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Employer Free Speech Under the Taft-Hartley Act

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It seems quite unjust that one of the two litigants in an action should be required to sit back and wait for the other litigant and the trial court judge to "fight it out" in the appellate court over the issuance of the writ of mandamus to expunge the judge's order on a particular motion, but such will be the case unless the Supreme Court's ruling is to reverse the Court of Appeals in the second *Rock Island* case.

As was said in the dissenting opinion in the second *Rock Island* case:

> Our mandamus power is not a muscle which requires exercise to maintain its vitality. More slides into abdication, today, than a mere order of transfer finally wrested from our court.[37]

[37] Chicago, R.I. & P.R. Co. v. Igoe, 220 F. 2d 299 (C.A. 7th, 1955) (quotation from slip opinion case No. 11247 at 13).

EMPLOYER FREE SPEECH UNDER THE TAFT-HARTLEY ACT

As the law of labor relations has grown since the original National Labor Relations Act[1] (Wagner Act) and the volumes of decisions have evolved on the subject, the conflict between the right of employer free speech and the right of employee self-organization has also grown.[2]

The right of employer free speech has been specifically recognized in Section 8(c)[3] of the National Labor Relations Act,[4] as amended by the Labor Management Relations Act (Taft-Hartley Act). However, the efficacy of this right is offset by Sec. 7 of the LMRA,[5] which provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . .[6]

The problem most frequently arises prior to a representation election when an employer speaks to his employees on the premises during working hours and refuses representatives of the union an equal opportunity to reply under the same conditions. Assuming that the union loses the election, it then becomes necessary to determine if the employer has been guilty of an unfair labor practice, which would be grounds for setting aside the election. In the decisions handed down by the National Labor Relations Board[7] and the courts on this

[1] 49 Stat. 449 (1935), as amended, 29 U.S.C.A. § 151 (1947).

[2] See for an appraisal, Kovar, Reappraisal of Employer Free Speech: The Livingston Shirt and Peerless Plywood Cases, 3 De Paul L. Rev. 184 (1954).

[3] "The expressing of any views, agreement, or opinion, or the dissemination thereof . . . 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."

[4] Labor Management Relations Act, 1947, 61 Stat. 136 (1947), 29 U.S.C.A. § 151 (1947).

[5] Hereinafter referred to as the Act.

[6] 61 Stat. 140 (1947), 29 U.S.C.A. § 157 (1947).

[7] Hereinafter referred to as the Board.

subject, three questions are usually decisive of the issue: the existence or non-existence of discrimination where the employer has a no-solicitation rule in effect, whether or not the employees are being given an equal opportunity to hear both sides of the issue, and whether or not the employer has imposed serious handicaps to employee self-organization by the nature of his business and the way in which it is conducted.

Under the Wagner Act the Board strongly upheld the employee's right of self-organization by enforcing Section 8 (a) (1) of the Act, which read:

> 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 Sec. 7 of the Act.[8]

The Board applied the theory that the employer's economic power created a compulsion among employees to follow the employer's wishes for fear of otherwise becoming jobless,[9] which in effect overrode the employer's right to free speech regardless of the lack of coercion. The Board also adopted the "totality-of-conduct" doctrine, where even normally protected statements of an employer were branded as unfair labor practices if made in a background of anti-union activity by the employer.[10]

In *Matter of Clark Bros.*[11] the Board gave rise to the "captive audience" doctrine by deciding that the mere act of compelling employees to listen to an anti-union speech during working hours on the premises, regardless of what the employer said, was an unfair labor practice. However, the Court of Appeals would not go that far in enforcing the Board's ruling. The court upheld the Board's ruling[12] on the basis of evidence showing an aggressive anti-union campaign, of which the employer's speech was the culmination. The court also found the employer's acts to be coercive and an interference with the employee's right to self-organization. But by way of dictum the court stated:

> An employer has an interest in presenting his views on labor relations to his employees. We should hesitate to hold that he may not do this on company time and pay, provided a similar opportunity to address them were accorded representatives of the union.[13]

Although the court in the *Clark Bros.* case laid down a more or less restrictive rule as compared to the Board, the dictum of the court was to have considerable import in the future.[14]

[8] 49 Stat. 452 (1935), 29 U.S.C.A. § 158 (1) (1935).

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

[10] NLRB v. Virginia Electric and Power Co., 314 U.S. 469 (1941).

[11] 70 N.L.R.B. 802 (1946).

