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Labor Law: Organization of Workers--Anti-Union Speech during Working Hours--Union Equivalent Opportunity to Reply

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nationally circulated magazines do not come within the prohibition of the statute because prospective jurors would not be considered a part of a court convened. And since these publications are not addressed to any particular pending action, the test of physical proximity is not met. Coupled with the fact that the state courts are bound by our present national policy relating to the freedom of speech and press, it must be concluded that the case against the insurance companies is considerably weakened. Though there has been no United States Supreme Court decision on these cases, it is difficult to see how criticism of excessive jury awards could obstruct the administration of justice. This thought was aptly put by a federal judge of the District Court of Pennsylvania when he said:

> "We are not certain that those advertisements will have the effect claimed by the plaintiffs on prospective jurors; they may resent being told that prior juries have been sentimental and have made excessive awards contrary to law."[17]

R. S. Kuyumjian

LABOR LAW: ORGANIZATION OF WORKERS — ANTI-UNION SPEECH DURING WORKING HOURS — UNION EQUIVALENT OPPORTUNITY TO REPLY.

In a recent United States Court of Appeals decision, *National Labor Relations Board v. F. W. Woolworth Co.*,[1] the Court denied enforcement of an order of the National Labor Relations Board restraining an employer from applying its no-solicitation rule. The rule denied the right to campaign for union organization. The Court ruled that an employer, a variety store company, whose agent had made a protected anti-union speech to employees on the premises during working hours was not required to relax the no-solicitation rule. Further, the Court held the employer did not have to give equal opportunity to union representatives to speak to employees on the premises during working hours.

The Labor Board had concluded that respondent's pre-election conduct violated Sections 8(a)(1) of the National Labor Relations Act.[2] This section states that it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of their rights to self-organization and to bargain collectively through representatives of their own choosing.[3] The conduct which the Board found violated the Act consisted of the company's refusal to permit the union to address its employees in the same manner as the manager of the store had addressed them, while, at the same time, the management enforced its rule prohibiting union representatives from soliciting its employees on company premises. This, the Board found, was a discriminatory application of the company's rule against solicitation, and amounted to interference with the employees' rights to the selection of a collective bargaining representative of their own choosing. This position had been upheld in *Bonwitt Teller v. National Labor Relations Board.*[4] The dissent by Circuit Judge McAllister in the *Woolworth* decision also took this position.

The Court in the *Woolworth* case contended that the ruling by the Board

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[17] Hoffman v. Perrucci, 117 Fed. Supp. 38, 49 (E.D. Pa. 1953).

[1] 214 F.2d 78 (6th Cir. 1954).

[2] 49 STAT. 449, 452 (1935), as amended by L.M.R.A., 1947, Public Law 101.

[3] 49 STAT. 452, 29 U.S.C. § 158(a)(1) (1935), as amended, 61 STAT. 140 (1947), 65 STAT. 601 (1951), 29 U.S.C. § 158(a)(1) (1952).

[4] 197 F.2d 640 (2d Cir. 1952), *cert. denied,* 345 U.S. 905 (1952).

ignored and nullified Section 8(c), the free speech provision of the National Labor Relations Act,[5] which is part of the amendment enacted June 23, 1947, and reads 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."

This section imposes no limitation upon the expression of the employer's view except that it must not contain a threat of reprisal or force or promise of benefit. The Board conceded that the manager's speech contained no threats nor promises and was protected by Section 8(c) of the Act. But the Board ruled that a limitation exists to the effect that the employer who expresses such views on his premises must give equal time to the union to answer during working hours and on the premises.

The Board had relied on a provision in the Federal Communication Act[6] that when a candidate for public office is permitted to use a broadcasting station the licensor must give an equal opportunity to all other candidates for the same office. The Court of Appeals held this analogy was not in point.

The purpose of the enactment of Section 8(c) was to guarantee to employers as well as to unions the right of free speech. In view of the legislative history, Section 8(c) of the NLRA is a restatement of the principle embodied in the First Amendment of the United States Constitution.[7] Its Addition to the NLRA is an authoritative direction given by the Congress to the Board to apply the First Amendment in behalf of the employer, as well as of the employee. The section was enacted to remedy the situation which arose under the Wagner Act. The Board, ruling under the influence of the unamended NLRA, had held it to be an unfair labor practice for an employer to address his employees in opposition to a union, even though his address was entirely noncoercive.[8]

A short time after the enactment of Section 8(c), the Board ruled that an employer could address its employees on the company's own time and property without violating the purpose of the Act.[9] However, in the *Bonwitt Teller* case, the Board reverted to its pre-amendment ruling and decided that such an address was an unfair labor practice, unless the union was given an equal amount of time to reply during working hours. The Board overruled the *S&S Corrugated Paper Machinery* case, holding that employers speeches protected by Section 8(c), cannot form the basis for a finding that the employer, by denying the union equal opportunity to use its facilities and time, has interfered with the employees' free choice of a bargaining representative. The Board relied on the *Clark Brothers* case,[10] which had been condemned by the Congress.[11] The Court of Appeals for

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[5] 49 STAT. 452, 29 U.S.C. § 158(c) (1935), as amended, 61 STAT. 140 (1947), 65 STAT. 601 (1951), 29 U.S.C. § 158(c) (1952)

[6] 48 STAT. 1088, 47 U.S.C. § 315 (1934), as amended, 66 STAT. 717 (1952), 47 U.S.C. § 315 (1952).

