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REAPPRAISAL OF EMPLOYER FREE SPEECH: THE LIVINGSTON SHIRT AND PEERLESS PLYWOOD CASES

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INSPIRING heated charges from union spokesmen of approving compulsory "brainwashing sessions" and capitulating to anti-union forces, the newly constituted National Labor Relations Board has re-examined the Board's controversial *Bonwit-Teller* doctrine, scrapped one-half of it, and substituted a new administrative rule applicable only to representation cases.

Under the original doctrine, the Board had previously held that an employer's use of company time and property to deliver a speech to its employees before a certification election urging employee rejection of the union, while denying the union an equal opportunity to address the employees on company time and property, not only was grounds for setting the subsequent election aside, but also constituted an unfair labor practice.

In *Matter of Livingston Shirt Co.*,[1] the majority of the Board[2] held that, absent a broad no-solicitation rule (where union solicitation is prohibited at all times on company property), an employer does not commit an unfair labor practice by making a pre-election speech on company time and premises and denying the union's request for an opportunity to reply. In a companion case, *Matter of Peerless Plywood Co.*,[3] the Board majority held that such employer action did not constitute sufficient grounds to set aside the election and established a new rule whereby both employer and union are prohibited from making speeches on company time within twenty-four hours of an election.

[1] 33 L.R.R.M. 1156, 107 N.L.R.B. No. 109 (1953).

[2] Chairman Farmer, Member Rodgers with Member Peterson concurring in the result; Member Murdock dissenting.

[3] 33 L.R.R.M. 1151, 107 N.L.R.B. No. 106 (1953).

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Immediately following the release of these rulings, CIO General Counsel Arthur J. Goldberg issued an official statement in which he charged that these decisions sanctioned compulsory "brain washing sessions," constituted anti-labor amendments to the Taft-Hartley Act by process of administrative interpretation, and were incompatible with basic American principles.[4] He stated that even the Taft-Hartley Act, prior to these decisions, required an employer to give the union an opportunity to reply on company time and property.

The reaction of the legal department of the AFL was equally denunciatory:

> The National Labor Relations Board in its decisions in Livingston Shirt Corp. and Peerless Plywood Co. has reversed precedents standing throughout the eighteen years of the Board's history by now permitting employers to make anti-union speeches before captive audiences on company time. The new majority ruling appears to be a capitulation to the demand of anti-union employers and attorneys made in the committee hearings at the last session of the Congress.[5]

Board Member Rodgers publicly took exception to these charges and countered by stating:

> In some quarters, these decisions have been characterized as "legislating" by the Board. This, in my opinion, is a false and hollow charge, based on emotion and not on fact. . . .
>
> Indeed, if any unauthorized legislative activity has been indulged in, it has not been indulged in by the present Board. I took an oath to administer this statute. I did not take an oath to accept and administer any modifications, unseen provisos or unsound interpretations which may have become engrafted upon it.[6]

Is there any substance to the union charges, and, if so, to what extent? Has the Board reversed precedent of eighteen years' standing? How exactly has the Board changed its prior decision in regard to employer speeches and what is its present position? And, finally, are the *Livingston Shirt* and *Peerless Plywood* cases indicative of a new anti-labor animus pervading the Board?

To attempt an answer to these questions, it is necessary, at the outset, to review the history of an employer's right to make known

[4] 248 Daily Lab. Rep. A-3, December 22, 1953, Statement of Arthur J. Goldberg, CIO General Counsel.

[5] 249 Daily Lab. Rep. A-2, December 23, 1953, Statement of AFL Attorneys Albert Woll, Herbert Thatcher, and James Glenn.

[6] From an address to the National Retail Dry Goods Association on January 12, 1954.

his opinion regarding the union to his employees as construed by Congress, the Board and the courts.[7]

In its early years under the Wagner Act, the Board interpreted the statutory prohibition against employer interference with his employees' right of self-organization[8] as requiring absolute neutrality on the part of the employer. Thus, *any* employer expression of opinion unfavorable to unionism was held to be unfair interference.[9] This position was founded upon the theory that an employer's economic control over his employees was so great that even an apparently innocuous statement of opinion by an employer assumed enormous coercive significance over his employees.[10]

While the judiciary, by and large, appeared more concerned than the Board with the constitutional right of the employer to speak,[11]

