1950); WHYTE, *THE ORGANIZATION MAN* (1956); Wirtz, *Government by Private Groups*, 13 *LA. L. REV* 440 (1952).

limited group interests before expansive national interests.²¹⁴ Others feel that a new type of industrial sovereignty is already upon us.

. . . the question must be raised in all seriousness whether the 'overmighty subjects' of our time — the giant corporations, both of a commercial and non-commercial character, the labor unions, the trade associations, farmers organizations, veterans legions, and some other highly organized groups — have taken over the substance of sovereignty. Has the balance of pressures and counter-pressures between these groups left the legal power of the State as a mere shell? If this is a correct interpretation of the social change of our time, we are witnessing another dialectic process in history: the national sovereign State — having taken over effective legal and political power from the social groups of the previous age — surrenders its power to the new massive social groups of the industrial age.²¹⁵

The three most powerful institutions of our feudal industrial society are the state, the corporation, and the labor union. Two of these groups, the labor union and the corporation, comprise the new factory community. This community is the predominant social, political, and economic institution of the 20th century, much more powerful than the state, and much more exacting and demanding in its laws flowing from the collective bargaining process than the state-made laws flowing from the political process. Already within the political order the factory community has fundamentally altered the power structure of government by substituting economic federalism for political federalism.²¹⁶ Most of the crucial conflicts of freedom today arise not from state-national clashes of power but from clashes among the three principal participants in the feudal industrial order. At times the factory community acts in unison against the state; at other times, the participants clash between themselves, the corporation seeking the wealth value, the union seeking the respect value. In attempting to emerge victorious within this power conflict, both institutions exercise maximum effort to rally the state to their side.

The 20th century has witnessed the rise of mass democracies throughout the world. The impact of this movement has not only resulted in severe changes in the state's power structure, but also in its power function. Group demands arising from society have been directed toward the greater distribution of values among the masses.

214. LIPPMAN, *ESSAYS IN THE PUBLIC PHILOSOPHY* (1955).

215. Friedmann, *Corporate Power, Government by Private Groups and the Law*, 57 COLUM. L. REV. 155, 165 (1957).

216. Miller, *The Constitutional Law of the "Security States,"* 10 STAN. L. REV. 620, 636 (1958); Berle, *Evolving Capitalism and Political Federalism*, in *FEDERALISM; MATURE AND EMERGENT* 68, 76 (Macmahon ed. 1955).

The modern western state has abandoned its negative role of a watchman and has taken on the affirmative role of an architect. It is no longer an umpire state concerned only with the wealth value; it is now a welfare state concerned with the respect value.

Aside from group control over the modern state and its social values, the third great change arising from modern society is group control over the individual. The fundamental unit of society is no longer the individual, but the group. The economic man has given way to the organization man. "The completely autonomous isolated individual does not exist as such — the individual spends his life as a member of groups and is significant only as a member of a group."²¹⁷ "It is the organization rather than the individual which is productive in an industrial system,"²¹⁸ for "this is an age of collective action."²¹⁹

A new institutional philosophy stressing group rights and group duties instead of individual rights and individual duties has taken hold of the industrial society. The protestant ethic has been replaced by the social ethic, ". . . that contemporary body of thought which makes morally legitimate the pressures of society against the individual. Its major propositions are three: a belief in the group as the source of creativity; a belief in 'belongingness' as the ultimate need of the individual; and a belief in the application of science to achieve the belongingness."²²⁰

Although America in this second half of the 20th century is a highly industrialized society, it is still predominantly pre-industrial in temperament and outlook.²²¹ It has never accepted the industrial way of life. It still continues to delude itself that DesMoines, Carson City and Iowa City represents the real America and Detroit, Chicago, and New York the unreal America. It still continues to believe that 18th century political and legal institutions framed for an agricultural economy can contain 20th century institutions framed for a social dynamic order. The battle for freedom, is still being fought on an 18th century platform instead of in a 20th century arena.

