Michigan Law Review

Volume 65 | Issue 6

1967

Labor Law-NLRB Regulation of Employer's Pre-Election Captive Audience Speeches

Michigan Law Review

LABOR LAW—NLRB Regulation of Employer's Pre-Election Captive Audience Speeches

One of the most effective weapons that an employer may utilize to dissuade his employees from accepting unionization is an anti-union speech delivered to the assembled employees on company time and property shortly before a scheduled representation election. Two recent National Labor Relations Board (NLRB) decisions have provided an opportunity for reopening the much debated question of a campaigning union's right to reply under equal opportunity conditions to such a captive audience speech.[1] In *McCulloch Corp.*,[2] a union sought to have the unfavorable results of a representation election set aside on the ground that the employer's refusal to allow an equal reply to his captive audience speech had interfered with the holding of a free and fair election. The NLRB, sustaining the election, reaffirmed its current doctrine that, absent special circumstances, an employer need not grant a union equal opportunity to reply to a captive audience speech. Moreover, the Board noted that further consideration of this doctrine would be deferred until the effect of the accompanying *Excelsior* decision upon union organizational opportunities could be evaluated. In *Excelsior Underwear Inc.*,[3] the issue was whether an employer's refusal to provide a campaigning union with the names and addresses of employees eligible to vote in a forthcoming representation election constituted grounds to set aside that election. Overturning existing policy,[4] the Board announced a new rule to be applied prospectively in all election cases: within seven days after the direction of a representation election, the employer must deposit with the regional office of the NLRB a list containing the names and addresses of employees eligible to vote; failure to comply will be,

1. Any attempt to list all of the articles written on the question would be unduly burdensome. The following are among the more recent and informative: Aaron, *Employer Free Speech: The Search for Policy*, in PUBLIC POLICY AND COLLECTIVE BARGAINING 28 (Shister, Aaron & Summers eds. 1962); Bok, *The Regulation of Campaign Tactics in Representative Elections Under the NLRA*, 78 HARV. L. REV. 38 (1964); Burke, *Employer Free Speech*, 26 FORDHAM L. REV. 266 (1957); Christiansen, *Free Speech, Propaganda and the NLRA*, 38 N.Y.U.L. REV. 243 (1963); Gould, *The Question of Union Activity on Company Property*, 18 VAND. L. REV. 73 (1964); Koretz, *Employer Interference With Union Organization Versus Employer Free Speech*, 29 GEO. WASH. L. REV. 399 (1960); Pokempner, *Employer Free Speech Under the NLRA*, 25 MD. L. REV. 111 (1965).

2. 156 N.L.R.B. No. 112, 61 L.R.R.M. 1222 (1966) [hereinafter referred to as *McCulloch*]. *General Elec. Co.*, involving essentially similar facts, was decided with *McCulloch*.

3. 156 N.L.R.B. No. 111, 61 L.R.R.M. 1217 (1966) [hereinafter referred to as *Excelsior*]. *K. L. Kellog & Sons*, involving the same issue, was decided with *Excelsior*.

4. The employer had previously been required to make available a list of eligible employee voters. However, there was no requirement that this list contain addresses. See Bok, *supra* note 1, at 99; Gould, *supra* note 1, at 100.

upon the filing of proper objections by the union, a sufficient basis for having the ensuing election set aside.[5]

A union which is denied an opportunity to reply under equal circumstances to an employer's captive audience speech may seek relief either by charging the employer with an unfair labor practice or, as in *McCulloch*, by instituting a proceeding to invalidate the election. The Board's first contacts with the captive audience problem arose in the context of unfair labor practice charges and consequently the Board's initial efforts to resolve the problem were based upon the criteria that determine the existence of an unfair labor practice. These criteria are derived from sections 7 and 8 of the National Labor Relations Act (NLRA); section 7 guarantees to employees a protected right of self-organization;[6] section 8(a)(1) designates as an unfair labor practice employer conduct that coerces or restrains employees in the exercise of their section 7 rights;[7] and section 8(c), added to the NLRA in 1947 by the Taft-Hartley Act, provides that an expression of opinion shall not be construed to be an unfair labor practice unless it contains threats of reprisal or promises of benefit.[8]

The Board's attempts to derive from these three provisions an effective means of regulating the captive audience speech have produced a series of broad mechanical rules.[9] Under the original NLRA, the Board concluded that any pre-election expression of anti-union opinion by an employer, whether or not delivered under captive audience conditions, was inherently coercive of his employees' section 7 rights and thus violative of section 8(a)(1).[10] In 1941, however, the Supreme Court rejected this doctrine of strict neutrality, holding

5. The requirement was expressly not limited to situations in which the employer had initially mailed anti-union literature to his employees and then refused the union's request for a mailing list.

6. National Labor Relations Act § 7, as amended, 61 STAT. 140 (1947), 29 U.S.C. § 157 (1964).

7. National Labor Relations Act § 8(a)(1), as amended, 61 STAT. 140 (1947), 29 U.S.C. § 158(a)(1) (1964).

8. § 8(c) reads: "The expressing of any views, arguments or opinions or the dissemination thereof shall not constitute or be evidence of an unfair labor practice under any provision of the act, if such expression contains no threat of reprisal or force or promise of benefit." National Labor Relations Act § 8(c), added by 61 STAT. 142 (1947), as amended, 29 U.S.C. § 158(c) (1964).

