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EMPLOYER'S RIGHT TO GIVE CAPTIVE AUDIENCE SPEECHES

The law relating to the right of an employer to make anti-union speeches to a "captive audience" (i.e. speeches on the employer's property and time, which employees are required to attend) has been in an uncertain status for a considerable period of time.

It is quite clear that an employer may express anti-union views to his employees, provided his statements or conduct as a whole are not threatening or coercive within the meaning of section 8 (a) (1) of the Labor Management Relations Act.[1]

But when there is added the factor of a captive audience, The National Labor Relations Board has been unable to chart a consistent course. In *Clark Bros. Co.*[2] the Board ruled for the first time that such a speech, in itself, is an unfair labor practice under section 8 (a) (1). In the subsequent enforcement proceeding,[3] the Circuit Court, by way of dictum, suggested a captive audience speech would not automatically constitute an unfair practice if the union had been afforded an equal opportunity to address the employees.

The decision was strongly criticized by Congress as restricting too greatly the employer's right of speech,[4] and the Labor Management Relations Act, passed in 1947, contained an entirely new section, 8 (c), which provided, "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 subchapter, if such expression contains no threat of reprisal or force or promise of benefit."[5]

This was apparently intended to overrule the *Clark Bros.* case, and in *Babcock & Wilcox Co.*[6] the Board so held, declaring that compulsory attendance at an anti-union speech did not in itself constitute an unfair labor practice. However, the union had not requested an opportunity to answer,

1. 49 Stat. 452 (1935), 29 U.S.C. sec. 158 (1946), as amended 61 Stat. 140 (1947), 29 U.S.C.A. sec. 158 (a) (1) (Supp. 1951). NLRB v. Virginia Electric & Power Co., 314 U.S. 469, 477, 62 S. Ct. 344, 86 L. Ed. 348 (1941); Virginia Electric & Power Co. v. NLRB, 319 U.S. 533, 539, 63 S. Ct. 1214, 87 L. Ed. 1568 (1943); NLRB v. American Tube Bending Co., 134 F.2d 993, 146 A.L.R. 1017 (2d Cir., 1943), cert. denied 320 U.S. 768, 64 S. Ct. 84, 88 L. Ed. 459 (1943); NLRB v. Mylan-Sparta Co., 166 F.2d 485 (6th Cir., 1948).
2. 70 N. L. R. B. 802 (1946).
3. NLRB v. Clark Bros. Co., 163 F.2d 373 (2d Cir. 1947).
4. "The Board has placed a limited construction upon these decisions [Thomas v. Collins, 323 U.S. 516 (1945) and NLRB v. American Tube Bending Co., 134 F.2d 993 (2d Cir. 1943), declaring right of free speech in labor matters] by holding such speeches by employers to be coercive . . . if the speech was made in the plant on working time (Clark Bros., 70 N. L. R. B. 802). The committee believes these decisions to be too restrictive and in this section [8 (c)], provides that if, under all the circumstances, there is neither an expressed or implied threat of reprisal, force, or offer of benefit, the Board shall not predicate any finding of unfair labor practice upon the statement." Sen. Rep. No. 105, 80th Cong., 1st Sess., p. 23 (1947).
5. 49 Stat. 452 (1935), 29 U. S. C. 158 (1946), as amended 61 Stat. 140 (1947), 29 U. S. C. A. 158 (c) (Supp. 1951).
6. 77 N. L. R. B. 577 (1948).

so that point was not in issue. Subsequently in *S & S Corrugated Paper Machinery Co.*,[7] in which the union had requested and been denied an opportunity to reply, it was held on the authority of the *Babcock* case that such opportunity to reply need not be given.

Thus it appeared for a time that section 8 (c) had ended the captive audience doctrine entirely. But it was soon revived by *Bonwit Teller, Inc.*[8] In this case the employer made an anti-union speech to a captive audience six days before an election to determine whether the employees would accept or reject union representation. At the time the store prohibited union solicitation on the selling floor at any time, and a subsequent request by the union for an opportunity to address the employees under similar conditions was not granted.

