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Employer Utteranecs as Unfair Labor Practices

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EMPLOYER UTTERANCES AS UNFAIR LABOR PRACTICES

THE Labor Management Relations Act, 1947,[1] popularly styled the Taft-Hartley Law, is the most comprehensive and detailed single piece of labor legislation enacted in this country. As illustrative of its scope, the statute extends the legislative mandate into the field of civil liberties, inasmuch as a provision thereof, Section 8 (c),[2] undertakes to protect the employer in the exercise of his right to speak and write about matters germane to a labor dispute.

The fact that Congress is apparently attempting to redefine or revitalize a Constitutional right gives rise to a number of interesting problems. For example, why was it necessary for Congress to provide legislative protection to the right of an employer to speak and write freely when this right is made inviolate by the fundamental law of the land, our Constitution? Apparently the exercise of this right had been measurably restricted, at least to a degree considered by the legislators as undesirable. Assuming the restriction, under what theory of law was it justified, and what were its boundaries?

Section 8 (c), the section under examination here, had no counterpart in the National Labor Relations Act. The exact wording of the section is as follows:

> "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."[3]

The precise effect of this section upon existing law can best be discovered by initial reference to (1) the measure of protection

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[1] 29 U. S. C. A. § 141 *et seq.* (Supp. 1947).

[2] *Id.* § 158 (c).

[3] 49 STAT. 449 (1935), 29 U. S. C. A. § 151 *et seq.* (1942).

afforded all persons by the Constitution in the exercise of their right to free speech, (2) the further restrictions imposed upon a particular class of persons, employers, when such persons, indulging in anti-union utterances, were found to have violated the provisions of the old National Labor Relations Act, hereafter referred to as the Wagner Act.

CONSTITUTIONAL LIMITATIONS ON FREEDOM OF SPEECH

The First Amendment to the Federal Constitution provides that Congress shall make no law abridging the freedom of speech.[4] Similar guarantees against state action are found in the constitutions of the several states.[5] This right is also secured against abridgement by the states by that provision of the Fourteenth Amendment to the Federal Constitution which prohibits a state from depriving a person of liberty without due process of law.[6] The right to discuss peaceably matters of public interest was considered to be of paramount importance by the framers of the Constitution.[7] Optimistically enough, the authors of the First Amendment were of the opinion that freedom of discussion would serve to instill in all persons "liberal sentiments on the administration of government . . . whereby oppressive officers are ashamed and intimidated into more honorable and just modes of conducting affairs."[8]

The judicial development of the various doctrines designed to preserve the right to exercise free speech has been influenced to a considerable extent by the social and political objectives currently considered by the judiciary to be of overriding importance. For example, seditious speech, especially in time of war, falls beyond the protection of the Constitution.[9] As Mr. Justice Holmes said:

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[4] U. S. CONST. Art. I, § 8.

[5] See TEXAS CONST. Art. I, § 8.

[6] U. S. CONST. Amend XIV.

[7] 1 JOURNAL OF THE CONTINENTAL CONGRESS, 104 (1904 ed.).

[8] *Ibid.*

[9] Schenck v. United States, 249 U. S. 47 (1919).

"The character of every act depends upon the circumstances in which it is done. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing panic. It does not even protect a man from an injunction against words having all the effect of force."[10]

When applied by courts, this doctrine was termed the "clear and present danger" test, indicating that the right to speak or write freely must yield if such acts will result in a clear and present danger of bringing forth evils that the United States may constitutionally seek to prevent. Freedom of speech was made subordinate to the right of the nation and state to preserve themselves. The doctrine has been applied in recent cases,[11] retaining sufficient flexibility to be capable of application to modern conditions of state. In the recent case of *United Public Workers v. Mitchell*,[12] however, the Court chose to depart from the clear and present danger test, at least to the extent of sustaining a restraint of free speech if a statute having this effect was one reasonably deemed by Congress to be necessary to the efficiency of public service. If the latter test, the "reasonable legislation" test, continues in judicial favor, it will not supplant the time-honored "clear and present danger" test. Given the additional factor of danger to the efficiency of public service, this test will merely serve to further restrict the privilege.

From this brief analysis of constitutional principles, the following propositions are ascertainable:

(a) Freedom of speech is not an absolute right, but is subject to regulation and restriction for the public welfare.

(b) The enjoyment of the right of free speech may be re-

[10] *Id.* at 52.

[11] Craig v. Harney, 67 S. Ct. 1249 (1947); Thomas v. Collins, 326 U. S. 516 (1945); West Virginia Board of Education v. Barnette, 319 U. S. 624 (1943); Cantwell v. Connecticut, 310 U. S. 296 (1940).

[12] 67 S. Ct. 556 (1947). The court there held that section 61(h) of the Hatch Act was constitutional. The section concerned is partially quoted: "no officer or employee in the executive branch of the Federal Government, or any agency or department thereof, shall take any active part in political management or in political campaigns." 18 U. S. C. A. § 61 *et. seq.* (Supp. 1947).

stricted if the speech itself is clearly injurious to the nation or state, or if the person claiming the privilege intended to bring about those substantive evils which the nation or state has the constitutional right to prevent.

(c) In determining if the speech, as a verbal act, is injurious to the state or nation, the act takes character from the surrounding circumstances.