9. This tendency to seek a mechanical solution is contrary to the professed desire of present Board members to replace the Board's previous per se approach with a pragmatic ad hoc technique. See Brown, *Free Speech in NLRB Representation Proceedings*, 50 L.R.R.M. 72, 78 (1962); McCulloch, *Labor Relations Philosophy of Kennedy Administration NLRB Board*, 49 L.R.R.M. 74, 75 (1962).

10. *E.g.*, Rockford Mitten Co., 16 N.L.R.B. 501 (1939); Virginia Ferry Corp., 8 N.L.R.B. 730 (1938); Nebel Knitting Co., 6 N.L.R.B. 284 (1938); see 1 NLRB ANN. REP. 73 (1936). This doctrine of strict neutrality was met with a mixed reaction in the circuit courts. The Second Circuit strongly approved. NLRB v. Federbush Co., 121 F.2d 954 (2d Cir. 1941). Other circuits disagreed with the Board. See Press Co. v. NLRB, 118 F.2d 937 (D.C. Cir. 1940); NLRB v. Ford Motor Co., 114 F.2d 905 (6th Cir. 1940); Continental Box Co. v. NLRB, 113 F.2d 93 (5th Cir. 1940).

that an employer is free to state his position in an election contest so long as his communications are not coercive when viewed against the whole complex of his pre-election activities.[11] Operating under this "totality of conduct" approach, the Board addressed itself directly to the captive audience characteristics of employer speech and, in 1946, in *Clark Brothers*, adopted a rule of absolute prohibition.[12] The Board reasoned that since section 7 guarantees to employees the right to receive information relevant to an impending election, it must also protect the right not to receive such information,[13] and therefore an employer would be acting in derogation of protected employee rights whenever he delivered a pre-election speech to a captive audience.[14]

In 1948, after the enactment of the Taft-Hartley amendments to the NLRA, the Board repudiated the *Clark Brothers'* rule as contrary to the legislative intent manifested by section 8(c).[15] Only three years later, however, in *Bonwit Teller, Inc.*,[16] the Board renewed its

11. NLRB v. Virginia Elec. & Power Co., 314 U.S. 469 (1941). The Board and the courts immediately adopted this "totality of conduct" approach. *E.g.*, NLRB v. American Tube Bending Co., 134 F.2d 993 (2d Cir. 1943); Oval Wood Dish Corp., 62 N.L.R.B. 1129 (1945); see 11 NLRB ANN. REP. 34 (1946); 10 NLRB ANN. REP. 37 (1945); 9 NLRB ANN. REP. 37-38 (1944). On employer free speech under the Wagner Act, see generally Daykin, *Employer's Right of Free Speech Under the NLRA*, 40 U. ILL. L. REV. 185 (1945); Morgan, *Employers Freedom of Speech and the Wagner Act*, 20 TUL. L. REV. 469 (1946).

12. 70 N.L.R.B. 802 (1946). The rule in *Clark Bros.* was foreshadowed by Board dictum in American Tube Bending, 44 N.L.R.B. 121 (1942), which was implicitly disapproved by the Second Circuit on review, NLRB v. American Tube Bending Co., 134 F.2d 993 (2d Cir. 1943). The Board then moved away from the rule, Oval Wood Dish Corp., 62 N.L.R.B. 1129 (1945); Republic Drill & Tool, 66 N.L.R.B. 955 (1946), until it was announced in *Clark Bros.*

13. 70 N.L.R.B. at 805.

14. When the Board sought enforcement of its order, the Second Circuit gave only limited approval to the *Clark Bros.* doctrine. The court considered the Board's rule too broad and indicated that an employer should be allowed to address his employees on company time and property, "provided a similar opportunity to address them were accorded to union representatives." NLRB v. Clark Bros., 163 F.2d 373, 376 (2d Cir. 1947). This was the earliest statement of the equal opportunity theory.

15. Babcock & Wilcox Co., 77 N.L.R.B. 577, 578 (1948); *accord*, Charroin Mfg. Co., 88 N.L.R.B. 38 (1950); Kentucky Util. Co., 83 N.L.R.B. 981 (1949); Hinde & Dauch Paper Co., 78 N.L.R.B. 488 (1948); Fontaine Converting Works, 77 N.L.R.B. 1386 (1948). Although the legislative history of § 8(c) may be ambiguous in other respects, it seems clear that one of the express purposes of the amendment was to reject the *Clark Bros.* doctrine.

> The Board has placed a limited construction upon . . . [judicial opinions guaranteeing freedom of speech on both sides of a labor dispute] by holding such speeches by employers to be coercive if . . . the speech was made in the plant on working time. The committee believes these decisions to be too restrictive . . . .

S. REP. No. 105, 80th Cong., 1st Sess. 23-29 (1947); see Aaron, *supra* note 1, at 36; Cox, *Some Aspects of the LMRA*, 61 HARV. L. REV. 1, 18-24 (1947); Koretz, *supra* note 1, at 403; Pokempner, *supra* note 1, at 114-15.