[7] This subject is not without previous comment. As to the early position of the Board and the judiciary, see 8 Univ. Chi. L. Rev. 359 (1941); Daykin, The Employer's Right of Free Speech in Industry Under the National Labor Relations Act, 40 Ill. L. Rev. 185 (1945); 14 Univ. Chi. L. Rev. 104 (1946); Sinsheimer, Employer Free Speech, A Comparative Analysis, 14 Univ. Chi. L. Rev. 617 (1947). For comment at time of the Bonwit-Teller case, see 65 Harv. L. Rev. 695 (1952); 61 Yale L.J. 1066 (1952). For more recent analysis concerning the impact of Section 8(c) and the expanded Bonwit-Teller doctrine, see Shair, Is the Captive Audience Doctrine Back?, 3 Lab. L.J. 475 (1952); Spanbock, Employer Speechmaking, 4 Lab. L.J. 474 (1953); Elkouri, Employer Free Speech, 4 Lab. L.J. 78 (1953).

[8] "(a) 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 157 of this title; . . ." 49 Stat. 452 (1935), 29 U.S.C.A. § 158 (1947).

[9] Matter of Citizen News Co., 21 N.L.R.B. 1112 (1940); Matter of Nebel Knitting Co., 6 N.L.R.B. 284 (1938).

[10] In the Third Annual Report of the National Labor Relations Board 125, (1938) it was stated:

"In considering the effect of the employer's conduct upon the self organization of employees, there must be borne in mind the control wielded by the employer over his employees—a control which results from the employees' complete dependence upon their jobs, generally their only means of livelihood and economic existence. As the natural result of the employer's economic power, employees are alertly responsive to the slightest suggestion of the employer. Activities, innocuous and without significance, as between two individuals economically independent of each other or of equal economic strength, assume enormous significance and heighten to proportions of coercion when engaged in by the employer in his relationship with his employees. . . ."

This position was expained somewhat more bluntly by one writer, as follows:

"Freedom of speech is possible only among those who approximate each other in equality of position. When an employer addresses himself to his employees on the subject of unionism, orally or in writing, directly or through some mouthpiece, economic compulsion comes in through the door and freedom of speech flies out the window." Rosenfarb, The National Labor Policy and How It Works 79–80 (1940).

[11] NLRB v. Union Pacific Stages, 99 F. 2d 153 (C.A. 9th, 1938); Jefferson Electric Co. v. NLRB, 102 F. 2d 949 (C.A. 7th, 1939).

the courts agreed that statements amounting to interference were not so protected.[12] The courts differed as to what constituted unlawful interference,[13] but the decision of the Second Circuit Court of Appeals in *NLRB v. Federbush*[14] was regarded by many as having settled the matter in favor of the Board's view that any employer opinion unfavorable to unionization was inherently coercive because of the employer's economic control over his employees. In 1941, however, the Supreme Court, in the case of *NLRB v. Virginia Electric Power Co.*,[15] announced that the First Amendment protected an employer in the expression of his opinions to his employees so long as such expression was not coercive in itself, or "part of a coercive course of conduct." Subsequently, in *NLRB v. American Tube Bending Co.*,[16] the Second Circuit reversed its *Federbush* decision and held that an employer's speech, delivered on the eve of an election, was privileged under the First Amendment.

The Board thereafter pursued a "pattern of coercive conduct" theory in determining the effect of an employer's speech opposing employee selection of a union.[17] Its approach veered in the direction of looking to the over-all course of conduct of an employer to determine if an otherwise uncoercive speech might assume coercive import in the light of the employer's pattern of conduct. In practice, however, it became apparent that the Board was not readily surrendering its view that employer speech is inherently coercive, for the Board found constructive coercion in any employer expression of opinion which followed alleged unfair practices by the employer. Court acceptance of the Board's approach, however, was cool.[18]

The Board then took a new approach. In *Matter of Clark Bros.*

[12] Texas & New Orleans Rr.Co. v. Broth. of Ry. & Steamship Clerks, 281 U.S. 548 (1930) (construing Railway Labor Act of 1926); Midland Steel Products Co. v. NLRB, 113 F. 2d 800 (C.A. 6th, 1940).

[13] Midland Steel Products Co. v. NLRB, 113 F. 2d 800 (C.A. 6th, 1940) (complusion rather than influence); NLRB v. Elkland Leather Co., 114 F. 2d 221 (C.A. 3d, 1940) (design to discourage unionization).

[14] 121 F. 2d 954 (C.A. 2d, 1941). Contra, NLRB v. Citizens News Co., 134 F. 2d 962 (C.A. 9th, 1943).