While it may appear to the uninitiated that we are winning the battle of freedom on the political front because the Supreme Court is protecting the person from state-institutional invasions of his personality, it also appears to the more sophisticated that we are losing the battle for freedom on the economic front, and that the Supreme

217. Miller, *supra* note 216, at 631.

218. DRUCKER, *THE NEW SOCIETY* 6 (1950).

219. COMMONS, *THE ECONOMICS OF COLLECTIVE ACTION* 23 (1950).

220. WHYTE, *THE ORGANIZATION MAN* 5 (1956).

221. DRUCKER, *op. cit. supra* note 209, at 22.

Court is not protecting the person from economic invasions of his personality by private institutions.²²² To separate economic freedom from political freedom, to affirm freedom within the political order and to deny it in the economic order, is not only to delude ourselves but to defame the name of freedom. The industrial order has succeeded in performing this act of surgery. Modern industrial man, especially the unemployed and the disorganized, has been disenfranchised not by the state but by our technological society. The industrial enterprise by denying the worker citizenship within the industrial democracy of the factory community has also denied him citizenship in the political democracy of the national community. The average worker with little or no stake in his industrial society will have little or no interest in his political society. The unemployed and unorganized worker becomes the displaced and disorganized citizen.

The principal task of our times is the creation of an industrial civilization, an industrial structure in which personal freedom and institutional freedom can co-exist. The problems incident to this task can only be solved by restoring to the person, *i.e.* the worker, his status and function and by integrating the industrial reality, both its social and industrial institutions, into the political process for the common good of all. The problem of freedom must always begin and end with the primacy of the person in the hierarchy of values. It cannot be solved by the employment of antique legal tools framed for a different order. We have progressed from a society based upon contract and wealth values to a society based upon status and respect values. The problems arising from this new society are trilateral, not bilateral.

New legal tools must be fashioned which can cope with problems arising from a group society. Since the government of the new society consists of a new ruling class of groups, the law must consider the status and relationship of the person to these institutions. For example, a union member not only has rights and duties toward his union, but he has also rights and duties toward other institutions, such as the local community, the state, the church and his family. At times these rights and duties conflict. To allow an institution, for instance a labor union, through freedom of contract to expel a member because he voted against a union proposal or violated a minor union rule is to permit an economic institution to strike at the essence of a free society. Here, not only the personal freedom of the individual is at stake but also the relational interests of the other institutions. The law of

²²² Affeldt, *The Labor Bill of Rights — Its Impact Upon Personal Rights*, 37 U. DET. L.J. 500 (1960).

institutional relational interests is yet to be developed but Dean Greene has made a good beginning in this area.²²³

The decision makers in the legal process must recognize that the right of association is not only a fundamental personal right, but a fundamental relational interest. They must recognize that it flows from a new economic institutional constitution contained in Section 7 of the National Labor Relations Act. These economic group rights must be balanced against the political rights contained in the United States Constitution, not simply struck down in the name of absolute constitutional rights.

In order for personal freedom and institutional freedom to co-exist within the industrial order, the legal process must not make the fatal error of equating the person and the institution as equal recipients of constitutional liberties. For example the exercise of free speech by the person usually ends in enlightenment, but the exercise of free speech by the institution usually ends in coercion. There is a vast difference between institutional liberty and personal liberty, and the legal process must take account of this fact.

The Wagner Act was an attempt by the American people to solve the problem of freedom by balancing personal freedom and institutional freedom so as to allow both to co-exist within an industrial society. The government protected personal freedom by guaranteeing in Section 9 (a) employee self-determination and reinforced this guarantee in Sections 7 and 8 (a) (1), by explicitly condemning employer interference with the personal right of association and collective bargaining. In this area of employee personal freedom, involving the right to accept or reject unionization, the government was not neutral. It directly intervened in the industrial order and threw its weight and authority behind employee free choice, protecting the employee not only from employer invasion but also from state invasion. The government protected institutional freedom by withdrawing from the economic arena after the employees had either rejected or accepted unionization, assuming a neutral attitude toward the process of collective bargaining and the economic warfare of concerted activities.

The result during the Wagner days and in a modified form during the early Taft-Hartley days was that the National Labor Relations Board implemented national policy by protecting the employee from employer invasions. It recognized the right of the union to share the employer's premises and the plant forum in order that the employees could enjoy their institutional right to information concerning union

223. Green, *Relational Interests*, 29 ILL. L. REV. 460 (1935).

activities. To insure that enlightenment, not coercion prevailed within the plant community, it carefully screened employer speech.