16. 96 N.L.R.B. 608 (1951). In *Bonwit Teller*, the employer had refused the union an equal reply to his captive audience speech and had concurrently enforced a broad no-solicitation rule, that is, a company regulation prohibiting employee solicitation activities on company property at any time. No-solicitation rules are presumptively valid if applied only to working time and presumptively invalid if extended to cover

efforts to control the captive audience speech by formulating the doctrine of equal opportunity.[17] This doctrine ostensibly avoided conflict with section 8(c) by predicating the finding of an unfair labor practice not upon the delivery of a non-coercive speech, but rather upon the employer's refusal to allow an equal reply. According to the Board's reasoning, an employee's section 7 right to choose a bargaining representative includes the right to hear both sides in an election contest under equal circumstances. Therefore, if an employer exercises his privilege to deliver a non-coercive captive audience speech, he may not deny the union an equal opportunity where such a denial would deprive the employees of a reasonable chance to hear both sides.[18] In practice, the doctrine of equal

non-working time. Peyton Packing Co., 49 N.L.R.B. 828 (1943), *approved*, Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945). Under special circumstances, a broad rule (one that extends to non-working time) will be allowed. Such circumstances exist, for example, in a retail store. The presence of customers on the selling floor at all times makes a broad rule necessary in order to maintain production and discipline. See, *e.g.*, Marshall Field & Co., 98 N.L.R.B. 88 (1952); Goldblatt Bros., 77 N.L.R.B. 1262 (1948); J. L. Hudson Co., 67 N.L.R.B. 1403 (1946). Thus, the no-solicitation rule enforced by the employer in *Bonwit Teller* was broad but valid. The above analysis applies only to the employer's ability to control *employee* organizational activity. An employer can ban non-employee organizers from the company premises at any time so long as the union retains effective communication with the employees through alternative channels. NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956). See generally Vanderheyden, *Employee Solicitation and Distribution—A Second Look*, 14 LAB. L.J. 781 (1963); Note, 112 U. PA. L. REV. 1049 (1964).

17. The Board's announcement of the doctrine of equal opportunity had been anticipated by the Second Circuit in its modification of the *Clark Bros.* rule. See note 14 *supra*. However, the Board had not immediately adopted the circuit court's theory as a replacement of the defunct *Clark Bros.* doctrine. In S. & S. Corrugated Paper Mach. Co., 89 N.L.R.B. 1363 (1950), it refused to accept the argument that an employer must allow a union equal opportunity to reply to a captive audience speech. Consequently, when the Board did adopt the equal opportunity theory, it expressly overruled the *S. & S.* case.

It has been argued that the doctrine of equal opportunity was merely the discredited *Clark Bros.* rule in "scant disguise." Livingston Shirt Co., 107 N.L.R.B. 400 (1953). However, there is a definite theoretical difference between the two: the *Clark Bros.* doctrine was based upon the right of the employees *not* to hear campaign propaganda; the equal opportunity doctrine is predicated upon the employees' right to hear all such propaganda under equal circumstances. This theoretical distinction has a significant practical effect: under the former rule, the employer is absolutely prohibited from delivering a captive audience speech; under the latter, his right of speech is preserved, but made contingent upon an allowance of equal opportunity to the union. See Aaron, *supra* note 1, at 37.

18. A second ground for the Board's decision in *Bonwit Teller* was the employer's discriminatory application of his broad no-solicitation rule. An otherwise valid no-solicitation rule becomes illegal if applied discriminatorily. See, *e.g.*, NLRB v. Link-Belt Co., 311 U.S. 584 (1941); NLRB v. Waterman S.S. Corp., 309 U.S. 206, 224-26 (1940); *cf.* Radio Officers Union v. NLRB, 347 U.S. 17 (1954). This principle had generally been invoked when an employer discriminated between competing unions, but in *Bonwit Teller* it was extended to reach the situation in which an employer uses the company premises as a campaign forum while denying the same opportunity to his employees. It was this narrow holding which ultimately gained judicial approval. Bonwit Teller v. NLRB, 197 F.2d 640 (2d Cir. 1952). On appeal, the court indicated that, if the employer abandoned the broad rule, he would have no obligation to

opportunity became a mechanical rule, guaranteeing to a union an equal reply whenever the employer delivered a captive audience speech.[19]

In 1953, a change in Board personnel resulted in the rejection of the equal opportunity doctrine and the formulation of the rule which presently controls the finding of an unfair labor practice in a captive audience case.[20] In *Livingston Shirt Corp.*,[21] the reconstituted Board reasoned that if an employer's right to deliver a non-coercive speech to his employees on company time and property is contingent upon his granting a union the same opportunity, the right of unrestricted non-coercive speech guaranteed by section 8(c) has been so encumbered that the right itself has been negated.[22] Accordingly, the Board held that, absent a broad no-solicitation rule (an employer enforced regulation prohibiting all employee solicita-

grant the union an equal reply to his captive audience speech. *Id.* at 646. *But see* Judge Swann's dissenting argument that the employer could not be held to have discriminatorily applied his no-solicitation rule because such a holding would infringe upon the right of non-coercive speech protected by § 8(c). Any doubt that the equal opportunity rule had been disapproved was dispelled by the Second Circuit's subsequent decision in NLRB v. American Tube Bending Co., 205 F.2d 45 (2d Cir. 1953).

19. As originally stated in *Bonwit Teller*, the equal opportunity doctrine was to be applied on a case-by-case basis where special circumstances existed that made an equal reply necessary. 96 N.L.R.B. at 612. There were several special circumstances present in *Bonwit Teller* that could have served as natural limitations upon future application of the doctrine: the employer had enforced a broad no-solicitation rule, the employer had committed other unfair labor practices in the period, an election was pending, and the speech was delivered shortly before the election. However, in a series of subsequent decisions, the Board ignored these factors and transformed the *Bonwit Teller* rule into a doctrine of mechanical equivalence. See Metropolitan Auto Parts Inc., 102 N.L.R.B. 1634, 1636 (1953) ("The conclusion is inevitable that when an employer uses company time and premises to make a pre-election speech, he must permit, upon request, an equal forum to union spokesman"); National Screw & Mfg. Co., 101 N.L.R.B. 1360 (1952); Onondaga Pottery Co., 100 N.L.R.B. 1143 (1952); Higgins, Inc., 100 N.L.R.B. 829 (1952); Biltmore Mfg. Co., 97 N.L.R.B. 905 (1951).