[12] NLRB v. Clark Bros. Co., Inc., 163 F. 2d 373 (C.A. 2d, 1947).

[13] Ibid., at 376.

[14] In the *Clark Bros.* case the union did not request equal speaking time from the employer, so the court was not called upon to rule on this issue.

Section 8 (c), the free speech provision of the Act, was embodied in the Taft-Hartley amendment for the purpose of guaranteeing to employers as well as to unions the right of free speech. This section is considered a restatement of the principle embodied in the First Amendment of the United StatesConstitution,[15] and was enacted to remedy the situation which arose under the Wagner Act viz., that it was an unfair labor practice for an employer to address his employees in opposition to a union, even though his address was entirely uncoercive. The legislature specifically condemned the decision of the Board in the *Clark Bros.* case as being too restrictive of the right of employer free speech.[16]

As a result, the Board changed its view in a later case and ruled that if an employer compelled his employees to attend and listen to an anti-union speech the language of Section 8 (c) and its legislative history made it clear that the *Clark Bros.* doctrine no longer existed.[17] Going further, in a later case, the Board also ruled that the "captive audience" aspect of employer's speeches, as protected by the free speech provision of the amended act, could not form the basis for a finding that the employer, by denying the union an equal opportunity to use its facilities and time, has interfered with the employee's free choice of a bargaining representative.[18] Here the employer made two protected pre-election speeches to its employees during working hours and ignored the union's request for a like opportunity. Thus the dictum in the *Clark Bros.* case was not invoked. The Board then felt that it was carrying out the intent of the legislature in passing the Act.

The presence of a no-solicitation rule can affect the result in this type of case. Generally, a no-solicitation rule is one set forth by an employer which prohibits union organizers from using the employer's premises for the purpose of soliciting the employees to form or join a union. Such a rule is held to be valid and lawful when it is limited and effective only during working hours. Working time is said to be for work and not union activity.[19] After working hours the employee's time is his own, therefore solicitation of such persons is deemed permissible, even if the employer's premises are used. A no-solicitation rule effective both during working and nonworking time is considered an unreasonable impediment to self-organization, and therefore discriminatory, unless there exist special circumstances arising out of the nature of the business that make the rule necessary to maintain production or discipline.[20] Where an employer has the latter type of rule and such special circumstances do exist, it is considered lawful and is termed a broad, but privileged, no-solicitation rule.

Until *Matter of Bonwit Teller, Inc.*[21] the Board had never ruled upon employer

[15] NLRB v. Bailey Co., 180 F. 2d 278 (C.A. 6th, 1950).

[16] Senate Report No. 105 on Sen. 1126 at 24–25.

[17] Matter of Babcock & Wilcox Co., 77 N.L.R.B. 577 (1948).

[18] Matter of S. & S. Corrugated Paper Machinery Co. Inc., 89 N.L.R.B. 1363 (1950).

[19] Peyton Packing Co., Inc., 49 N.L.R.B. 828 (1943). [20] Ibid.

[21] 96 N.L.R.B. 608 (1951).

free speech where an employer had a no-solicitation rule in effect. Rulings had been handed down, however, that lawful no-solicitation rules, applied in a discriminatory manner, violated the act when enforced against union solicitation, even though other forms of solicitation were permitted;[22] or when enforced against solicitation by one union although another union was permitted to solicit.[23]

Bonwit Teller, Inc., v. NLRB[24] is the leading case on this topic and has been cited in practically every decision dealing with the subject matter of this comment. The employer operated a retail department store and had in effect a broad, but privileged, no-solicitation rule due to the nature of its business;[25] union solicitation on the selling floors of the store would tend to disrupt the employer's business.[26] Six days prior to a representation election, the employer's president made a speech to his employees on the company time and premises but refused the union's request for an equal opportunity to reply. The subject of pending wage increases was discussed in the speech,and there were department meetings with the employer's president on the subject of unionization as well as some statements of the employer's supervisory employees, alleged to have been designed to influence the election. On a petition by the union to set aside the election, the Board held that the employer enforced its no-solicitation rule in a discriminatory manner when he denied the union request for the same amount of speaking time. This denied the employees a reasonable opportunity to hear both sides of the issue of union representation. The Board also cited the decision of the Court of Appeals in the *Clark Bros.* case emphasizing that the dicta in the case was not dicta at all, but the law on the subject. The Board then provided an interpretation of the rule which it set down by stating:

> That is not to say that an employer is proscribed from addressing his employees and urging that they reject a union unless he invites a union representative to come into his plant and make an appeal for support of the union. Nor does it mean that under any and all circumstances an employer is under an obligation to accede to a union's request that it be granted an opportunity to address the employees on the employer's premises. It is to say that an employer who chooses to use his premises to assemble his employees and speak against a union man 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.[27]

[22] NLRB v. American Furnace Co., 158 F. 2d 376 (C.A. 7th, 1946).