(d) If the intent of the actor is the determinative factor, such intent may be deduced from the consequences reasonably to be expected to follow from the acts in question.

LIMITATIONS ON FREEDOM OF SPEECH UNDER THE WAGNER ACT

The Wagner Act singled out existing industrial strife as a very real impediment to the free flow of commerce.[13] Its express purpose and policy was to restore and promote an equality of bargaining power between an employer and his employees whereby disturbances and interruptions to interstate commerce, which experience had found to be the result of this inequality, would be minimized.[14] Thus formulated, the policy of the statute then justified the Supreme Court in holding the entire statute constitutional under the Commerce clause of the Constitution.[15] The validity of the statute having been established, the right of an employer to speak or write about labor problems was brought under judicial scrutiny by means of a simple reasoning process. If, as stated by Mr. Justice Holmes in *Schenck v. United States*,[16] words might have all the effect of force, it was not unlikely that the words of an employer would tend to bring about or perpetuate industrial strife, a substantive evil which the nation had the constitutional right to prevent. Concretely, these words could have the effect of interfering with the right to organize and bargain collectively granted his employees in Section 7.[17] If so, the uttering of such words be-

[13] 49 STAT. 449 (1935), 29 U. S. C. A. § 151 (1942).
[14] *Ibid.*
[15] N. L. R. B. v. Jones & Laughlin Steel Corp., 301 U. S. 1 (1937).
[16] Schenck v. United States, 249 U. S. 47 (1919).
[17] 49 STAT. 449 (1935), 29 U. S. C. A. § 157 (1942).

came an unfair labor practice under Section 8,[18] and were susceptible to a cease and desist order by the National Labor Relations Board.[19] A Board order, directed to an employer, requiring him to cease and desist from making such utterances, secured real force and effectiveness by a provision of the statute authorizing the Board to obtain an order from a United States Circuit Court of Appeals directing the employer to comply with the Board's decision.[20] But if the employer chose to raise his privilege of free speech, the courts were confronted with the problem of reconciling the provisions of the statute with the First Amendment of the Constitution.

In each case the facts were of paramount importance. The statute provided that "the findings of the Board as to the facts, if supported by evidence, shall be conclusive."[21] This provision was interpreted by the Supreme Court to require substantial evidence, or "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[22] Applying this standard, the Circuit Court of Appeals, in most instances, permitted the Board's findings of unfair labor practices to remain undisturbed. The weighing of conflicting evidence was held to be within the exclusive province of the Board.[23] In *Union Drawn Steel Co. v. N.L.R.B.*,[24] the court sustained, as being supported by substantial evidence, a finding based on hearsay. The reluctance on the part of courts to review certain phases of administrative procedure was justified by Mr. Justice Brandeis, in a case involving an alleged confiscatory rate order by an administrative body, in this manner:

> "May it not tend to emasculate or demoralize the rate-making body if ultimate responsibility is transferred to others? To the capacity of

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[18] *Id.* § 158.
[19] *Id.* § 160(a).
[20] *Id.* § 160(e).
[21] *Ibid.*
[22] Consolidated Edison Co. v. N. L. R. B., 305 U. S. 197, 229 (1938).
[23] Medo Photo Supply Corp. v. N. L. R. B., 321 U. S. 678, 681 (1943).
[24] 109 F. (2d) 587 (C. C. A. 3d 1940).

men there is a limit. May it not impair the quality of the work of the courts if this heavy task of reviewing questions of fact is assumed?"[25]

Early decisions by the Board reveal a strong tendency to utilize this fact-finding power to restore a balance of bargaining power to the industrial disputants. The policy of the statute, *i.e.*, to protect the employee in his efforts to organize and bargain collectively, was the determining factor in close cases. If a shifting, illusory fact pattern could sustain either a finding that an utterance was privileged or that it constituted an unfair labor practice, the latter view would prevail. For example, speeches made *before* a union organization was perfected, or *during* the process of organization, were apt to be unfair labor practice.[26] At such a time, the feeble organizational drive could easily be halted. Similarly, the announcement of a Christmas bonus at a time when the employees were seeking to organize, was held to violate the provisions of the statute.[27] A "fallacious" argument to an unlearned audience was found to be capable of changing an otherwise innocuous statement into an unfair labor practice. That is, economic arguments by the employer to the effect that wages were determined by the relation of selling prices to cost was forbidden by the Board as a "counsel of futility."[28] While an employer might emphasize the fact that the employees could resign from a union if they chose, he was under a duty to give equal emphasis to the positive rights secured to the employees by the statute.[29] These few cases indicate the early trend of the Board's decisions. However, since an order of the Board was ineffective until the acquiescence and affirmative approval of the appropriate court was secured, the doctrines announced by the courts are of greater importance.