20. Two members retired, including Chairman Herzog. They were replaced by Eisenhower appointees: Member Rodgers and Chairman Farmer. These two were part of the majority that overruled *Bonwit Teller*. For discussions of the political overtones of this reversal, see McGUINESS, THE NEW FRONTIER NLRB 30-40 (1963); Aaron, *supra* note 1, at 37; Mittenthal, *Employer Speech—A Life Cycle*, 5 LAB. L.J. 101, 107 (1954); Wirtz, *Board Policy and Labor-Management Relations: "Employer Persuasion,"* 7th N.Y.U. CONF. ON LAB. 79 (1954).

21. 107 N.L.R.B. 427 (1953).

22. The majority did not deny the union's right to an equal opportunity but felt that the traditional means of union-employee communication were adequate for this purpose. For a sharp attack on this reasoning, see Aaron, *supra* note 1, at 51. Member Murdock, in dissent, argued for affirmation of equal opportunity, asserting in a well documented opinion that no customary union campaign media could counteract the powerful impact of an employer's captive audience speech, and that without a union rebuttal under similar conditions, there could be no equal opportunity. Member Peterson, concurring in the decision, did not consider § 8(c) to be involved in the case. He returned to the theory of the Second Circuit in Bonwit Teller v. NLRB, 197 F.2d 640 (2d Cir. 1952) (see note 18 *supra*), concluding that there could be no violation unless the employer discriminatorily applied a broad no-solicitation rule. For a good discussion of all of the opinions in *Livingston Shirt*, see Mittenthal, *supra* note 20.

tion activities on company property),[23] an employer does not commit an unfair labor practice by delivering a captive audience speech and denying the union an equal opportunity to reply.[24] Underlying this rule is the assumption that, so long as the opportunity for in-plant, pro-union activity is not eliminated, a union will be able to counteract the effect of a captive audience speech through traditional channels of union-employee communication. Recent Board decisions indicate that, under the *Livingston Shirt* rule, the right of a union to reply to a captive audience speech turns mechanically upon the presence or absence of a broad no-solicitation rule.[25]

Livingston Shirt delineated the circumstances under which an employer's refusal to allow a rebuttal to his captive audience speech could constitute an unfair labor practice, but it left unanswered the substantially different question raised in a representation case such as *McCulloch*: when will the employer's refusal to allow a

---

23. See note 16 *supra* for a discussion of no-solicitation rules. The exception for situations in which the employer enforces a broad no-solicitation rule seems inconsistent with the reasoning by which the majority overruled *Bonwit Teller*. If § 8(c) provides a protection for non-coercive speech, then exercise of the § 8(c) privilege should not be made contingent upon the breadth of the employer's no-solicitation rule. See Brown, *Employer Free Speech and the No-Solicitation Rule*, 6 LAB. L.J. 710, 718 (1955). However, leaving the exception for broad no-solicitation rules does allow the *Livingston Shirt* decision to be reconciled with the Second Circuit's holdings in *Bonwit Teller* and NLRB v. American Tube Bending Co., 205 F.2d 45 (2d Cir. 1953). See note 18 *supra*.

24. The *Livingston Shirt* rule encountered almost immediate judicial disapproval. In NLRB v. F. W. Woolworth, 214 F.2d 78 (6th Cir. 1954), the Sixth Circuit carried the reasoning of the Board's majority to a logical extreme, holding that § 8(c) provides absolute protection to employer non-coercive speech regardless of the breadth of his no-solicitation rule. Thus, contrary to the implication of the *Livingston Shirt* rule, the court found that an employer does not commit an unfair labor practice by denying a union equal opportunity while concurrently enforcing a broad no-solicitation rule. *Accord*, NLRB v. Bonwit Teller, 197 F.2d 640, 646 (2d Cir. 1952) (Swann, J., dissenting); see note 17 *supra*. However, this absolute interpretation of § 8(c) was subsequently expressly refuted by the D.C. Circuit, United Steelworkers v. NLRB, 243 F.2d 593, 599-600 (D.C. Cir. 1956), and implicitly disapproved by the Supreme Court, NLRB v. United Steelworkers, 357 U.S. 357, 364 (1958). See Aaron, *supra* note 1, at 44-46; Koretz, *supra* note 1, at 408.

25. It was immediately obvious that the Board would not find an unfair labor practice where an employer refused a union equal opportunity unless the employer also enforced a broad no-solicitation rule. See Williamson Dickie Mfg. Co., 115 N.L.R.B. 356 (1956); Johnston Lawn Mower Corp., 110 N.L.R.B. 1955 (1954); Detergents, Inc., 107 N.L.R.B. 1334 (1954). However, it was not clear whether the Board would automatically find an unfair labor practice where the employer did enforce such a rule. See Koretz, *supra* note 1, at 405. This question was answered in May Dep't Stores Co., 136 N.L.R.B. 797 (1962), wherein the Board indicated that if an employer chooses to enforce a broad no-solicitation rule, he cannot refuse a union the right to an equal reply to his captive audience speech. The Board justified this holding on the theory that the *Livingston Shirt* decision had actually left the *Bonwit Teller* rule in force with respect to department stores with broad no-solicitation rules. *Id.* at 800. This interpretation of *Livingston Shirt* was subsequently affirmed by the Board in Montgomery Ward & Co., 145 N.L.R.B. 846 (1964). See note 36 *infra* and accompanying text for further discussion of these cases.