[15] 314 U.S. 469 (1941).

[16] 134 F. 2d 993 (C.A. 2d, 1943).

[17] Matter of J. L. Brandeis & Sons, 54 N.L.R.B. 880 (1944); Matter of Goodall Co., 68 N.L.R.B. 252 (1946).

[18] Edward G. Budd Mfg. Co. v. NLRB, 142 F. 2d 922 (C.A. 3d, 1944); NLRB v. Brown-Brockmeyer Co., 143 F. 2d 537 (C.A. 6th, 1944); NLRB v. J. L. Brandeis & Sons, 145 F. 2d 556 (C.A. 8th 1944). But see Peter J. Schweitzer, Inc. v. NLRB, 144 F. 2d 520 (App. D.C., 1944).

Co., Inc.,[19] it was held that an employer's anti-union speech to his employees, during working hours and only one hour before an election, constituted an unfair labor practice because the employer had

> . . . exercised its superior economic power in coercing its employees to listen to speeches relating to their organizational activities, and thereby independently violated Section 8(1) of the Act.[20]

This was considered the birth of the "captive audience" doctrine.[21]

Again it was apparent that the Board was still of the belief that when an employer addressed his employees, ". . . economic compulsion comes in through the door and freedom of speech flies out the window."[22] The new approach was an attempt to weaken this economic compulsion by prohibiting the speech at the situs of the employer's control during the hours such control was exercised.

On appeal from the Board's ruling in the *Clark Bros.* case the Court of Appeals held that it was not necessary to lay down so broad a rule that compulsory attendance at an anti-union speech on company premises and time is itself an unfair practice. The court stated:

> We should hesitate to hold that he [the employer] may not do this on company time and pay, *providing a similar opportunity to address them were accorded representatives of the union.*[23]

[19] 70 N.L.R.B. 802 (1946).

[20] Member Reilly dissented, stating:
"But this decision is more retrogressive than the general run in that it finds the mere fact that the employees were assembled in the plant during working time to listen to anti-CIO campaign speeches of respondent's officials was itself a violation of the Act, the theory being that the employees were not at liberty during working hours to avoid hearing the speeches. It must be remembered, however, that these were the same circumstances under which the crucial speech in American Tube Bending case was made and virtually the identical argument in support of the Board's disapproval of it was urged unsuccessfully upon the courts. It ignores the fact that the whole Board doctrine of employer neutrality developed with respect to employers using the plant facilities as channels for their propaganda. It was this doctrine of the Board that the courts repudiated, not some notion that an employer did not have access to public media of expression, for no Board decision had ever held this to be illegal per se."

[21] Actually, the factor of an employer speech being made during the working hours had been previously noted by the Board, but never considered independently as an unfair practice. Matter of Thompson Products Co., 60 N.L.R.B. 1381 (1945); Matter of Wennonah Cotton Mills Co., Inc., 63 N.L.R.B. 143 (1945); Matter of Montgomery Ward & Co., Inc., 64 N.L.R.B. 432 (1945); Matter of Monumental Life Ins. Co., 67 N.L.R.B. 244 (1946). In the Montgomery Ward case, the Eighth Circuit Court of Appeals specifically denied the efficacy of this factor. 157 F. 2d 486 (1946).

[22] Rosenfarb, op. cit. supra note 10.

[23] 163 F. 2d 373 (C.A. 2d, 1947). The italicized portion of the quotation was a harbinger of things to come.

The Board's findings were upheld, however, on the theory that the evidence showed an aggressive anti-union campaign, of which the employer's speech was the culmination.

Between the time of the Board's decision and the Second Circuit's review thereof, Congress stepped into the picture. Concerned over the apparent subjugation of the rights of the employer in attempting to foster the rights of the employee, without attendant responsibilities upon the latter, Congress enacted the Taft-Hartley Act. With respect to the free speech issue, the *Clark Bros.* decision was cited as being too restrictive of the right of free speech,[24] and Section 8 (c) was added to the Act, providing that the expression of views, arguments or opinion ". . . shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit."[25] It was clear that a majority of Congress wished to prevent future application of the"captive audience" doctrine and to restrict the finding of an unfair practice regarding speech to the contents of the speech itself.