From the initial judicial treatment of the problem, two distinct concepts emerged. The first may be called the "economic de-

[25] St. Joseph Stock Yards Co. v. United States, 298 U. S. 38, 92 (1935).
[26] *In re* Harrisburg Children's Dress Co., 2 N. L. R. B. 1058 (1937); *in re* Crawford Mfg. Co., 8 N. L. R. B. 1227 (1938).
[27] *In re* Roberti Bros., 8 N. L. R. B. 925 (1938).
[28] *In re* Yale & Towne Mfg. Co., 17 N. L. R. B. 666 (1939).
[29] *In re* Standout Hat Co., 17 N. L. R. B. 883 (1939).

pendence" theory which takes form in the general proposition that since the employer dominates his employees in an economic sense, any anti-union utterances were apt to be *per se* violative of the Wagner Act. The Second Circuit Court of Appeals reasoned that because of this relationship, anti-union utterances of the employer would "have a force independent of persuasion."[30] The Supreme Court itself took notice of the fact that "slight suggestions as to the employer's choice between unions may have telling effect among men who know the consequences of incurring the employer's strong displeasure."[31] An analogous doctrine, perhaps best called the "neutrality" doctrine, began to emerge in court decisions, requiring the employer to maintain an attitude of strict neutrality toward all union activities.[32] "Interference," "restraint," and "coercion" were not given separate and distinct meanings, but were legally synonymous.

The Supreme Court's decision in the *Virginia Electric & Power* case,[33] handed down in 1941, announced the principles which were to guide the courts and the Board in subsequent cases. The court recognized that words in themselves may be coercive, but if not of such a nature, they might gain this status when considered a part of and in reference to an entire complex of past acts and words.[34] This doctrine, known as the "totality of conduct" doctrine,

[30] N. L. R. B. v. Federbush Co., Inc., 121 F. (2d) 954, 957 (C. C. A. 2d 1941); overruled in N. L. R. B. v. American Tube Bending Co., 134 F. (2d) 993 (C. C. A. 2d 1941).

[31] Int. Assn. of Machinists v. N. L. R. B., 311 U. S. 72, 78 (1940).

[32] "The employer has no more right to intrude himself into the employee's efforts to organize and select their representatives to represent them in collective bargaining than the employee would have to intrude himself into a stockholders' meeting to interfere with the election of the company's directors...." N. L. R. B. v. W. A. Jones Foundry & Machine Co., 123 F. (2d) 552, 555 (C. C. A. 7th 1941). *See also* N. L. R. B. v. Link-Belt Co., 311 U. S. 584, 600 (1945): "Intimations of an employer's preference, though subtle, may be as potent as outright threats of discharge."

[33] Virginia Electric & Power Co. v. N. L. R. B., 314 U. S. 469 (1941).

[34] "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." *Id.* at 478. The case was sent back to the Board because the record did not reveal sufficient evidence of this connection. Judge Learned Hand, in N. L. R. B. v. American Tube Bending Co., 134 F. (2d) 993, 995 (C. C. A. 2d 1943) concluded that

is a re-expression of Mr. Justice Holmes' statement to the effect that "the character of every act depends upon the circumstances in which it is done."[35] Recent cases continued to apply the proposition that coercive words standing alone may violate the Wagner Act.[36] The "totality of conduct" doctrine also became an accepted judicial standard.[37]

With a growing awareness of their responsibilities under the Wagner Act, employer utterances which could be deemed unmistakably coercive by their terms became uncommon. The appealable situations usually involved an application of the "totality of conduct" doctrine, the question no longer being whether or not the employer had a constitutional right to say what he pleased, but the more troublesome question of whether or not the employee was actually prevented from freely enjoying the rights guaranteed him by the Act. Usually the solution involved the weighing of a highly complex and shifting pattern of factors, unique to the case, and thus unproductive of the solid precedent so revered by the American judiciary. For example, in enforcing the statute, courts were called upon to distinguish between "influence" and "interference;" utterances which intimated reprisals, and those which did not.[39] To be called upon to assay and bring order to a multitude of imponderables, legally lifeless without reference to an economic postulate, was in itself, an invitation to the judiciary to take note of the changes taking place in the economic order, to halt the pro-labor pendulum, and to start it along its return arc. In the last analysis, the criterion of coercion was the demonstrated strength of the labor movement.

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the employer had claimed the privilege of freedom of speech and that the Supreme Court had sustained it. *But see* N. L. R. B. v. M. E. Blatt Co., 143 F. (2d) 268, 274 (C. C. A. 3d 1944) for the contrary view.

[35] Schenck v. United States, 249 U. S. 47, 52 (1919).

[36] N. L. R. B. v. Winona Textile Mills, 19 LAB. REL. REF. MAN. 2417, 2422. (C. C. A. 8th 1947).

[37] N. L. R. B. v. M. E. Blatt Co., 143 F. (2d) 268 (C. C. A. 3d 1944); Reliance Mfg. Co. v. N. L. R. B., 143 F. (2d) 761 (C. C. A. 7th 1944).

[38] Midland Steel Product Co. v. N. L. R. B., 113 F. (2d) 800 (C. C. A. 6th 1940).

[39] N. L. R. B. v. Trojan Powder Co., 135 F. (2d) 337 (C. C. A. 3d 1943).