[23] NLRB v. Waterman Steamship Corp., 309 U.S. 206 (1940).

[24] 197 F. 2d 640 (C.A. 2d, 1952).

[25] NLRB v. May Department Stores Co., 154 F. 2d 533 (C.A. 8th, 1946).

[26] As to the areas of the store in which the employer may prohibit union solicitation, employee restaurants and cafeterias which are closed to the public and public waiting and wash rooms are upheld; whereas solicitation in a street or alleyway which ran between portions of the store and which was owned by the store was held to be invalid. Marshall Field & Co. v. NLRB, 200 F. 2d 375 (C.A. 7th, 1952).

[27] *Matter of Bonwit-Teller, Inc.*, 96 N.L.R.B. 608, 612 (1951).

On appeal the court found that the speeches by the employer's president were protected by the free speech provision of the Act and the supervisory employees' utterances were of the same quality.[28] But the court affirmed the Board concerning the discriminatory application of the no-solicitation rule in that the employer refused to grant the union request. The court further stated by dictum:

> 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's president) 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.[29]

Chief Judge Swan, in dissenting, expressed the opinion that "Section 8 (c) of the Act . . . grants the employer the privilege of arguing against unionization without any limitation except that the expression of his views must contain 'no threat of reprisal or force or promise of benefit.' "[30] A no-solicitation rule cannot cut down the rights granted by Section 8 (c) of the Act. Judge Swan also made note of the fact that the majority based its decision on authorities decided prior to enactment of Section 8 (c).

Both the Board and the Court of Appeals decided that employer free speech was not involved.

The *Bonwit Teller* case led to broad applications of its rule. In *Matter of Biltmore Manufacturing Company*[31] an employer of a manufacturing concern made an anti-union speech to its assembled employees two hours before the election opened. An employee union representative was denied similar opportunity to reply thereto where the employer had no rule barring union solicitation on company time and property. However, the Board expressly followed the *Bonwit* case and decided that the employer interfered with the employees' freedom of choice in the selection of a bargaining representative; setting aside the election.[32] It is interesting to note at this point that this was an adoption of the dictum of the Court of Appeals for the Second Circuit in affirming the Board's decision in the *Clark Bros.* case.

In the cases of *Metropolitan Auto Parts, Inc.* and *Massachusetts Motor Car Company, Inc.*[33] the employer used company time and premises to make a pre-election speech two days prior to a representation election, and refused a request of the union for an equal forum. Metropolitan had a limited no-solicitation rule and was held to have discriminatorily applied it. The Massachusetts Company did not have a no-solicitation rule and yet was held guilty of an unfair

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

[29] Ibid., at 646. [30] Ibid.

[31] 97 N.L.R.B. 905 (1951).

[32] Board Member Reynolds dissenting.

[33] Decided together in 102 N.L.R.B. 1634 (1953).

labor practice for refusing the union request on the theory that the right of employees freely to select or reject union representation has been curtailed.

Chairman Herzog of the Board dissented insofar as the *Massachusetts* case was concerned on the theory that in the absence of a discriminatory application of a no-solicitation rule, Section 8 (c) of the Act should apply.

It was held in *NLRB v. American Tube Bending Co., Inc.*[34] that a broad no-solicitation rule by a manufacturing plant, refusing to allow any solicitation on the premises during working and nonworking hours, was itself an unfair labor practice, and it was an added unfair labor practice for an employer to address the employees and deny the union's request for the same privilege while such a rule was in force. The court recognized a duty of the employer to allow solicitation on the premises during nonworking hours, which duty the Supreme Court in *Republic Aviation Corp. v. NLRB*[35] recognized as within the power of the Board to impose in all industrial plants. *American Tube Bending* expressly followed *Bonwit Teller.*

Under the so-called *Bonwit Teller* rule manufacturers as well as retailers who used company time and property for making anti-union speeches before representation elections were required, upon request, to grant the union equal opportunity to reply under similar circumstances. Failure to grant such a request was held to be both an unfair labor practice and a ground for setting aside the subsequent election, where the union had been defeated. It seems as if the Board disregarded the element of a no-solicitation rule being present in handing down these decisions.