Thereafter, the Board appeared to withdraw the "captive audience" theory as a basis for finding an unfair labor practice. In *Matter of Babcock & Wilcox*, the Board held that the "captive audience" doctrine no longer existed as a basis for finding unfair labor practices.[26] Several years later, the Regional Director for the Second Region recommended that an election be set aside in *Matter of S & S Corrugated Paper Machinery Co.*,[27] partly on the grounds that the em-

[24] Senate Report No. 105 on S. 1126, at p. 24–25. There were those who opposed this view, and the House Minority Report (H. Rep. No. 245 on H.R. 3020, at 84) states: "Here again, the laudable purpose of protecting free speech cloaks an evil design to encourage unfair labor practices by employers."

[25] 49 Stat. 452 (1935), 29 U.S.C.A. § 158 (c) (1947).

[26] 77 N.L.R.B. 577 (1948). The Board stated:

"With respect to the 'compulsory audience' aspect of the speeches, the trial examiner concluded from all the evidence that the notices of the meetings as well as the oral instructions given to the employees concerning these meetings removed the element of choice from the employees, and, in effect, compelled them to attend in a violation of the act. In reaching this conclusion, the trial examiner relied upon the 'compulsory audience' doctrine enunciated in Matter of Clark Bros. Co., Inc. However, the language of Section 8(c) of the amended Act, and its legislative history, make it clear that the doctrine of the Clark Bros. case no longer exists as a basis for finding unfair labor practices in circumstances such as this record discloses. Even assuming, therefore, without deciding, that the respondent required its employees to attend and listen to the speeches, we conclude that it did not thereby violate the act."

Also see Matter of Fontaine Converting Works, Inc., 77 N.L.R.B. 1386 (1948); Matter of Hinde & Dauch Paper Co., 78 N.L.R.B. 488 (1948).

[27] 89 N.L.R.B. 1363 (1950).

ployer had subjected his employees to a "captive meeting" and thereafter ignored the union's request for a like opportunity to address the employees. The Board held that this theory was untenable in view of its *Babcock & Wilcox* decision. The Board stated:

> In that case [Babcock & Wilcox] the Board held that Section 8(c) of the amended act and its legislative history make it clear that the "compulsory audience" doctrine of the Clark Bros. case no longer exists as a basis for finding unfair labor practices, under circumstances substantially similar to those presented in this case. The decision in the Babcock & Wilcox case is controlling here. On the facts revealed by the Regional Director's reports in this case, *the "captive audience" aspect of the Employer's speeches, otherwise protected by Section 8(c) of the amended act, cannot form the basis for a finding that the employer, by denying the Petitioner an equal opportunity to use its facilities and time, has interfered with the employee's free choice of a bargaining representative.* The petitioner's objections to the conduct of the election on this ground are therefore overruled. (Italics added)

But, then came the *Bonwit-Teller*[28] case. The Board, overruling the *S & S Corrugated* case, held that the employer's refusal to allow the union an opportunity to speak to the employees on company time, where the employer made such an address, constituted an unfair labor practice and also interfered with the election so that it should be set aside.

It is important to note that the Board advanced two theories in explaining its holding. The first was that the refusal constituted a discriminatory application of the broad no-solicitation rule which the employer had in effect. The Board held:

> . . . It cannot be denied that, while the rule was justified and lawful, the organization of the Respondent's employees had to be conducted under a practical disadvantage which we have not sanctioned in other types of business operations. We believe the special privilege of department stores to promulgate the broadest type of rule against union solicitation gives rise to an equal obligation to assure that such rules are 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 which, we believe, the statute does not intend us to license.

The second theory advanced was that, regardless of the existence (or lack thereof) of a no-solicitation rule, an employer may not deny a union the opportunity to address the employees on company time where the employer has so spoken. In establishing this "equal op-

[28] 96 N.L.R.B. 608 (1951).

portunity" theory, the Board reasoned that Section 7 of the Act guaranteed to employees

. . . the right to hear both sides of the story under circumstances which reasonably approximate equality.

From this premise, the Board concluded:

. . . that an employer who chooses to use his premises to assemble his employees and speak against a union may not deny that union's reasonable request for the same opportunity to present its case, where the circumstances are such that only by granting such request will the employees have a reasonable opportunity to hear both sides.[29]

Again it was the Second Circuit which reviewed the Board's position.[30] This court upheld the Board's finding, *solely on the basis of the "first theory," i.e.*, a discriminatory application of the no-solicitation rule. The court stated:

As we have indicated above, the violation here 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 [employer] 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.[31]

Following its *Bonwit-Teller* decision, the Board began anew its efforts to protect employees from the coercion it believed to be inherent in an employer's address to his employees. In *Matter of Biltmore Mfg. Co.*,[32] the Board relied solely upon the "equal opportunity theory" (a no-solicitation rule not being present) in