When a court attempts to mark out the degree to which the free will of a particular class of persons has been influenced by the words of an individual, it is in effect, attempting to project the judicial imagination into the human mental process. Obviously this is a delicate and baffling endeavor, ill-suited to practical judicial methodology. Early in the period of enforcement of the Wagner Act, a short cut was developed. A simple subjective test of coercion was evolved whereby speech could be proscribed without reference to its actual effect. The Third Circuit Court of Appeals was of the opinion that the Wagner Act did "not require proof that the proscribed conduct had its desired effect."[40] Statements were condemned without regard to their effect on the minds of the employees if they "served to support" the Board's conclusion,[41] or even if they were merely "symptomatic" of an existing attitude of anti-unionism.[42] Under this view, utterances might become unfair labor practices without reference to their effectiveness, and moreover, could be used as "evidence" of the unfairness of other activities. The latter approach involved a new use of the doctrine of the *Virginia Electric Co.* case.[43] There the *utterances* were held susceptible to a coercive finding if past events imparted this quality; under this theory, *separate events*, as unfair labor practices under other provisions of the Wagner Act, may derive a flavor of illegality from the utterances.[44]

The subjective test of coercion, outlined above, was by no means universally accepted. A number of courts insisted upon an objective test, requiring proof that the utterances complained of had

[40] N. L. R. B. v. John Engelhorn & Sons, 113 F. (2d) 553 (C. C. A. 3d 1943).

[41] Humble Oil & Refining Co. v. N. L. R. B., 113 F. (2d) 85 (C. C. A. 5th 1940). *See also* American National Bank of St. Paul v. N. L. R. B., 144 F. (2d) 268 (C. C. A. 8th 1944).

[42] Boeing Airplane Co. v. N. L. R. B., 140 F. (2d) 203 (C. C. A. 10th 1944).

[43] 314 U. S. 469 (1941).

[44] *See* N. L. R. B. v. Mt. Clemens Pottery Co., 147 F. (2d) 262 (C. C. A. 6th 1945). The court was of the view that while an employer's expression of views might not be an unfair labor practice in itself, *the views* are important in determining whether the employees have reasonable grounds to believe that supervisors, in discouraging unionization, represented the views of management.

the unmistakable effect of depriving the employee of his rights under the Wagner Act. The words used by the Supreme Court in elevating the right to picket to a constitutional status in *Thornhill v. Alabama*,[45] took on a fresh meaning in view of the growing might of the labor unions. There the Court had said:

> "Free discussion concerning the conditions in industry, and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the process of popular government to shape the destinies of modern society."[46]

That same year, a court had occasion to utter a warning that "unless the right of free speech is enjoyed by employers as well as by the employees, the guarantee of the First Amendment is futile,"[47] and to recall that freedom of speech "is the matrix, the indispensable condition, of nearly every other form of freedom."[48] But the subjective test rested on foundations more firm than a vagrant judicial conscience. In the *Ford Motor Co.* case,[49] the court listed the following factors as having an important bearing on its decision to protect the utterances under attack: (a) The passage of the Wagner Act itself, (b) its adjudication of constitutionality, (c) the liberal attitude of the courts in construing it, (d) the enjoyment by employees of freedom from fear of employer reprisals. An important question to be answered was whether or not the utterances in question did actually bring about the alleged results.[50] So much is implied in a decision holding a

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[45] Thornhill v. State of Alabama, 310 U. S. 88 (1940).

[46] *Id.* at 103.

[47] Midland Steel Products Co. v. N. L. R. B., 113 F. (2d) 800, 804 (C. C. A. 6th 1940).

[48] N. L. R. B. v. Ford Motor Co., 114 F. (2d) 905, 914 (C. C. A. 6th 1940). The quoted words are from the opinion of Mr. Justice Cardozo in Palko v. Connecticut, 302 U. S. 319, 327 (1937).

[49] N. L. R. B. v. Ford Motor Co., *Id.* at 914. Other courts have refused to follow the *Ford* case because there the order of the Board sought to enjoin *all future* anti-union utterances, whereas the Board has power to seek the aid of the courts in restraining only adjudicated unfair labor practices. The anti-union statement by the Ford Motor Company might not, at some future date, have a coercive effect. *See* N. L. R. B. v. New Era Die Co. Inc., 118 F. (2d) 500 (C. C. A. 3d 1941); N. L. R. B. v. Reed & Prince Mfg. Co., 118 F. (2d) 874 (C. C. A. 1st 1941).

[50] Press Co., Inc. v. N. L. R. B.; Gannett Co., Inc. v. N. L. R. B., 118 F. (2d) 937 (App. D. D. C. 1940) "Before oral statements of an employer may be held to be an unfair

communication to be a mere "informative" letter,[51] or an "appeal to reason."[52] Expressions of hostility became "privileged opinions" in the absence of a showing that employees were thereby prevented from joining or prompted to quit the union.[53] The occasion on which the employee elected to utter his thoughts was not deemed to be significant.[54] The employer was not to be put at the "mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning."[55] The employer was not required to stand "mute as a sheep before his shearer" in face of attacks on his reputation.[56] The employee was no longer deemed to be unaware of his rights under the Wagner Act, and therefore helpless, for employees, equally with management, were presumed to have knowledge of its provisions.[57]

Enough has been cited to demonstrate a growing disinclination on the part of the courts to maintain the fetters placed upon the employer's right to free speech by early decisions. In turn, this led to a change in the Board's treatment of the problem. By 1947 the subjective test of coercion was recognized in a number of the Board's decisions.[58] In light of the times, an employer utterance could be said to concern " . . . matters on which the employees as well as the company, were able to exercise reason and judg-

labor practice, it must appear that they interfered with, restrained, or coerced employees in the rights guaranteed by the act. . . ."

[51] Big Lake Oil Co. v. N. L. R. B., 146 F. (2d) 967 (C. C. A. 5th 1945).