A case then came before the Board[36] where an employer, through its manager, delivered protected anti-union speeches on company time and premises prior to a representation election. This employer owned a retail variety store chain, and had in effect a broad but privileged no-solicitation rule which it enforced by refusing to grant the request of the union for an opportunity to reply to the employer's speeches on its premises during working hours. The employer was F. W. Woolworth Co. The union had begun its campaign five months prior to the election, contacting Woolworth's employees in their homes and other public meeting places during this period. The union hall was approximately one and one half blocks from Woolworth's store and the employees were easily available for contact by the union. In the proceeding before the NLRB, the Board ruled that Woolworth discriminatorily applied its no-solicitation rule by refusing the union request, and was thereby guilty of an unfair labor practice. The election, which the union lost, was set aside and the Board rendered its usual cease and desist order. This decision went to the Court of Appeals for review.

In the meantime, however, in the *Livingston Shirt Corp.*[37] case the new Board

[34] 205 F. 2d 45 (C.A. 2d, 1953). [35] 324 U.S. 793 (1945).

[36] Matter of F. W. Woolworth Co., 102 N.L.R.B. 581 (1953).

[37] 107 N.L.R.B. 109 (1954).

ruled that an employer does not violate the Act by making a speech to his employees on company time and property three days before an election, when he denies the union's request for an opportunity to reply. Here the employer had a limited no-solicitation rule, prohibiting union solicitation only during working hours. The union therefore had access to the employer's premises during non-working hours. Livingston was a manufacturing concern, but the employer's status as a retailer or manufacturer is important only in determining the validity of its no-solicitation rule.

The Board recognized Section 8 (c) of the Act and went as far as saying that even the *Bonwit Teller* case did not require an employer who exercised his own rights under the statute (free speech provision) to incur an affirmative obligation to donate his premises and working time to the union. The Board further rejected the idea of making the facilities of the employer available to the union, while at the same time recognizing that the employee has the right to hear both sides under circumstances which approximate equality.[38] All decisions of the Board inconsistent with the *Livingston* case were specifically overruled by this decision.[39]

On appeal in the *Woolworth* case the Court of Appeals for the Sixth Circuit denied enforcement of the Board's order and held that a no-solicitation rule cannot prevent an employer from conferring with his employees on his own time and property. The court also stated that the rule is not discriminatorily applied because of the employer's refusal to permit the union to campaign on its premises when there are adequate facilities for access to the employees.[40]

The court distinguished a group of cases which upheld the board's ruling in the *Woolworth* case. On the basis of the facts, the adequacy of facilities, based upon the nature of the business and the way it is conducted, is controlling. The courts have recognized the Board's ruling under exceptional circumstances. Where the premises are a ship,[41] a lumber camp,[42] or a company dominated town,[43] union organizers must be given reasonable access to the employees who live on the premises and who are not readily open to contact by representatives of the union. The Supreme Court has therefore held that adequacy of facilities is material.[44]

The court in the *Woolworth* case first decided that the broad no-solicitation

[38] The Board has established a new election rule that makes it a ground for setting aside an election, but not on unfair labor practice, where an employer or a union makes speeches to employees on working time within 24 hours of a Board conducted election. Peerless Plywood Co., 107 N.L.R.B. No. 106 (1953).

[39] Massachusetts Motor Car Co., Inc., 102 N.L.R.B. 1634 (1953); Biltmore Manufacturing Co., 97 N.L.R.B. 905 (1951).

[40] NLRB v. F. W. Woolworth Co., 214 F. 2d 78 (C.A. 6th, 1954).

[41] NLRB v. Waterman Steamship Corp., 309 U.S. 206 (1940).

[42] NLRB v. Lake Superior Lumber Corp., 167 F. 2d 147 (C.A. 6th, 1948).

[43] NLRB v. Stowe Spinning Co., 336 U.S. 226 (1949). [44] Ibid.

rule was privileged due to the nature of the employer's business. The court then held that the employer's speeches were permissible due to Section 8 (c) of the Act which makes them lawful speeches. The court concluded that two lawful acts cannot be turned into an unfair labor practice.