[29] The Board made specific reference to the Second Circuit's dictum in the Clark Bros. case, 70 N.L.R.B. 802 (1946). Member Reynolds dissented, stating:
". . . that this freedom of speech [guaranteed in Section 8(c)] encompassed the right to address employees in the plant, as did Respondent's president, is beyond question. Nowhere in the act or in its legislative history, however, does it appear that a concomitant of this right is the obligation to provide a forum of debate for unions. Indeed, hinging an employer's right to speak upon his readiness to make available the means by which his arguments, views, and opinions can be nullified, effectively emasculates Section 8(c) as it applies to the right of an employer to address his employees."

[30] Bonwit-Teller, Inc. v. NLRB, 197 F. 2d 640 (C.A. 2d, 1952).

[31] Chief Judge Swan dissented, stating:
"It is clear from the legislative history, which criticized as too restrictive the decision in Clark Bros., 70 N.L.R.B. 802, that Congress intended the employer to have the right to address his employees on company time and property. There is no suggestion that if he exercised the right he must accord to union representatives a similar opportunity."

[32] 97 N.L.R.B. 905 (1951).

setting aside an election.[33] In *Matter of Bernardin Bottle Cap Co.*,[34] the Board again set aside an election because of the employer's refusal to allow the union to reply to his address on company time. The Board noted:

> The critical question here, as it was in the two aforementioned cases, is whether the circumstances were such that only by granting the Union's request for use of the same forum could the employees have a reasonable opportunity to hear both sides of the issue on which they were about to vote.[35]

This critical question would appear on its face to be a factual condition upon which the application of the doctrine must depend. Thus, it would appear that the Board recognized the employer's constitutional and statutory right to speak, but was establishing a reasonable limitation thereon where the facts were such that otherwise the employees would be denied their right to hear both sides. For all practical purposes, however, no such factual condition existed. The Board interpreted the "reasonable opportunity to hear both sides" as requiring the union's opportunity to be one "under circumstances which reasonably approximate equality" to those utilized by the employer, and approximate equality was only to be found where the union was allowed an equal opportunity to speak on company

[33] The Board stated:
"The Board has recently dealt with this question in Bonwit-Teller, Inc. The Board there found that when the employer chose to deliver a speech to its employees, it could not lawfully deny the union's reasonable request for an opportunity to reply under similar circumstances. We affirm that holding here. . . . It is true, as pointed out by our dissenting colleague, that the record in this case does not disclose the existence of a general no-solicitation rule and its discriminatory application as was found in the Bonwit-Teller case. It does reveal, however, that at the very time the Employer addressed the employees on company time and property, it denied union spokesmen the similar opportunity. Certainly, the same legal consequences should flow from this conduct as would flow from the discriminatory application of an established rule against solicitation. For, in either case, the employer is discriminating in favor of anti-union adherence to the serious detriment of union adherents."
Where an employer had a limited no-solicitation rule, proscribing solicitation only during working hours, the Board held, in setting aside the election, that the employer's address during working time was a discriminatory application of that rule. Matter of Higgins, Inc., 100 N.L.R.B. 829 (1952); Matter of J. J. Newberry Co., 100 N.L.R.B. 1140 (1952); Matter of National Screw & Mfg. Co. of Calif., 101 N.L.R.B. 1360 (1952).

[34] 97 N.L.R.B. 1559 (1952).

[35] To this same effect, see Matter of Cornell-Dubilier Elec. Corp., 101 N.L.R.B. 1483 (1952); Matter of Muter Co., 101 N.L.R.B. 287 (1952); Matter of Foreman & Clark, Inc., 101 N.L.R.B. 40 (1952); Matter of Onondaga Pottery Co., 100 N.L.R.B. 1143 (1952); Matter of Belknap Hardware & Mfg. Co., 98 N.L.R.B. 484 (1952); Matter of Mass. Motor Car Co., Inc., 30 L.R.R.M. 1080 (1952).

time and property.[36] Thus by definition, the Board eliminated the supposed condition.

The "reasonable opportunity to hear both sides" was also found by the Board to be denied per se where the employer's speech was so timed as to preempt the last opportunity for discussion, thereby making the presentation of the union's view under equal circumstances impossible.[37] By these expansions, the Board veered dangerously close to its old "captive audience" doctrine. While not denying the right to speak on company time and property, the Board grafted on to the right the condition that equal opportunity must be granted to the union.