union rebuttal justify the setting aside of an election.[26] The Board has indicated that representation elections are to be conducted under ideal laboratory conditions that will assure to the employee-voters a free and untrammeled choice for or against unionization.[27] Consequently, when the relief sought by a union or employer is only the invalidation of an election, the sole issue which the Board will consider is whether the pre-election activity of the contestants had upset those delicately balanced conditions.[28] Section 8(c), which by its terms applies only to unfair labor practice cases and upon which *Livingston Shirt* was based, will not protect an employer's non-coercive expression of opinion from being construed as an impediment to employee free choice.[29] Accordingly, in *Peerless Plywood Co.*,[30] decided with *Livingston Shirt*, the Board formulated an independent rule to be applied in election cases, pursuant to which both

26. In Peerless Plywood Co., 107 N.L.R.B. 427, 429 (1953), the Board said:
> We are now called upon to decide what our rule will be in an election case in the light of our *Livingston Shirt* decision. We have abandoned the *Bonwit Teller* doctrine in complaint cases. But this does not, however, dispose of the problem as it affects the conduct of an election.

27. The Board stated in General Shoe Corp., 77 N.L.R.B. 124, 127 (1948), that its function in a representation election is to "provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, in order to determine the uninhibited desires of the employees."

28. See, *e.g.*, Oak Mfg. Co., 141 N.L.R.B. 1323 (1963); Lord Baltimore Press, 142 N.L.R.B. 328 (1963).

29. See Metropolitan Ins. Co., 90 N.L.R.B. 935 (1950), wherein the Board said that "Section 8(c) does not . . . prevent the Board from finding in a *representation* case that an expression of views, whether or not protected by Section 8(c), has, in fact, interfered with the employees' freedom of choice . . . ." Under the Eisenhower Board, however, the theory of *General Shoe* was all but abandoned. See, *e.g.*, National Furniture Co., 119 N.L.R.B. 1 (1957); Lux Clock Mfg. Co., 113 N.L.R.B. 1194 (1955); Esquire Inc., 107 N.L.R.B. 1238 (1954); American Laundry Mach. Co., 107 N.L.R.B. 511 (1954). See also Burke, *supra* note 1, at 277; 21 N.L.R.B. Ann. Rep. 72 (1956). But, the present Board has revived the *General Shoe* doctrine, expressly overruled the cases that cast doubt upon its vitality, and stated that § 8(c) "has no application to representation cases." Dal Tex Optical Co., 137 N.L.R.B. 1782, 1787 n.11 (1962); see, *e.g.*, Oak Mfg. Co., 141 N.L.R.B. 1323 (1963); Sewell Mfg. Co., 138 N.L.R.B. 66 (1962).

The greatest effect of the resurgence of the *General Shoe* doctrine has not been upon the captive audience cases but rather upon the standards which the Board will apply to determine if the *content* of an employer's speech has created an impediment to the conduct of the election. For discussion of the problem, see generally Bok, *supra* note 1, at 66-92; Pokempner, *supra* note 1, at 128-47; Note, *NLRA Elections: Post Election Objections*, 38 TEMP. L.Q. 288 (1965). The representation case test has been attacked by one commentator as vague and likely to lead to purely subjective decision-making by the Board. See Christiansen, *supra* note 1, at 274-75. Other critics have defended the test as necessary to protect employee free choice. See Brown, *Free Speech in NLRB Representation Proceedings*, 50 L.R.R.M. 72, 74 (1962); Fields, *Pre-election Conduct and Free Speech*, 14 LAB. L.J. 967, 973 (1963); Platt, *Rules on Free Speech Under Taft-Hartley Act*, 55 L.R.R.M. 105, 108-10 (1964). Despite the fact that representation cases are not generally subject to judicial review, the *General Shoe* doctrine has received some support from the courts. See NLRB v. Houston Chronicle Publishing Co., 300 F.2d 273 (5th Cir. 1962); NLRB v. Shirlington Supermarket, 224 F.2d 649 (4th Cir. 1955).

30. 107 N.L.R.B. 427 (1953).

union and employer are prohibited from delivering captive audience speeches within twenty-four hours of a representation election.[31]

The use of broad mechanical rules, which the Board has apparently favored in the captive audience area, has two significant advantages: it removes from the already overworked Board the burden of extended case-by-case factual analysis and it provides the interested parties with notice of the precise limits of permissible conduct. However, in 1958, in *NLRB v. United Steelworkers (Nutone Inc.)*,[32] the Supreme Court implicitly disapproved of this mechanistic approach to the captive audience problem.[33] Although *Nutone* did not involve a captive audience speech, the basic issue was similar to that which is raised in the captive audience cases: under what circumstances must an employer allow a union equal access to the campaign media through which he has presented his anti-union views.[34] The Court indicated that the proper approach would

---

31. The 24-hour prohibition was based on the theory "that last-minute speeches by either employer or union delivered to massed assemblies of employees on company time have an unwholesome and unsettling effect and tend to interfere with that sober and thoughtful choice which a free election is designed to reflect." Peerless Plywood Co., 107 N.L.R.B. 427, 429 (1953). Subsequent decisions have modified and refined the rule, but have not altered it in substance. See Koretz, *supra* note 1, at 409-10; Pokempner, *supra* note 1, at 120.