[52] N. L. R. B. v. West Kentucky Coal Co., 152 F. (2d) 198 (C. C. A. 6th 1945).

[53] Jacksonville Paper Co. v. N. L. R. B., 137 F. (2d) 148 (1943); N. L. R. B. v. J. L. Brandies & Sons, 145 F. (2d) 556 (C. C. A. 8th 1944).

[54] N. L. R. B. v. American Tube Bending Co., 134 F. (2d) 993 (C. C. A. 2d 1943); Continental Box Co. v. N. L. R. B., 113 F. (2d) 93 (C. C. A. 5th 1940); N. L. R. B. v. West Kentucky Coal Co., 152 F. (2d) 198 (C. C. A. 6th 1945).

[55] N. L. R. B. v. Montgomery Ward & Co., 157 F. (2d) 486, 500 (C. C. A. 8th 1946).

[56] Humble Oil & Refining Co. v. N. L. R. B., 113 F. (2d) 85, 89 (C. C. A. 5th 1940).

[57] Midland Steel Products Co. v. N. L. R. B., 113 F. (2d) 800 (C. C. A. 6th 1940).

[58] Federal-Mogul Corp., 73 N. L. R. B. No. 69 (1947) (statements of "genuine policy"); Fafner Bearing Co., 73 N. L. R. B. No. 189 (1947) (mere offers of advice); Hercules Motors Corp., 73 N. L. R. B. No. 123 (1947) (expressions of disapproval of a union).

ment."[59] The "totality of conduct" doctrine was yet a useful tool,[60] but significantly, its uses by the Board was predicated on a "well defined" course of coercive conduct, that is, stronger evidence was required.[61] Moreover, the Board required a showing of positive coercive effect based upon *reasonably contemporaneous* conduct.[62]

By way of summary then, it can be said that the protection of the employee's rights under the Wagner Act was effectuated by use of legal theories as flexible as the needs of the case. The basic premise remained inviolate: the courts were charged with the duty of protecting his right to enter the ranks of the labor movement and treat with the employer from that vantage point. All courts, during the period of enforcement of the Wagner Act were in agreement on this. But a *stare decisis* definition of what amounted to a deprivation of the right was impracticable. The decisions of the courts were conditioned by their estimates of existing employee solidarity and the relative immunity from employer interference at that time.

Effect of Labor-Management Relations Act

Under the Wagner Act, the limitation placed upon the employer's right to free speech was the product of judicial decision. By way of contrast, the Labor Management Act purports to deal with this problem in a specific manner. But it is by no means correct to assume that the specific statute will supersede all that was the law before its advent, for the Labor Management Act[63] only amends the Wagner Act.[64] Thus the possibility remains that the statutory provision does not dispose of all the doctrines de-

[59] Electric Steel Foundry, 74 N. L. R. B. 30 (1947).

[60] United Welding Co., 72 N. L. R. B. 165 (1947 (non-coercive letters devoid of an anti-union background).

[61] Fisher-Governor Co., 71 N. L. R. B. 1291 (1947); LaSalle Steel Co., 72 N. L. R. B. 78 (1947).

[62] *Ibid.*

[63] 29 U. S. C. A. § 141 *et seq.* (Supp. 1947).

[64] 49 Stat. 449 (1935), 29 U. S. C. A. § 151 *et seq.* (1942).

veloped under the Wagner Act. On the other hand, Congress must be assumed to have spoken purposefully and that some change in existing law was effected. But what Congress intended to do, and what, in the eyes of the courts, Congress succeeded in doing, may be separate questions.

In weighing the probable impact of Section 8 (c) upon existing law, it would be premature to look upon that provision as receptive to none but a literal construction. Nor can it be said, at the outset, that the section is so phrased that it instantly admits to an ambiguous construction. An intermediate approach is open, since the provision is so fashioned that reasonable minds could differ as to the presence or absence of ambiguous language therein.

Section 8 (c), in a summary fashion, forbids the use of employer expressions so as to constitute or be evidence of an unfair labor practice if such expressions *contain* no threat of reprisal or force or promise of benefit. A literal interpretation would proceed upon the theory that employer expressions, as a class, are to be privileged and that all illegal expressions are confined to a very restricted category. It is then an easy matter to arrive at the conclusion that the fear or hope-inducing elements must be discovered, if at all, within the bare confines of the expression in question. On the other hand, it may truthfully be said that the character of every act, verbal or otherwise, depends upon the circumstances surrounding it. An expression may "contain," in a very practical sense, a threat or a promise though proof of the existence of this quality can only be made by use of collateral evidence. Thus, an ambiguity is discoverable by virtue of the use of the word "contain" in Section 8 (c). The important question is, what are the factors which will predispose a court to fasten upon it? Although most human utterances are ambiguous, a statute is not so considered until a court finds such to be true.

As previously stated, the Labor Management Act only amends the Wagner Act. Under the Wagner Act, it was an established practice to find that an employer expression contained an element

of coercion when the expression was viewed in the light of other activities. In enacting amendatory legislation, the legislature is presumed to have been aware of the judicial interpretation placed upon the amended statute and to have precluded this interpretation from attaching to the amending statute only in so far as it does so expressly or by necessary implication.[65]

Twelve years of litigation upon the question of the permissible bounds of employer free speech under the Wagner Act produced a number of highly adaptable formulas which the courts will be loath to abandon. The law abounds with illustrations of the ability of the judiciary to preserve a useful legal tool from legislative annihilation by use of a "nice distinction."