Although the Taft-Hartley Act confirmed employer free speech, subtracted some benefits of unionization, such as the closed shop, and clarified the right of employees to reject unionization, it in no way amended the basic policy of the Wagner Act. It did not disturb the hierarchy of values contained in Section 7 which committed the government to a policy of intervention to protect employee self-determination. "The wisdom of legal protection for the core of rights [was] not open to serious public dispute."²²⁴ In fact Congress explicitly confirmed its faith in personal freedom by declaring it to be the policy of the United States to "eliminate the causes of certain substantial obstructions . . . by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association."²²⁵

In re-interpreting the Act, the Farmer Board, without congressional amendment nor any hint of change in national thinking, completely revamped the policy of the Act by substituting mercantile values for industrial values. In turning back the clock, the Board completely reshuffled Section 7's hierarchy of values, placing at the apex, in the place of the right of association, the new employer right — the right of disassociation. In effectuating this policy it permitted the employer to invade employees' rights on all fronts, allowing him to coerce his employees and to isolate them from the union and his plant.

The question naturally arises — how was it possible for a small body of men in public view to amend national policy by substituting its will for the popular will? The answer to this question cannot help but focus doubt upon the ability of political institutions such as the NLRB to adequately contain the social institutions of the industrial order.

It is the thesis of this article that the post-1953 Board under the spell of an appealing but false theory of legal equality drove both the state and the union — the two institutions protecting the employee — from the industrial arena. It permitted the remaining participant, enterprise, to form a new alliance with the state, designed toward the suppression of the worker in his organizational activities. By substituting institutional freedom for personal freedom, by employing a mercantile interpretation of statutory and constitutional doctrines, and

224. COX, *LAW AND THE NATIONAL LABOR POLICY* 39 (1960).

225. Labor Management Relations Act (Taft-Hartley Act) § 1, 61 Stat. 136, 137 (1947), 29 U.S.C. § 151 (1958).

by affirming its faith in a democracy of non-existent individuals rather than in a realistic democracy of groups, the National Labor Relations Board proclaimed to a world community that personal and institutional freedom could not co-exist within American industrial society.

In structure the Board is not designed to reflect the views of the group community. It is not a coalition board composed of representatives from industry, labor and the public; it is a political Board composed of political appointees. As a political institution it is inclined to reflect the views of the administration in power rather than the views of society at large; to be pro-institution rather than pro-statute.

In 1953 the new administration appointed a new majority to the Board, Chairman Farmer and Members Rodgers and Beeson. Almost immediately this new Board denounced the previous Boards for having been mechanistic and biased, and announced that its policy would be flexible and neutral. "As custodian of the law, the proper role of the agency is to apply it as the creators of the law intended it to be applied without regard to personal preferences."²²⁶ The new Board professed a philosophy that was neither pro-labor nor pro-employer, but rather pro-public.²²⁷

This new doctrinal approach of neutrality was based on the silent Board assumption that since both labor and management were now equally powerful, they should be equally free from government intervention in waging economic warfare for the control of the unorganized worker. This new indifference toward employee freedom marked a radical departure from Board policy which was established at the inception of the Act in 1935. Previously, the Board had viewed the policy of the Act as two-edged, protecting both personal and institutional freedom. It regarded Section 7 as an aristocratic and democratic Bill of Rights: aristocratic in that it discriminated in favor of the unorganized employee in his conflict with the organized institution; democratic in that it did not discriminate in favor of any groups in their institutional conflicts among themselves.

The Board prior to 1953 was unified in believing that Congress intended to extend greater protection in the form of state support to the natural person than to the conventional institution and that it did not intend to make them equal in the legal order because they were not equal in the social order. It believed that Congress wrote into the Act the spirit of our democratic heritage — that in order for the

226. Address by Member Rogers before Retail Dry Goods Association, New York, N.Y., Jan. 12, 1954, reprinted in part, 33 LAB. REL. REF. 207-9.

227. Remarks of Chairman Farmer before Joint Conference of Industrial Committee of the Edison Electric Institute, New Orleans, La., Jan. 21, 1954.

person to be free within the industrial order, it was necessary that the institution not be completely free within the legal order.