The court also held that there are no limitations upon employer free speech other than contained in Section 8 (c) of the Act. The free speech provision does not provide that an employer who expresses his views on unionization to his employees on the premises during working time must give an equal opportunity to the union. Also in its opinion the court stated:

> The dissenting opinion of Chief Justice Swan in the *Bonwit Teller* case is the correct holding, that Section 8 (c) has direct and controlling application and that a no-solicitation rule cannot cut down the rights given the employer under Section 8 (c).[45]

The concurring opinion delivered by Judge Miller expressed the view that the employer's refusal of the union's request was discriminatory, but not unlawfully so, since each has the right to the lawful use of the customary fora and media available to each of them and there is no duty to make the facilities of one available to the other. Judge Miller also said that the act complained of dealt only with working time so that the portion of the rule pertaining to nonworking time was not involved and was not enforced, citing the *Livingston* case for his authority.

Judge McAllister in dissenting based his opinion mainly upon *Bonwit Teller*.

In a more recent case before the Board, that of *Johnson Lawn Mower Corp.*,[46] a manufacturing concern had a broad no-solicitation rule and refused a union request to speak to the employees on company time and property after the employer had done so. The Board held it to be an unfair labor practice to have such a rule and an additional unfair labor practice for applying the rule in a discriminatory manner. This case follows the *American Tube* case and is the correct result.

The only difference between the *Johnston* or *American Tube* cases and the *Livingston* case is the type of no-solicitation rule; therefore the existence or nonexistence of a no-solicitation rule is controlling.

The Board and courts are beginning to recognize and apply the free speech provision of the Act. Previous to the *Livingston* case, they held it was not involved in finding an unfair labor practice, where an employer made an anti-union speech to his employees on company time and property and refused to grant a union request for a similar opportunity. However, in the absence of an invalid no-solicitation rule, or the unlawful discriminatory application of a valid rule, the employer free speech provision will be applied today.

As to what constitutes an invalid rule there is little or no dispute, but as to when the employer's denial of a union request will amount to the unlawful discriminatory application of a no-solicitation rule seems to remain highly con-

[45] NLRB v. F. W. Woolworth Co., 214 F. 2d 78, 81 (1954).

[46] 110 N.L.R.B. 220 (1954).

troversial. Under almost identical sets of facts *Bonwit Teller* and *Woolworth* were decided differently.

Where there is a limited rule, employees are accessible during nonworking hours on the company property. This accessibility is considered equal opportunity to hear both sides. Therefore, only a speech promising benefit or threatening reprisal will constitute an unfair labor practice.

Where there is a broad rule, the existence of the rule itself is an unfair labor practice unless the rule is privileged. When the privilege exists, then, on the basis of the *Woolworth* decision, it may be said that the employer is not required to grant the union equal time provided there are no exceptional circumstances which would interfere with the employee's right of self-organization, such as a company owned town or the like.

Both *Bonwit Teller* and *Woolworth* were department stores with broad, privileged rules and both made protected anti-union speeches to their employees on company time and property before refusing a union's request for equal opportunity to reply prior to a representation election. Both were located in vast metropolitan areas where a number of halls are available within easy reach of prospective union members. The court in the *Woolworth* case tried to distinguish the *Bonwit* case on the basis of the facts; that "promises of benefit had been made by the employer in the announcement of pending wage increases and threats of reprisal had been made by a supervisory employee to influence an election," while in *Woolworth* the one act was the refusal, after the manager's address, to permit the union to use the premises for its campaign. This distinction is contrary to the decision of the Court of Appeals for the Second Circuit in the *Bonwit* case which found the Bonwit speeches protected by the free speech provision of the Act.

The change in policy of the Board in *Woolworth*, with its approval by the Sixth Circuit, reduces the persuasive value of the Second Circuit *Bonwit* case considerably. Perhaps the Supreme Court will eventually put the matter to rest.

CONSCIENTIOUS OBJECTORS AND JEHOVAH'S WITNESSES

The calling of young men to serve in the armed forces of the United States has been limited by Congress in that those who are conscientiously opposed to such service have been exempted. An entire body of law has arisen concerning members of Jehovah's Witnesses, a religious semi-pacifist sect, over the classification of that organization's members in regard to this exemption. In much the same manner as the Supreme Court had handed down on one day four decisions that reviewed the propriety of the "net worth" method of proving tax fraud,[1] so too, the Court on March 14, 1955 rendered four opinions that defined the rights of Jehovah's Witnesses for draft purposes.[2]

[1] See page 237 of this issue.

[2] Gonzales v. U.S., 348 U.S. 407 (1955); Simmons v. U.S., 348 U.S. 397 (1955); Sicurella v. U.S., 348 U.S. 385 (1955); Witmer v. U.S., 348 U.S. 375 (1955).