Section 8 (c) of the Labor Management Act, by its terms, assumes that *some* employer expressions will attain the status of unfair labor practices. To be sure, the expressions of the employer are to be sifted and subjected to a rigid qualitative analysis, but the fact remains that some may pass the test. This being true, the courts will again be called upon to weigh the effect of an expression upon the mental process of a listener, or group of listeners. To require that the threat or promise be "contained" in the sentence, paragraph, letter, pamphlet or address, as the case may be, will in no way relieve them of the difficulties inherent to this decision. The state of a man's mind will again be the object of judicial inquiry, and again the enjoyment of a constitutional privilege is to depend upon the varied understandings and emotional susceptibilities of the complainant. This was the basic problem which confronted the courts in the employer free speech cases under the Wagner Act. There the solutions were forged to fit the case and admit to no criticism without an exhaustive analysis of the particular fact situation involved. The problem being of such complexity, a statutory intrusion therein is apt to be deemed inadequate, and a construction of that statute which permits the most flexible approach may well be favored.

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[65] United States v. Dakota-Montana Oil Co., 288 U. S. 459 (1933).

The Labor Management Act intends to promote industrial peace *through the encouragement of collective bargaining and protection* of *employee rights.*[66] In short, the employee continues to occupy a favored position. A widely accepted principle of statutory construction requires a statute to be construed as a whole,[67] and if the whole context of the statute indicates a particular object of the legislature, certain implications consonant with that controlling intent may be imported into the section under consideration.[68] A general purpose must control the interpretation put upon the particular section. Therefore the question of whether or not the courts will be content to accept a bare literal construction of Section 8 (c) largely depends on their conception of how well such construction will serve the controlling purposes of the statute. If judicial experience and common understanding indicate a lack of practical utility, then an ambiguity may conveniently appear.

Under the Wagner Act, all restrictions placed on the employer's right to free speech were the results of judicial interpretation. Consequently the courts were free to fashion their own tools. An expression which could clearly be found to be coercive by virtue of its own composition was not often encountered. These could be relegated to an illegal category with ease. When the expression, from all surface indications, was devoid of illegality, the accepted practice permitted reference to other events in order to give meaning to the utterance. That this method often led to absurd results is not now relevant. The important thing is that the courts have recognized that an *effective and accurate* inquiry into the consequences of the act of uttering words will nearly always involve a consideration of the circumstances surrounding the act. A

[66] 29 U. S. C. A. § 151 (Supp. 1947). "It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce ... 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."

[67] Helvering v. New York Trust Co., 292 U. S. 455 (1934).

[68] Durousseau v. United States, 101 U. S. 307 (1810).

construction of Section 8 (c) which requires that the illegality of the expression be taken from the words alone may not take care of the problem of actually protecting the employee. As one learned judge remarked:

> "Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used. . ."[69]

Taking this to be an eloquent expression of what lesser men simply refer to as "common knowledge," the result may be that any interpretation of Section 8 (c) which attempts to divorce words from their natural setting will not be lightly regarded. At this point, a court may be disposed to note with satisfaction that Section 8 (c) as such, does not preclude a finding that *implied* threats or promises may become the basis for any employer unfair labor practice.

A decision to the effect that a given expression, *standing alone*, is coercive, is a conclusion of law. Conclusions of law were subject to judicial review under the Wagner Act.[70] On the other hand, the power to review findings of fact was not considered by the courts to be within their province.[71] In this, the Labor Management Act purports to change the law, for now the courts have increased power to review findings of facts as made by the Board.[72] Thus, a literal interpretation of Section 8 (c) would provide the courts with no occasion to exercise these new powers. If, however, that provision may be looked upon as admitting to an interpretation which presupposes the evaluation of factors other than the expression alone, then the increased power of the court to review the findings of fact as made by the Board is appropriate to the

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[69] N. L. R. B. v. Federbush Co., 121 F. (2d) 954, 957 (C. C. A. 2d 1941).

[70] Consolidated Edison Co. v. N. L. R. B., 305 U. S. 197, 229 (1938).

[71] *Ibid.*

[72] 29 U. S. C. A. § 160(c) (Supp. 1947). The conference committee, in discussing this feature of the act were of the opinion that the courts had "abdicated" to the Board. 1 C. C. H. LAB. LAW SERV., ¶ 8350 (1947).

problem of determining the coercive effect of an employer expression.

Laying aside a consideration of the factors which may dispose a court to find ambiguous terminology in Section 8 (c), evidence to support a literal interpretation is available.

The National Labor Relations Act indicated by its title that it was a statute designed to further the collective efforts of the industrial employee. The amending statute, by virtue of the presence of the word "management" in its title, evidences an intention to deal with the employers in a more favorable way.