The Farmer Board of 1953 with its neutrality or equality doctrine reversed the previous policy of applying different standards of protection to the hierarchy of rights contained in Section 7. By so doing, it democratized Section 7, reducing personal freedom to the status of institutional freedom, thereby applying its neutrality theory to all of Section 7's values equally.

The Board's function in the administration of the Act was not to be neutral. Neither was its function to be pro-labor or pro-management. Its function was to be pro-collective bargaining and pro-individual. In a society dominated by the giants of the factory community, its function was to protect the worker's personal freedom, his right to accept or reject industrial democracy within an environment free from the economic pressures and disconcerting influences of enterprise. Government was allied with neither institution; it was committed to the protection of the individual, the unorganized employee. It was not neutral; it was a prejudiced, active participant. This administrative agency had no right to democratize the legal rights contained in Section 7 because Congress had already evaluated these rights and had found that employee right of association outweighed employer economic interference.

For the Board to have withdrawn the protection of the Act from the unorganized was a mistake in the administrative order, but for it to have withdrawn this protection in the name of equality and neutrality was a mistake in a higher order. Equality is a warm word which has the seductive ring of freedom, conjuring up the cause for which our forefathers died. Unfortunately, however, the Board in applying this concept to the National Labor Relations Act was speaking about legal equality, not social equality with which the Act was concerned. It is a harsh fact of life that legal equality does not always insure social equality. In fact, many times they are opposed to each other.

To speak of neutrality and equality within the legal order and to ignore the differences in bargaining power between the participants in the industrial order is not to speak of neutrality but to speak of partisanship. In the interpretation of a broad social statute like the National Labor Relations Act, it is impossible for an agency to adopt an attitude of neutrality without fundamentally changing the policy of the Act and taking a biased position in favor of the stronger participant in the economic order, for "the equal treatment of unequals

produces only inequality."²²⁸ Once the state was banished from the economic arena, the Board by ignoring economic inequality and employing the tools of legal equality, restored the industrial order to the economic power concept of the mercantile society. It "seems a fair conclusion that the law has become in this area a matter primarily of form and that economic power has re-emerged as the decisive factor in determining the result of representative elections."²²⁹

"The net [effect] of the present law of employer persuasion is that the employer may do in some form, the persuasional equivalent of everything he is prohibited from doing in another form — except only that he may not penalize individual employees for their views and may not establish his own union It is hard to conceive of any statement regarding an employer's future plans which could not be presented in the form of 'prediction', 'prophecy' or 'statement of legal rights'. The doctrine of 'isolated instance' has been used to immunize a wide variety of statements and activities, and the 'good faith' umbrella now extends over a broad area of bargaining procrastination, lethargy and even intransigence."²³⁰

The post-1953 Board's policy of equality ran in two directions. By equalizing the person and the institution from within the confines of the Act, through statutory interpretation, it drove the state from the plant community. By equalizing the person and the institution from without the confines of the Act, through constitutional interpretation, it drove the union from the factory community. Specifically, through "free speech", the Board banished the union from the plant forum; through "property", it banished the union from the plant.

The common law, individualistic in nature, has always displayed more ingenuity in adapting itself to the revolutionary changes of individualistic units than it has to institutional units. In attempting to assimilate new institutions into its fabric, it has always displayed extreme perplexity and confusion. The status of the corporation was eventually resolved by absorbing it as an individual. The status of the labor union, although originally regarded as a criminal conspiracy, was resolved by assigning it the status of a person under a civil rights theory.²³¹ The result today, in this second half of the 20th century, is that great industrial empires enjoy the same constitutional rights as the isolated individual. In many cases, these constitutional rights which emerge from the United States Constitution as personal

228. Wirtz, *supra* note 192, at 614.

229. *Id.* at 609.

230. *Id.* at 608-9.

231. See GREGORY, *LABOR AND THE LAW* 82 (1958).

rights radiate from the institution as coercive rights. This unrealistic process of equating the person and the institution as co-equal beneficiaries of constitutional rights has caused much embarrassment for the Supreme Court. In *Thornhill v. Alabama*²³² the Court equated group speech with personal speech, and was compelled to retreat from this position when it realized that the union was practicing the persuasion of force rather than the persuasion of speech. In the *Virginia Electric & Power Company*²³³ case, where the Court made the same mistake, it ignited a conflagration of contradictory doctrines which still continue to haunt labor relations.