[7] N.L.R.B. v Bailey Co., 180 F.2d 278 (6th Cir. 1950).

[8] SEN. REP. No. 105 on Senate Bill No. 1126, *Legislative History of Labor Management Act* 429 (1947).

[9] The Babcock and Wilcox Co., 77 N.L.R.B. 577 (1948), S.&S. Corrugated Paper Machinery Co., 89 N.L.R.B. 1363, 1364 (1950).

[10] 70 N.L.R.B. 60 (1946)

[11] See note 8 *supra.*

the Second Circuit affirmed in a two-to-one decision, Chief Judge Swan dissenting. The majority of the Court based its decision on an interpretation of the Wagner Act made by the courts *prior* to the Labor Management Relations Act of June 23, 1947 The Court held that the existing no-solicitation rule during both free and working time was unfairly applied when the employer conferred on his own premises with his employees. The Board had previously ruled that it was an unfair labor practice to relax the no-solicitation rule in favor of one union as against another,[12] or favor certain parties as against others,[13] but it had not decided that the rule applied to an address by the employer. In its reliance upon the *Clark Brothers* decision, the Board in the *Bonwitt Teller* case indicated its unwillingness to apply Section 8(c) according to its terms.

The Court in the *Woolworth* case held that the dissenting opinion of Chief Justice Swan in the *Bonwitt Teller* case is the correct view. Namely, 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).

If the employer here had made no speech, its exclusion of the union from its premises would have been legal under the no-solicitation rule, which the Board conceded to be valid. However, this exclusion was converted into what the Board found to be an unfair labor practice by linking up with the lawful exclusion, lawful utterances of the employer which contained neither threats nor promises of benefit.

To compel the employer, if he exercises his right of free speech, to accord union representatives a similar opportunity during working hours, limits the application of the freedom of speech provision written in Section 8(c). *The Republic Aviation Corporation* case,[14] decided at the same time as *National Labor Relations Board v. Le Tourneau Co.*,[15] held that employees could not be discharged for violating no-solicitation rules on their own time within the plant or premises of the employer.

The Supreme Court has never held that the no-solicitation rule prohibits an employer from conferring with his own workmen. The Court in the principle case points out that the majority of the cases relied on by the Board were decided prior to the enactment of the amendment. Moreover, that the decisions cited by the Board presented situations so factually different that they could not be called controlling. There was no secondary boycott.[16] No discrimination between rival labor unions is involved.[17] This is not a case of a union assisted by the employer against a rival union.[18] No discrimination against an employee is alleged or proved.[19] No exceptional circumstances exist to limit access of the union to the employees who live on the premises and are not readily open to contact by representatives of the union. The premises are not a ship,[20] nor a lumber camp,[21] nor a company-owned

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[12] International Association of Machinists v. N.L.R.B., 311 U.S. 72 (1940).
[13] N.L.R.B. v. Waterman Steamship Corporation, 309 U.S. 206 (1940).
[14] 324 U.S. 793 (1945).
[15] N.L.R.B. v. Le Tourneau Co., 324 U.S. 793 (1945).
[16] International Brotherhood of Electrical Workers v. N.L.R.B., 341 U.S. 694 (1950).
[17] See note 13 *supra*.
[18] See note 12 *supra*.
[19] See note 14 *supra*.
[20] See note 13 *supra*.
[21] N.L.R.B. v. Lake Superior Lumber Corp., 167 F.2d 147 (6th Cir. 1948).

and company-dominated town.[22] These cases lay down the rule that, when the employees live upon premises owned by the employer, controlled by him, and removed from contact with the outside world, reasonable access must be given union organizers.

The Court concluded that to decide that a no-solicitation rule deprives the employer of the right to confer with his employees about any important matter, including unionization, is to deprive him of the freedom of speech specifically guaranteed by the Constitution and by Section 8(c) of the NLRA. The Board is not authorized to write into the Act a limitation that does not exist.

Circuit Judge Miller in a concurring opinion points out that it is conceded by the Board that, in the absence of a rule prohibiting solicitation of employees on company property on other than working time, an employer does not commit an unfair labor practice if he makes a pre-election speech on company time and premises to his employees and denies the union's request for an opportunity to reply [23] However, it was held in the *Bonwitt Teller* case, mentioned above, which ruling was followed in *National Labor Relations Board v. American Tube Bending Co.*,[24] that the existence of a rule prohibiting solicitation of employees on other than working time changed the refusal by the company of the union's request from a valid refusal into an unfair labor practice. This Judge Miller feels is not an illegal discrimination but a reasonable construction of the Act.