32. 357 U.S. 357 (1958). The case came to the Supreme Court as a consolidation of two separate cases. In Nutone Inc., 112 N.L.R.B. 1153 (1955), the employer had enforced a valid no-distribution rule while concurrently distributing anti-union literature on plant premises. The Board held that the employer had not committed an unfair labor practice, relying upon *Livingston Shirt* and asserting that § 8(c) protected from restriction the employer's right to disseminate information non-coercively. On review, the D.C. Circuit reversed, rejecting the argument that § 8(c) creates an absolute privilege and reasoning that if the employer distributed on company property, there could be no valid reason to prohibit the employees from doing the same. United Steelworkers v. NLRB, 243 F.2d 593 (D.C. Cir. 1956). In Avondale Mills, 115 N.L.R.B. 840 (1956), the Board found an employer guilty of an unfair labor practice when he enforced a valid no-solicitation rule while engaging in solicitation activities himself. On appeal, the Fifth Circuit refused to enforce the Board's order. NLRB v. Avondale Mills, 242 F.2d 669 (5th Cir. 1957).

33. The court said that the unions "are not entitled to use a medium of communication simply because the employer is using it. . . . No such mechanical answers will avail for the solution of this non-mechanical, complex problem in labor-management relations." NLRB v. United Steelworkers, 357 U.S. 357, 364 (1958). There seems to be a consensus among the commentators that the *Nutone* opinion constituted a clear disapproval of the Board's past and present policy in regard to captive audience speeches and that it represented a Supreme Court mandate for an ad hoc factual analysis of each captive audience case. See, *e.g.*, Aaron, *supra* note 1, at 46; Cox, *Labor Decisions of the Supreme Court at the October Term*, 1958 A.B.A. REP. 12, 26-29 (1958); Koretz, *supra* note 1, at 408-09; Note, *Limitations on Employer Conduct During Union Organizational Campaigns—A Survey*, 19 VAND. L. REV. 438, 445 (1966).

34. The Court described the narrow issue before it as derived

> from the claim that, when the employer himself engages in anti-union solicitation that if engaged in by employees would constitute a violation of [the employer's no-solicitation rule] . . . his enforcement of an otherwise valid no-solicitation rule against the employees is itself an unfair labor practice.

357 U.S. at 362.

be an inquiry into the circumstances of each case to determine whether the employer's refusal to allow the union access to the desired campaign media did in fact upset the balance of campaign opportunities.[35] However, despite this apparent Supreme Court mandate for a case-by-case analysis, the Board has indicated in recent decisions that it will continue to adhere to the mechanical rules of *Livingston Shirt* and *Peerless Plywood*.[36]

The Supreme Court recognized in *Nutone* that the complex factual components of election communications problems are not amenable to regulation by broad mechanical rules. A union demands equal opportunity because it fears that an unrebutted captive audience speech will afford the employer an insurmountable campaign advantage. The difficult factual question in every case must therefore be whether, given the refusal of the employer to allow an equal reply, the union retains access to alternative channels of communication through which it can establish an equilibrium of campaign opportunities.[37] The ad hoc case-by-case approach suggested by *Nutone*, although probably the most accurate, would nonetheless be inimical to the need for administrative expertise and the desirability of providing both union and employer with clear guidelines for preelection behavior. This fundamental conflict between administrative and substantive considerations can be satisfactorily resolved only through the formulation of a regulatory standard that is both suf-

35. The *Nutone* opinion was foreshadowed by the Supreme Court's decision in NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956). There, the question was whether an employer could validly prohibit non-employee union organizers from distributing literature on his property. The Court held that the employer had this privilege so long as the union retained access to effective alternative channels of communication. Since rebuttal of a captive audience speech generally involves allowing non-employee organizers on plant premises, the *Babcock-Wilcox* opinion seems to reinforce the conclusion of the Court in *Nutone*. Both decisions point to a case-by-case "alternative channels" analysis.

36. In May Dep't Stores Co., 136 N.L.R.B. 797 (1962), the Board found that an employer had committed an unfair labor practice by denying a union the right to an equal reply to his captive audience speech while concurrently enforcing a broad no-solicitation rule. The Board sought to reconcile this holding with *Nutone* by declaring that the employer's conduct had created a "glaring imbalance" of organizational opportunities. However, Members Leedom and Rodgers in dissent pointed out that the Board had made no real factual findings and had apparently revived the mechanical equal opportunity doctrine for application to situations in which the employer enforced a broad no-solicitation rule. Consequently, on review, the Sixth Circuit refused to enforce the Board's order on the ground that the unfair labor practice holding was not supported by the proper factual findings. May Dep't Stores Co. v. NLRB, 316 F.2d 797 (6th Cir. 1963). Despite this strong judicial disapproval, the Board has since reaffirmed the theory of the *May* case and has, in so doing, expressly stated its disagreement with the Sixth Circuit. Montgomery Ward & Co., 145 N.L.R.B. 846 (1964). Ironically, the Sixth Circuit enforced the Board's order in the latter case, distinguishing it from *May* on the ground that the no-solicitation rule enforced by the employer was invalid. Montgomery Ward & Co. v. NLRB, 339 F.2d 889 (6th Cir. 1965); see Christiansen, *supra* note 1, at 273; Pokempner, *supra* note 1, at 122, 125-27; *cf.* S. H. Grossingers, Inc., 156 N.L.R.B. No. 20, 61 L.R.R.M. 1025 (1965).

37. This is, in essence, the test of *Nutone*.

ficiently flexible to adjust to the factual realities of the captive audience situation and sufficiently precise to be workable from the standpoint of practical administration.