It should be obvious to all but the most prejudiced that institutional speech in most instances is not a matter of free speech, but a matter of power. The "issue actually presented is whether the employer should be permitted to add the weight of his economic power to what he says in pre-election campaign speeches. This presents neither more nor less a 'free speech' issue than does employee picketing It only camouflages and confuses the real problem when there is proposed or developed, in the name of 'free speech', a privilege of using speech as part of the persuasion not of reason but of pressure."²³⁴

To insist that it is a free speech problem as the courts and the Board have done, is to legislate within the power arena by expanding and contracting the allowable area of economic conflict. Under our political system the drawing of economic frontiers is the exclusive concern of the legislature. It is the most gross form of activism for administrative and judicial agencies to enter into this area under the guise of constitutional doctrine.

Individual speech tends toward knowledge and enlightenment; it is of the drawing room. Economic institutional speech tends toward power and force; it is of the battlefield. To equate the two in time of conflict is to make a policy decision in favor of institutional force. A representative of a group or institution speaks in two capacities; as a citizen and as a commander. In the former status, by virtue of his personal constitutional rights, he is permitted broad latitude in expressing his views to the public. In his latter status, by virtue of his position as a military leader, he should not be permitted the same latitude in speaking to his subordinates because here he is conveying orders for economic advancement in an economic war. This is not persuasion but a verbalization of orders, a verbal act.

232. 310 U.S. 88 (1940).

233. *N.L.R.B. v. Virginia Elec. & Power Co.*, 314 U.S. 469 (1941).

234. Wirtz, *supra* note 192, at 613.

Congress has always recognized that speech between institutions concerning market agreements is not free speech but an illegal act indictable under the Sherman Anti-Trust Act. The Supreme Court, at least in the past, has recognized that institutional speech differs immeasurably from personal speech. In *Gompers v. Buck Stove & Range Company*,²³⁵ it held that a labor leader, who stated in his opinion that no union member should purchase products from certain named firms who refused to hire union help, was guilty of conspiracy.

Society itself is an organization, and does not object to organizations for social, religious, business and all legal purposes. The law, therefore, recognizes the right of working men to unite and to invite others to join their ranks, thereby making available the strength, influence, and power that come from association. By virtue of this right, powerful labor unions have been organized. But the very fact that it is lawful to form these bodies, with multitudes of members means that they have thereby acquired a vast power, in the presence of which the individual may be helpless. This power when unlawfully used against one, cannot be met, except by purchasing peace at the cost of submitting to terms which involve the sacrifice of rights protected by the Constitution; or by standing on such rights, and appealing to the preventive powers of a court of equity. When such appeal is made, it is the duty of government to protect the one against the many as well as the many against the one.

In the case of an unlawful conspiracy, the agreement to act in concert when the signal is published gives the words 'unfair,' 'we don't patronize,' or similar expressions, a force not inhering in the words themselves, and therefore exceeding any possible right of speech which a single individual might have. Under such circumstances they become what have been called 'verbal acts' and as much subject to injunction as the use of any other force whereby property is unlawfully damaged."²³⁶

In the name of another constitutional right, the absolute control of property, the Supreme Court in the *Babcock-Wilcox* decision²³⁷ paved the way for state alliance with enterprise by excommunicating the union from the plant community. This decision in effect destroyed the relational interest of the employees to receive information from the union within the plant. It substituted the employer as the guardian of the employees' rights and relational interests.

The policy of encouraging collective bargaining is not unqualified, for Section 7 reserves to the individual employee the right to

235. 221 U.S. 418 (1911).

236. *Id.* at 439.

237. *NLRB v. Babcock-Wilcox Co.*, 351 U.S. 105 (1956).

refrain from concerted activities, and Section 9 gives to the majority in the bargaining unit the power to reject the process of collective bargaining. These, however, are rights granted to the individual employees, not to the employer. To read into these provisions the right of the employer to resist and obstruct unionization is to conceive of the employer as the benevolent protector of his employees, a direct denial of the underlying premises of the statute.²³⁸

As a result of this decision no longer do the Board and courts balance individualistic property rights against institutional group rights, but now strike them down in the name of absolute constitutional rights. Such action, in view of the fact that Congress, in Section 7, had privileged incidental intrusions upon property control, once again is a violation of the legislative domain by the decision makers.