It is significant that the fundamental right of employees to engage in concerted activities is, by the Labor Management Act, to be protected by "restoring equality of bargaining power between employers and employees."[73] An impression that reciprocal rights are to be created is inescapable. If equality in bargaining power is to be restored, one of the industrial adversaries must now occupy an unfairly weak position. It may well be the employer, for Congress made no finding in the Labor Management Act, as was made in the Wagner Act, that the employer occupies a position of ascendancy.[74]

The Wagner Act attributed industrial unrest to the refusal of employers to bargain collectively with employees.[75] The Labor Management Act attributes this condition to the refusal of *some* employers to bargain collectively,[76] thus implying that employers, as a group, no longer refuse to recognize the rights of the employees. Moreover, labor unions are now found to be responsible for a measure of industrial strife.[77]

Certain features of Section 2, the definition section of the Labor Management Act, continue to develop the theme of limited employer liability. As defined therein, an employer is one who acts

[73] 29 U. S. C. A. § 141 *et seq.* (Supp. 1947).
[74] 49 STAT. 449 (1935), 29 U. S. C. A. § 151 (1942).
[75] *Ibid.*
[76] 29 U. S. C. A. § *et seq.* (Supp. 1947).
[77] *Ibid.*

in that capacity, and also a person "acting as an agent of the employer."[78] The National Labor Relations Act defined an employer so as to include any person "acting in the interest of an employer."[79] The obvious intent of this change is to narrow the employer's liability for the remarks of his supervisory employees to cases covered by ordinary rules of agency law.[80]

The statute contains other provisions implying a decided change in the position to be occupied by the employer; it narrows the liability of employers for discharges under union security agreements;[81] it provides that employers are under no duty to recognize supervisors' unions; [82] it gives employers the right to petition for investigations of representation;[83] it gives the employers the right to sue unions for damages in certain cases;[84] it permits employers to file charges of unfair labor practices against unions. Last, but most important, is the fact that the mere presence of Section 8 (c) is evidence of a congressional intent to alter the previous concept of the employer's liability for his choice of words while treating with his employees.

Thus far, an attempt has been made to identify a number of influences that might logically be expected to condition the courts to one of two approaches to the problem of applying Section 8 (c).

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[78] *Id.* § 15 2 (3).

[79] 49 STAT. 449 (1935), 29 U. S. C. A. § 152 (3) (1942).

[80] "The bill, by defining as an 'employer' 'any person acting *as an agent* of an employer' makes employers responsible for what people say or do only when it is within the *actual* or *apparent* scope of their authority, and thereby makes the ordinary rules of the law of agency equally applicable to employers and to unions." 1 C. C. H. LAB. LAW SERV. ¶ 8018 (1947).

[81] 29 U. S. C. A. 158(a) (3) (Supp. 1947). Section (14b) expressly provides that it does not authorize the execution of any union-security agreements in any state or territory in which such agreements are prohibited by State or Territorial law. Apparently this will do much to settle the question of the constitutionality, from a federal point of view, of the various anti-closed shop statutes or constitutional amendments enacted by several states.

[82] *Id.* § 152 (3). The act expressly provides, in Section 164, that organizational activities on the part of supervisors are not made unlawful.

[83] *Id.* § 159(c) (1) (B), and § 159(c) (2) requires the Board to apply the same rules regardless of the identity of the person filing the petition.

[84] *Id.* § 185. See also § 187(b) relating to right of employers to sue for damages resulting from boycotts and illegal strikes.

On the one hand, the very nature of the problem of measuring the effect of a mere choice of words, and the practical solution thereof, probably requires that some extra meaning be read into that section. Congress, however, may not have intended to leave to the courts the matter of choosing the most practical solution. On the other hand, considerable evidence is available to support an inference to the effect that Congress has said that the coercive elements of an employer expression must be discovered somewhere between its first and last syllables. The trouble with this view is that if such was the intent of the legislators, they could easily have found words to that precise effect. In short, the ambiguity in Section 8 (c) arises, not from the words used, but from a lack of sufficient words. Congress has commanded the courts to protect the employee and at the same time save the employer from the consequences of his acts. Precisely how this should be done is not revealed; therefore a reference to legislative history is justified.

Both the House bill[85] and the Senate amendment[86] contained provisions designed to protect the right of employers to free speech. The Senate amendment sought to moderate the somewhat extreme position taken by the House, and the final result was embodied in the compromise suggested by a conference committee.[87] An analysis of these various adjustments will do much to clarify Section 8 (c).

The House Report complained of the manner in which the Board would "infer from what the employer said, perhaps long before," that a present act constituted an unfair labor practice.[88] In legal parlance, this would amount to no more than a general objection to the quality of the evidence upon which a finding was based. For example, the evidence was irrelevant, lacked probative value, or was without connection with the fact in issue. But the House did not intend to base its statute on legal refinements,

[85] 1 C. C. H. LAB. LAW SERV. ¶ 8180 (1947).
[86] *Ibid.*
[87] *Ibid.*
[88] *Ibid.*

for, in the words of its committee, the bill sought to provide that

> ". . . nothing anyone says shall constitute or be evidence of an unfair labor practice unless it, *by its own express terms*, threatens force or economic reprisal. This means that a statement may not be used against a person making it unless it *standing alone* is unfair . . ."[89] (Italics supplied.)

The views of the Senate Committee were not of this positive nature. As did the House Committee, that body complained of the practice of the Board in finding a speech of an employer to be coercive by referring to "severable and unrelated" unfair labor practices.[90] The Senate, however, only meant to provide that

> ". . . if, *under all the circumstances*, there is neither an express or implied threat of reprisal, force, or offer of benefit, the Board shall not predicate any finding of unfair labor practice upon the statement."[91] (Italics supplied.)