These cases in which the Board applied its "equal opportunity theory," with the above described expansions, were all representation cases in which the Board set aside an election because of the alleged interference.[38] However, in *Matter of Metropolitan Auto Parts, Inc.*,[39] the Board was faced with its first unfair practice case involving the

[36] Matter of Onondaga Pottery Co., 100 N.L.R.B. 1143 (1952); Matter of Foreman & Clark, Inc., 101 N.L.R.B. 40 (1952).

One qualification to this position utilized by the Board was that the union must make a request of the employer for an opportunity to reply before the principle enunciated in the Bonwit-Teller case could be applied. Matter of Silver Knit Hosiery Mills, Inc., 99 N.L.R.B. 422 (1952); Matter of R. H. Osbrink, 32 L.R.R.M. 1043, 104 N.L.R.B. No. 1 (1953).

[37] Matter of Hills Bros. Co., 100 N.L.R.B. 964 (1952); Matter of John Irving Stores, 101 N.L.R.B. 82 (1952). Even where the employer presented evidence that the union still had time to address the employees had it requested to do so, the Board found that the facts indicated too great an inconvenience to the union and the employees to attempt a reply in the brief period of time left between the speech and the election. Matter of Crown Cork & Seal Co., Inc., 32 L.R.R.M. 1356, 105 N.L.R.B. No. 112 (1953).

Qualifications to this preemption theory were also applied. In Matter of Reeves Instrument Corp., 32 L.R.R.M. 1130, 104 N.L.R.B. No. 99 (1953), the Board held that the union's knowledge of the likelihood that the employer might make a last minute speech (pamphlets were distributed warning of such a stratagem) placed the burden of making a request to reply upon the union. Failing this, the union could not invoke the preemption theory when in fact the employer did address the employees shortly before quitting time the day before the election. Also, in Matter of Fulton Bag and Cotton Mills, 32 L.R.R.M. 1445, 106 N.L.R.B. No. 59 (1953), the Board held that an employer address made at the close of the working day prior to election day, where the election was not to be held until the close of the day, did not preempt the union's opportunity to reply.

[38] The Board had earlier pointed out that conduct which may not constitute an unfair practice may nevertheless constitute grounds to set aside an election. Matter of General Shoe Corp., 77 N.L.R.B. 124 (1948). As to the free speech problem this placed the Board in an apparently unembarrassed position of construing "legally non-coercive language as creative of an illegally coercive atmosphere." See 58 Yale L. J. 165 (1948).

[39] 102 N.L.R.B. 1634 (1953).

employer speech issue since the *Bonwit-Teller* case. The entire Board agreed that a refusal to allow the union an opportunity to reply was sufficient to support a finding of an 8 (a) (1) violation where a no-solicitation rule was in effect. (This was a limited no-solicitation rule, unlike the Bonwit-Teller broad rule, only prohibiting solicitation during working hours.) However, the Board split four to one in applying the doctrine where the employer did not have a no-solicitation rule.[40] The majority of the Board applied its "equal opportunity theory" and held that the Act was thereby violated, stating:

> It is clear that where an employer chooses to enter the representation campaign and utilizes company time and property to present his views, he uses a "privileged and effective forum" which he may not in fairness refuse to the opposition upon request. We believe that this refusal, without more, prevents the employees from hearing "both sides of the story under circumstances which reasonably approximate equality." It follows that in these circumstances a refusal alone constitutes interference with the employees' freedom of choice, regardless of the existence of other media of communication between the union and the employees. Accordingly, we find that the [employers'] use of company time and property for electioneering speeches to employee assemblies, while simultaneously denying the union the same forum for a like use, interferes with the right of employees freely to select or reject union representation and constitutes a violation of Section 8(a)(1) of the Act.[41]

[40] Two different employers were here involved.

[41] The Board explained its position in some detail:

"In the original *Bonwit Teller* case, the Board utilized as the basis for its decision both the disparate use of a no-solicitation rule, and the theory that 'the right of employees, guaranteed by Section 7 of the Act, freely to select or reject representation by a labor organization necessarily encompasses the right to hear both sides of the story under circumstances which reasonably approximate equality.' The question presented is whether the latter theory alone is sufficient basis for a finding that the refusal by an employer to accord a union equal opportunity to present its case prior to an election violates Section 8(a)(1) of the Act. We believe this question must be answered affirmatively 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. . . .