In the *Livingston Shirt Corporation* case, referred to above, a company rule prohibited activities for or against any union during working hours. The non-observance of the rule by the employer, and the denial by the employer of the union's request for a similar use of the premises was held not to be an unfair labor practice. In the *American Tube Bending Company* case, mentioned above, the Court conceded that if the no-solicitation rule had been limited to working hours, it would have been a valid rule and the refusal by the employer of the union's request would not have been an unfair labor practice. Basically, the Court felt that the validity of the Board's ruling rested upon the alleged invalidity of the rule, in that it prohibited any use of the employer's property, even during non-working hours. The enforcement of this rule clearly interfered with the employees' right to engage in union activities.[25] But in the present case, due to the nature of the business, such a rule which prohibits solicitation both during working hours and non-working hours is not invalid,[26] because this is a retail store. In addition, the employers address complained of was delivered during working time and his refusal to allow rebuttal pertained to working time only That portion of the rule pertaining to non-working time was not involved and was not enforced. That portion of the rule which was enforced was a valid regulation.

The judge concluded that discrimination against a union is not an unfair labor practice per se. Nor did the refusal by Bonwitt Teller interfere with the exercise by the employees of their rights under the NLRA. Interference on the part of the employer means something more than opposition to the union. Neither the Constitution, the Common Law, nor the Labor Management Relations Act confers

[22] N.L.R.B. v. Stowe Spinning Co., 336 U.S. 226 (1948).
[23] Livingston Shirt Corp., 107 N.L.R.B. 109 (1953).
[24] 205 F.2d 45 (2d Cir. 1953).
[25] See notes 14 and 21 *supra*.
[26] May Department Stores Co., 154 F.2d 533 (8th Cir. 1946).

upon employees the right to use for union purposes the property of their employer during working hours, over the objections of the employer.

Circuit Judge McAllister, in a strong dissent states that there is no issue of freedom of speech in the case, but that the question is whether the use of certain campaigning methods is unfair. He relies on the statement of the policy of Congress, set forth in the Taft-Hartley Act to guide the courts. The Taft-Hartley Act, amendatory of the Wagner Act, the original NLRA, declares it to be the policy of the United States to encourage the practice of collective bargaining and to protect the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing.[27]

Many labor cases involving "no-solicitation" rules have been before the courts for adjudication, and such rules have been found non-discriminatory, or discriminatory, according to the varying circumstances of each case.[28] Under normal conditions, solicitation may be properly limited to the employees' non-working time, although even in these cases, such a reasonable rule may be administered in an arbitrary and discriminatory manner.[29] Normally, an employer cannot forbid union solicitation on company property during non-working time, even where there is no showing that solicitation away from the plant would be ineffective.[30] In department stores, a rule prohibiting union discussion and solicitation, at all times, on the selling floors, has been held to be reasonable, in view of the presence of customers at such places; yet, at the same time, such a rule prohibiting union solicitation off the selling floors during non-working hours has been held invalid.[31]

In the *Bonwitt Teller* case, in speaking for the Court, Judge Augustus Hand, referring to the company's availing itself of the privilege of prohibiting all solicitation on its premises, said:

> "Bonwitt Teller chose to avail itself of that privilege and, having done so, was in our opinion required to abstain from campaigning against the Union on the same premises to which the Union was denied access; if it should be otherwise, the practical advantage to the employer who was opposed to unionization would constitute a serious interference with the right of his employees to organize."

As mentioned above, the *Bonwitt Teller* case was followed in the Second Circuit by *National Labor Relations Board v. American Tube Bending Company*. The unfair labor practice upon which the Board's order was based was the making of anti-union speeches while, at the same time, enforcing a rule prohibiting the solicition of its employees on its premises at any time by union representatives. The Court was of the opinion that the actions were a serious obstruction to carrying out the policy of Congress to encourage the practice of collective bargaining, and to protect the exercise by workers of full freedom in selecting representatives of their own choosing, and that such conduct constituted an unfair labor practice.

From the foregoing discussion, it appears the United States Court of Appeals, Sixth Circuit and the United States Court of Appeals, Second Circuit are in disagreement. They do agree that the *Republic Aviation* case gives a union a presumptive right to solicit on company property during non-working time. And that

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[27] 49 STAT. 449, 29 U.S.C. § 151 (1935), as amended, 61 STAT. 136 (1947), 29 U.S.C. § 151 (1952).

[28] N.L.R.B. v. Bersted Mfg. Co., 124 F.2d 409 (6th Cir. 1942); see also note 11 *supra*.

[29] N.L.R.B. v. Peyton Packing Co., 142 F.2d 1009 (5th Cir. 1944).

[30] N.L.R.B. v. American Furnace Co., 158 F.2d 376 (7th Cir. 1946); see also note 13 *supra*.

[31] See note 26 *supra*.