The Senate Committee went on to state that "the Board, of course, will not be precluded from considering such statements *as evidence*."[92] (Italics supplied.)

The foregoing reference to the committee reports of the several legislative bodies indicates the precise result each sought to bring about. The House bill sought to confine the search for coercive elements to the very expression in question. The Senate amendment, on the contrary, condoned the use of evidence other than the expression under surveillance. It should be noted that the Senate had desired that some logical connection be preserved between the expression and the circumstances alleged to impart a coercive color to that expression. Then if the original House bill, and the Senate amendment thereto, are carefully compared with Section 8 (c), with a view of discovering how much of the House and how much of the Senate view survived, it is logical to expect that some sort of workable interpretation will emerge.

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[89] *Ibid.*
[90] *Ibid.*
[91] *Ibid.*
[92] *Ibid.*

The House bill took this form:

> "Notwithstanding any other provision of this section, the following shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act:
>
> (1) Expressing any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form *if it does not by its own terms* threaten force or economic reprisal."[93] (Italics supplied.)

As far as is relevant to this discussion, the Senate amendment provided:

> "The Board shall not base any finding of unfair labor practice upon any statement of views or arguments, either written or oral, if such statement contains *under all the circumstances* no threat, express *or implied*, of reprisal or force, or offer of benefit . . ."[94] (Italics supplied.)

Section 8 (c), which represents the compromise between these views, adopted the provisions of the House bill with one very significant change: it does not specifically require that an expression by its own terms, threaten force or reprisal before it can become an unfair labor practice. Impliedly, at least, it is recognized that apparently innocuous expressions may have this very effect. This is the first step toward the view that Congress realized that words cannot be divorced from their natural setting with practical results.

The Conference Report stated that the House bill was to be adopted with one change as derived from the Senate amendment.[95] Thus it appears that the only change in the House bill was to embody the views of the Senate on this precise matter. The missing feature of the House bill was that portion which referred to the *manner* of proving the coercive character of an expression. Since the Senate amendment must supply this, and since that amendment would permit reference to "all the circumstances," there is em-

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[93] H. R. REP. No. 3020, 80th Cong., 1st Sess. (1947). LAW REP. 26 (April 24, 1947).

[94] SEN. REP. No. 105, 80th Cong., 1st Sess. (1947).

[95] 1 C. C. H. LAB. LAW SERV. ¶ 8180 (1947).

bodied in the final provision an implied congressional approval of the Senate view. In other words, when Section 8 (c) requires that the element of coercion must be "contained" in the expression under attack, it means that a reference to the circumstances surrounding the expression is not forbidden.

The question of how far afield the investigator may go to find facts to color the expression is not to be settled in this manner. As did the House report and the Senate report, the conference report was concerned with the practice of the Board in drawing coercive implications from apparently disconnected events. Some significance may be attached to the fact that the conference committee referred to this as the practice of using "irrelevant and immaterial" evidence.[96] Connecting this statement to the portion of the statute which apparently increases the courts' power to review finding of fact as made by the Board,[97] it is not illogical to conclude that Congress intended that the courts were free to apply ordinary legal standards in determining the evidentiary value of these auxiliary facts. The Board, as a matter of course, would be forced to comply with the same standards, since an order of the Board has no force until the power of an appropriate court is invoked.[98] A little weight is added to this view by virtue of the fact that Section 10 (b) provides that Board hearings

> "...shall, as far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of procedure for such courts, adopted by the Supreme Court of the United States..."[99]

The Wagner Act had provided that in Board proceedings "the rules of evidence prevailing in courts of law or equity shall not be controlling."[100] Perhaps the courts will now be required to appraise, in order to reject, those "imponderable subtleties" which

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[96] *Ibid.*

[97] 29 U. S. C. A. § 160(e) (Supp. 1947).

[98] *Id.* § 160(e) and 160(f).

[99] *Id.* § 160(b).

[100] 49 STAT. 449 (1935), 29 U. S. C. A. § 151 (1942).

the Supreme Court refused to consider in the *Virginia Electric & Power Co.* case. [101] At any rate, Section 8 (c) in light of the committee reports, appears to be no more than a rule of evidence.

By adopting a view that Congress contemplated a procedure whereby the courts are free to look beyond the bare confines of an employer expression to discover its coercive character, the practical problem of protecting the employee can be answered. Precisely how far the courts will go in using evidence other than the expression itself is open to doubt. At the moment, the following rule may present a fairly safe guide:

> The coercive character of an employer expression may be found (1) from the tenor and unmistakable import of the words of the expression itself, or (2) by reference to the circumstances immediately surrounding the expression when made, or (3) by reference to facts and circumstances which, though not coincidental in point of time to the expression, bear such a relationship to it that no reasonable mind could fail to perceive that the expression, in light of those circumstances, had the net operative effect of coercing an employee or group of employees.

It is not improbable that the courts will be prepared to adopt a highly flexible interpretation of Section 8 (c); one that is capable of affording protection to both of the industrial adversaries. It is a mistake to assume that the interests of the employer and employee are irreconcilable. For this reason, it would be unreasonable to advocate an interpretation of Section 8 (c) which would give either one of the industrial combatants a marked advantage. The bar of justice is the proper place to seek a compromise, and there is no reason to suppose that none can be found.

—*Richard H. Munsterman.*

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[101] 314 U. S. 469, 479 (1941).