"In reaching this conclusion, we believe that our finding is supported not only by theoretical consideration but also 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 this control over the working time; nor do they approach the persuasive power of an employer's presentation. Soliciting employees on the employer's premises, even when not precluded by a no-solicitation rule, can not 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. Consistent with the foregoing, we find that solicitation and extensive use of other approaches to the employees by the union does not qualify the principle involved herein, and we find no merit in the [employers'] contentions in that regard. The conclusion is inevitable that, where an employer uses company

Chairman Herzog dissented, questioning the breadth of the Board's application of the *Bonwit-Teller* doctrine in representation questions, and, more specifically, stating:

> The spirit and legislative history of Section 8(c) do not seem to me to encourage this Board to find that an employer's insistence on monopolizing his own property as a platform constitutes a violation of the amended Act, absent that discrimination which arises whenever he treats his no-solicitation policy as a one-way street.

The second court test for the broad "equal opportunity" theory arose in *NLRB v. American Tube Bending Co.*[42] The Board had based its unfair practice finding upon both theories advanced in the *Bonwit-Teller* case. The Court of Appeals for the Second Circuit made it clear that its original affirmance of the Board position was limited solely to the first theory, and again denied the efficacy of the Board's broad theory.[43]

The Board reaffirmed its *Metropolitan Auto* decision in at least two subsequent cases before the court's decision was handed down.[44] It was clear at this point that the Board felt that if any employer spoke to his employees on company time and property, he must accede to the union's request for an equal opportunity or be guilty of unlawful interference with the employees' rights. It would appear that the Board's old distrust of employer speechmaking had been applied in a different form. The right to speak itself could no longer be denied the employer, but its "evil" the Board attempted to alleviate by conditioning the "right" upon the granting of an equal right to the union.

As Eisenhower appointees replaced retiring Board members in

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time and premises to make a preelection speech, he must permit, upon request, an equal forum to the union spokesman.

"Upon the basis of this principle, the Board has set aside elections in a succession of cases which involved conduct by employers identical to that presented in the instant case. We find that the same considerations which impelled us to set aside elections in those representation proceedings are applicable in finding a violation of Section 8(a)(1) herein."

[42] 205 F. 2d 45 (C.A. 2d, 1953).

[43] Chief Judge Swan concurred in the result as he felt bound by the majority decision in the Bonwit-Teller case. However, Judge Frank stated, in his concurrence with the result of the decision, that he did not join in the statement that the Board's second theory was without merit. He noted it was not necessary to decide the issue in this case, but opined: "Much can be said for an opposite conclusion." Three separate opinions were thus represented on the court.

[44] Matter of Seamprufe, Inc., 31 L.R.R.M. 1522, 103 N.L.R.B. No. 17 (1953); Matter of Onondaga Pottery Co., 31 L.R.R.M. 1568, 103 N.L.R.B. No. 75 (1953).

1953,[45] a reappraisal of many of the Board's policies was begun. The *Livingston Shirt Co.*[46] case gave the newly constituted Board its first opportunity to examine its predecessor Board's application and expansion of the *Bonwit-Teller* doctrine. Respondent Livingston had in effect a limited no-solicitation rule. Its president addressed the employees during working hours several days before an election and refused the union's request to do likewise. The Board majority rejected the "equal opportunity theory" of the *Bonwit-Teller* case, reasoning that Section 8(c) guarantees the right of free speech to the employer, and: "If the privilege of free speech is to be given real meaning, it cannot be qualified by grafting upon it conditions which are tantamount to negation."[47] The majority noted that the *Bonwit-Teller* doctrine was the ". . . discredited *Clark Bros.* doctrine in scant disguise."

The Board's ruling in the *Livingston* case cannot be regarded as having obliterated the *Bonwit-Teller* doctrine. For if Section 8(c) disallows the grafting of administrative conditions upon the right of free speech, then logically, the limited *Bonwit-Teller* doctrine, which the Board affirmed, is equally as unfounded as the broad doctrine. If a broad no-solicitation rule is lawful (as it is in the case of department stores),[48] then isn't it clear that conditioning an employer's right to speak upon the granting of an equal right to the union, where the employer has such a lawful rule, is just as much a grafting process as that condemned? Viewed another way, is a refusal to allow the union an opportunity to speak during working time any less discrimination where the employer speaks during working time and

[45] Farmer replaced Herzog, Rodgers replaced Houston, and Stlyes resigned.