Unfortunately, the Board's various attempts to control the captive audience speech have fallen short of this ideal regulatory standard. The doctrine of equal opportunity was based on the assumption that the union's available alternative channels of communication could never be sufficient to offset the effect of a captive audience speech.[38] Unquestionably, the captive audience speech is a uniquely effective campaign weapon.[39] As a purely practical matter, it provides an employer with the invaluable opportunity to communicate partisan propaganda to all of the voters simultaneously at the closest possible moment to the election. As to campaign psychology, it affords the employer a significant advantage in the vitally important area of personal contact propaganda;[40] while the employer has the voters virtually trapped in his campaign headquarters, the union must struggle to achieve personal contact by house-to-house canvassing of the electorate or by mass meetings on non-working time.[41] Most important, however, is that the captive audience speech is the medium through which the employer can most effectively exert the tremendous economic and social leverage inherent in his authoritarian position. The average working man, dependent upon the company for continuance of his security and satisfaction, may derive from the employer's expression of opinion a force far greater than mere persuasion.[42] However, notwithstanding the foregoing factors,

38. See note 17 *supra* and accompanying text. *Compare* Bonwit Teller, Inc., 96 N.L.R.B. 608, 612 (1951), *with* Metropolitan Auto Parts, Inc., 102 N.L.R.B. 1634 (1953).

39. For defense of the doctrine of equal opportunity, see Livingston Shirt Co., 107 N.L.R.B. 400, 410 (1953) (Murdock, dissenting); Note, 61 YALE L.J. 1067, 1074-80 (1952). See also the recent report of the House subcommittee on the NLRB wherein it was stated that:

> In many situations, an employer utilizes the captive audience speech to present his views to his employees on company time and property and in contrast, the union is deprived of all effective techniques and media for communication with the employees. . . . The subcommittee recommends that the labor board reexamine its Livingston Shirt doctrine with an eye to adopting a policy of equal opportunity in presentation of issues.

HOUSE SUBCOMMITTEE ON NLRB, 87TH CONG., 1ST SESS., REPORT ON ADMINISTRATION OF THE LMRA BY THE NLRB 98-99 (Comm. Print 1961) [hereinafter cited as HOUSE REPORT].

40. There appears to be general agreement among the social and political scientists that personal contact is an extremely effective form of propaganda. See DOOB, PUBLIC OPINION AND PROPAGANDA 460-61, 529 (1948); Eldersveld, *Experimental Propaganda Techniques and Voting Behavior*, in POLITICAL BEHAVIOR (Eulau, Eldersveld & Janowitz eds. 1956); LAZARSFELD, BERELSON & GAUDET, THE PEOPLE'S CHOICE 150-52 (1944).

41. See HOUSE REPORT at 57-58, wherein a union attorney described the difficulties encountered by the union in attempting to make contact with the employees during the organization of the May Department Store chain in Cleveland.

42. For discussion of the impact of employer captive audience communications upon employees, see Livingston Shirt Co., 107 N.L.R.B. 400, 409 (1953) (Murdock, dissenting); Note, 61 YALE L.J. 1067, 1074-80 (1953); Note, 14 U. CHI. L. REV. 104 (1947). See also DOOB, *op. cit. supra* note 40, at 371; HOVLAND, JANIS & KELLY, COM-

an unrebutted captive audience speech should not invariably predetermine an imbalance of communications opportunities. When the speech is delivered well in advance of the election and the employee unit is small, the union might have a reasonable opportunity to counteract its effect by means of traditional alternative channels: solicitation or distribution activities by professional union organizers at mass meetings, at the plant gate, or at the employee's homes; solicitation or distribution activities by employees on company premises during non-working time (absent a broad no-solicitation rule); and dissemination of propaganda through the mails.

The current *Livingston-Peerless* formula does not fare any better when subjected to a similar analysis. The *Peerless Plywood* rule is based upon an essentially valid premise—namely, the possibility of neutralizing captive audience propaganda decreases as the election draws nearer. However, the insulated period established by the rule is unrealistically short;[43] the twenty-four hour prohibition will neither guarantee that the employer's words will have lost their force by the time of the election nor assure the union of sufficient opportunity to communicate an effective rebuttal through alternative channels. Similarly, while the pivotal factor under the *Livingston Shirt* rule—the breadth of the employer's no-solicitation rule—is a significant element to consider in evaluating the availability of alternative channels, the presence or absence of such a rule should not be conclusive as to the union's ability to counteract the effect of a captive audience speech.[44] If the union lacks an organized contingent

MUNICATION AND PERSUASION 20 (1953). Of course, the actual effect of an employer speech will depend, to a large extent, upon the nature of the employer-employee relation in the particular plant. "Words which may only antagonize a hard bitten truck driver in Detroit may seriously intimidate the rural textile worker." COX, LABOR AND THE NATIONAL LABOR POLICY 44 (1960). Employer propaganda has been most effective in the South where company power still reigns supreme. See Roy, *Unionization in the South*, 15 LAB. L.J. 451 (1964); Zivalich, *Process of Unionization in the South*, 15 LAB. L.J. 468 (1964).

43. Willard Wirtz described the *Peerless Plywood* rule as creating "an almost absurdly artificial distinction which will only be prevented from causing endless litigation by the fact that most employers will feel that their words will carry for 25 hours as well as for 23." Wirtz, *Board Policy and Labor Management Relations: Employer Persuasion*, 7th N.Y.U. CONF. ON LAB. 79, 97 (1954); see Peerless Plywood Co., 107 N.L.R.B. 427, 433 (Murdock, dissenting); Aaron, *supra* note 1, at 51 (the assumption underlying the rule is "arrant nonsense"); Christiansen, *supra* note 1, at 277-78; Gould, *supra* note 1, at 91 ("the 24 hour period is unrealistically short"). *But see* Platt, *supra* note 29, at 113, defending the rule.