VIII.

CONCLUSION.

It should be obvious from this survey of the right of association that personal freedom in our technological society is not being protected by either the National Labor Relations Board or the courts. The decision makers within the political process are failing to meet the crucial problems of freedom emanating from the new industrial process. They still continue to apply legal tools with built in values framed for a mercantile society, in direct defiance of legislative policy. As a result of this approach, they have accomplished what the 1947 Congress and industry together could not accomplish — the freezing of labor's drive to organize the unorganized.²³⁹

238. Summers, *Politics, Policy Making and the NLRB*, 6 SYRACUSE LAW REV. 93, 103 (1955).

239. Cox, *op. cit. supra* note 224, at 20. Professor Cox says: "The struggle for union organization has not been completed. Despite the power of some unions there remain masses of unorganized workers who would benefit by collective bargaining. In the United States about half the employees engaged in manufacturing belong to labor organizations; in Sweden, Denmark, and Norway, more than 90 per cent. In the United States roughly 15.8 million workers out of the 64.8 million employed belong to unions affiliated with the American Federation of Labor and Congress of Industrial Organizations — about 25 per cent. In Great Britain 42 per cent of the employed persons are union members.

"Collective bargaining is no longer spreading. In 1933, 11.5 per cent of the employees in nonagricultural establishments belonged to a labor union; in 1940, 27.2 per cent; in 1945, 35.8 per cent; but in 1956, only 33.7 per cent. In the twelve-year period 1935-1947 union membership increased fivefold; for the past twelve years there has been no increase.

"The distribution of union strength is very uneven. The latest figures available show that, in 1953, 27.2 per cent of the employees in New England's non-agricultural establishments and 39 per cent on the Pacific Coast belonged to unions, but only 18.3 per cent were members in the South Atlantic states despite the inclusion of the highly organized state of West Virginia. In North Carolina only 8.3 per cent were members, compared with 30.1 per cent in Massachusetts and 35.7 per cent in California."

The protection of personal freedom within the factory community, especially in southern localities, is not only very faint today, but it is in a very confused state. Instead of proceeding in a policy-wise fashion, marking out clearly the boundaries of personal and institutional freedom, the Board has followed a staggering *ad hoc* path of decision making. In general, it may be said, that the Board has lost sight of policy and is drifting in a sea of technicalities. No employer really knows what he can say or do.²⁴⁰

The protection of personal freedom within an industrial civilization is the central problem of our times. It is foolish and perhaps suicidal to pretend that these problems do not exist, that they can be covered with legal veils designed for a bygone era. We must recognize the fact that industrial sovereignty has superseded political sovereignty, and that the industrial plant by the force of circumstances has become the basic social unit of our industrial cultural, but that it unfortunately has not yet become a social institution, performing the responsibilities of the institutions which it has displaced. For only in this way, by enterprise performing its social, political, and economic responsibilities, by restoring to the worker his status and function through an industrial democracy can our industrial society function.

The American system of freedom is on trial today. The corporation as an institution is at the crossroads of history. "For twentieth-century capitalism will justify itself not only by its out-turn product, but by its content of life values. Within its organization and impact are lives of many millions of men; and these lives are the first concern, not the by-product, of our century. In American thought, an economic system, like a political government, is made for men. If it denies rights of men to life as they understand life, or to liberty as they understand that, or to property, whatever modern property shall turn out to be, the community gathers itself for a kind of revolt whose results are unforeseeable."²⁴¹

The democratic form of government alone holds out to the world the only hope for freedom, for it alone possesses the structure in which both the person and the institution can live together in harmony and freedom. The democratic system is not functioning when the institution is seducing the person. Peace and freedom will only be achieved when democracy shall prevail not only in the political order but also in the industrial order.

240. Wirtz, *supra* note 192, at 616.

241. BERLE, *THE TWENTIETH CENTURY CAPITALIST REVOLUTION* 114 (1954).