[46] 33 L.R.R.M. 1156, 107 N.L.R.B. No. 109 (1953).

[47] The Board further stated:
"In the original Bonwit Teller case, the Board, as then constituted, found that a 'fundamental consideration' in support of its decision was the right of employees under Section 7 to 'hear both sides under circumstances which approximate equality.' We have no quarrel with this principle, but we think that it is to be achieved not by administratively grafting new limbs on the statute, but by strict enforcement of those provisions of the statute which afford employers the right of free and uncoercive speech and grants employees the protected right to join labor unions free from coercion or discrimination. The majority in Bonwit-Teller did not cite, nor have we been able to find, any support in the statutory language or legislative history for holding that the employer who exercised his own admitted rights under the statute thereby incurs an affirmative obligation to donate his premises and working time to the union for the purpose of propagandizing the employees."

[48] See Matter of Marshall Field & Co., 98 N.L.R.B. 88 (1952).

has a limited no-solicitation rule, than is such a refusal where there is a broad no-solicitation rule?

It appears that the Board did not deny its authority to attach conditions to employer speech, but rather, re-appraised the grounds for such conditioning. Whereas the former Board had *stated* that its requirement that an employer grant equal opportunity to the union was only to be invoked where necessary to allow the employee a "reasonable opportunity to hear both sides," it was clear that the Board arbitrarily *held* that it was always so necessary when the employer spoke on company time. The present Board has not forsaken the theory, but has forsaken the broad arbitrary rule. It has applied the theory to those situations where the employer has in effect a broad no-solicitation rule, and has thus attempted to equate the right to organize and the right of free speech, thereby attempting to protect the rights of both sides.[49]

In the *Peerless Plywood*[50] case, the majority established a new rule prohibiting all addresses on company time and property within twenty-four hours of an election. Violation of this new rule, the Board held, constituted grounds for setting the election aside.

While admittedly a limitation upon the right to speak, this rule does not provide one party an advantage at the expense of the other. What deprivation there is, has been equally cast upon both sides. As any arbitrary rule, it is subject to attack on the examples of its application in extreme cases, but it represents an attempt to guarantee the employees' rights with as little encroachment as possible upon the rights of others.

Clearly, the Board has upset no precedent of eighteen years' standing. Upon reflection, it is evident that the charges of "brainwashing," "un-American" and the like were heated declamations of the moment. More importantly, it is submitted that the Board's recent action in the *Livingston* and *Peerless* cases is by no means "anti-labor." What the Board has done is to cast aside an arbitrary rule which categorically announced that *only* by granting a union's request to speak on company time and property, where the employer so spoke, could the employees have a "reasonable opportunity to hear both sides." It has restricted the encroachment of employers' right of free speech

[49] It is submitted that Member Peterson's concurring opinion, in relying solely upon the American Tube Bending decision to justify the result, is in no ways contrary to what the Board in reality held.

[50] 33 L.R.R.M. 1151, 107 N.L.R.B. No. 106 (1953).

to cases where the employees' right to organize has been seriously restricted by the Board's recognition that in certain types of business union solicitation would be too disruptive to be allowed at any time on company property.

Eighteen years of controversy and litigation testify that the balancing of employee rights of self-organization against employer rights of free speech has been productive of numerous conflicting doctrines and rules. The primary purpose of the Wagner Act was to foster and protect employee organizational rights. This purpose was not renounced by the Taft-Hartley Act, but rather Congress therein attempted to equalize the responsibilities of the parties. In the *Peerless* and *Livingston* cases, the present Board has attempted to rule upon the employer free speech issue in light of the present legislation rather than the old.

How long the rules thus established will prevail is speculative in view of the current Congressional activity.[51] Certainly so fundamental a right as free speech should not be subject to the ebb and flow of political tides represented in personnel changes on the Board. If policy is to be revised, that is properly the function of Congress, not the Board. While the presently constituted Board has attempted to follow the general policy established by Congress in 1947, the tardiness of such recognition should indicate to Congress that a more detailed exposition of its policy regarding employer free speech is necessary. Only in this way will employer and employee be able to know their rights and responsibilities.

[51] President Eisenhower recommended in his Taft-Hartley Act address to Congress that the right of free speech should apply "equally to labor and management in every aspect of their relationship." Senator Smith, Chairman of the Senate Labor Committee, introduced a bill (S. 2650) in which it is provided that employer free speech shall not be the basis for setting aside a representation question. Enactment of this provision would at least terminate the Peerless 24 hour rule.