The Board held that, under the circumstances, this constituted an unfair labor practice. The decision was based on two grounds, the first being the denial of the union's request was discriminatory application of the no-solicitation rule. Only because Bonwit Teller was a department store was it allowed to forbid union solicitation on the selling floors during non-working as well as working hours. The Board felt this special privilege given to the store placed upon it an obligation to assure that the rule was enforced with an even hand. For an employer, in the face of such a rule, to utilize its premises for the purpose of urging its employees to reject the Union, and then to deny the Union's request to present its case to the employees under the same circumstances, is an abuse of that privilege. . . ."

The other ground relied on was that, without regard for the no-solicitation rule, the refusal of the union's request deprived the employees of their right guaranteed by section 7 of the Labor Management Relations Act[9] to freely select or reject union representation, as that right includes the right to hear both sides under conditions reasonably approximating equality.

The Second Circuit affirmed the Board's order,[10] but stated the determinative feature was the discriminatory application of the no-solicitation rule. "If Bonwit Teller were to abandon that rule, we do not think it would then be required to accord the Union a similar opportunity to address the employees each time Rudolph [Bonwit Teller president] made an anti-union speech."

Despite this statement by the Court, the Board has tended toward almost automatic declarations that captive audience speeches constitute unfair labor pracices, with virtually no inquiry into the other circumstances in each case.

7. 89 N. L. R. B. 1363 (1950).
8. 96 N. L. R. B. 608 (1951).
9. 49 Stat. 452 (1935), 29 U. S. C. 157 (1946), as amended 61 Stat. 140 (1947), 29 U. S. C. A. 157 (Supp. 1951).
10. Bonwit Teller, Inc. v. NLRB, 197 F.2d 640 (2d Cir. 1952).

Thus, in one case[11] the Board applied the rule of the *Bonwit Teller* case even though the employer did not maintain a no-solicitation rule. Chairman Herzog, dissenting, objected to the extension of the *Bonwit Teller* doctrine "beyond the limits thought permissible by the reviewing Court."

The Board found another captive audience speech to be an unfair labor practice even though the union did not ask for an equal opportunity to address the employees (Chairman Herzog again dissented). The Board did state, however, that under the circumstances (employer gave his speech so late that no further meetings could be held before the election), the employer had in effect denied the union a chance to reply, and thus prevented the employees from hearing both sides of the story under reasonably equal circumstances.[12]

The Board now seems to have formulated a general test that whenever a company makes "anti-union speeches to its employees during working hours on its premises in the course of an organizing campaign by a labor organization without according, upon reasonable request, a similar opportunity to address its employees to the labor organization against which such speeches are directed" it commits an unfair labor practice.[13]

Chairman Herzog has been the lone dissenter to the mechanical application of such a rule. His position he stated clearly in the *National Screw & Manufacturing Co.* case:[14]

> "I am compelled to disagree with what seems to me an undiscriminating extension of the *Bonwit Teller* doctrine. When I joined in the *Bonwit* decision, I thought that the application of that doctrine was to depend, as we said there, upon the particular circumstances of each individual case. I thought the criterion to be whether employees had had a resaonable opportunity to hear both sides of the story under circumstances which reasonably approximate equality, rather than that our judgment would depend simply and automatically upon whether an employer who uses his premises to make a speech had refused identical facilities to a labor organization."

Inasmuch as no cases have reached the courts since *Bonwit Teller,* the ultimate decision as to which view will prevail must await further court proceedings. In the meantime, any conjecture as to what will be decided seems unwarranted.

WARD A. WHITE

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11. Metropolitan Auto Parts, Inc.; Massachusetts Motor Car Co., Inc., 102 N. L. R. B. No. 171 (1953).
12. Foreman & Clark, Inc., 101 N. L. R. B. No. 12 (1952).
13. Onondago Pottery Co., 103 N. L. R. B. No. 75 (1953); see also Seamprufe, Inc., 103 N. L. R. B. No. 17 (1953).
14. 101 N. L. R. B. No. 218 (1952).