44. In the *absence* of a broad rule, the employees may carry on organizational activities during breaks, at lunch, or in the washrooms. These opportunities do not necessarily guarantee the success of union efforts to counteract the effect of a captive audience speech. See Bok, *supra* note 1, at 97-98. As to whether the *presence* of a broad rule invariably thwarts union attempts to balance the impact of a captive audience speech, *compare* May Dep't Stores Co., 136 N.L.R.B. 797 (1962), *with* Montgomery Ward & Co., 145 N.L.R.B. 846 (1964). In both cases, the employer was found to have committed an unfair labor practice by denying a union the right to an equal reply to his captive audience speech while concurrently enforcing a broad rule. But, in

in the plant or if the speech is delivered shortly before the election, the absence of a prohibition against employee solicitation activities may not greatly enhance the union's chances of restoring a balance of propaganda communications. By the same token, when an employee unit is relatively small and the employer delivers his speech well in advance of the election, the prohibition of in-plant employee solicitation should not necessarily preclude the union from effectively combatting the employer's propaganda through alternative channels.

In *McCulloch*, the Board was presented with an opportunity to re-examine its heretofore unsatisfactory captive audience policy.[45] Because the complaining union sought only the invalidation of an election, the case was subject to representation case standards. However, since the employer's speech was not delivered within the twenty-four hour prohibited period, the *Peerless Plywood* rule was inapposite. The Board could have seized upon this situation to create a new rule, based upon representation case criteria, for application to all pre-election captive audience speeches. Instead, adhering to its recent practice, the Board applied the *Livingston Shirt* unfair labor practice doctrine to this representation case and, finding that the employer had not enforced a broad no-solicitation rule, sustained the election.[46] In order to justify its decision, the Board asserted that reconsideration of the captive audience problem should be deferred until an evaluation could be had of the effect of *Excelsior* upon the balance of pre-election communications opportunities. However, it is questionable whether the union's new-found access to a list of employee names and addresses, which admittedly represents a valuable campaign asset, will actually alter the fundamental nature of the problem.[47] Union propaganda efforts through the

May there were 3,000 employees involved and the store was in a large city, while in *Montgomery Ward*, there were only 50 employees, the store was located in a small town in which the union had a hall, and the employees ate lunch in a public cafeteria. It seems doubtful that the presence of a broad rule would have the same impact on the balance of campaign opportunities in both cases. See also Aaron, *supra* note 1, at 51; Burke, *supra* note 1, at 288-90; Gould, *supra* note 1, at 146.

45. The complaining union, recognizing that there was no prospect of relief under the *Livingston-Peerless* formula (the employer had neither delivered his speech during the 24-hour prohibited period nor concurrently enforced a broad no-solicitation rule), argued for a re-appraisal of the law. Going beyond the old doctrine of equal opportunity, the union advocated adoption of a rule which would allow the campaigning union access to company property any time the employer used the premises for his anti-union activities.

46. Since *Livingston Shirt*, the Board has not held an employer's refusal to allow an equal reply to his captive audience speech to be grounds for finding an unfair labor practice or setting aside an election except where the employer concurrently enforced a broad no-solicitation rule or an unlawful no-solicitation rule. See Montgomery Ward & Co., 145 N.L.R.B. 846 (1964); May Dep't Stores Co., 136 N.L.R.B. 797 (1962). In both cases, the Board followed the *Livingston Shirt* standard despite the that the legality of a rule must depend on a case-by-case "alternative channels"

47. See Bok, *supra* note 1, at 99-100; Gould, *supra* note 1, at 148.

mails, which will necessarily be more efficient after *Excelsior*, may not be an effective counterbalance to the personal contact persuasion of a captive audience speech.[48] The union's increased capacity to reach the employees in their homes will point toward an equalization of personal contact opportunities, but if the employee unit is large and the employer's speech is delivered shortly before the election, the list of employee names and addresses will be a doubtful replacement for an equal reply.

Had the Board chosen to take full advantage of the distinction between representation and unfair labor practice cases, it would have been able to fashion a more satisfactory rule for the regulation of the captive audience speech. Two legal barriers block the development of a workable and realistic regulatory standard: the free speech guarantees of section 8(c) and the Supreme Court's *Nutone* decision. Section 8(c) inhibits realistic treatment of the captive audience speech by casting doubt upon the legality of any conditioning of the employer's right to deliver a non-coercive address to his employees. *Nutone* impedes the development of an administratively practical approach in that it represents a disapproval of the use of mechanical rules. However, both of these barriers could be circumvented by a regulatory formula conceived in terms of representation case standards.[49] Although the distinction between unfair labor practice and representation cases may be subject to challenge, it has been noted above that Board policy is now firmly established to the effect that section 8(c) will not apply when the only issue before the Board is whether there has been interference with the conduct of an election.[50] The *Nutone* precedent is a more difficult obstacle to overcome,[51] but *Excelsior* may be construed to indicate that *Nutone* will not control in a representation case. In *Excelsior*, the employer, relying on *Nutone*, had argued that he could not be required to allow the union access to a particular communications medium (in this case, an employee mailing list), unless it had been factually established that in the particular case the union could not reach the employees with equal effectiveness through alternative channels.[52] In

48. For authorities discussing the superiority of personal contact as a propaganda medium, see note 40 *supra*.

49. See Gould, *supra* note 1, at 146-47.

50. See notes 26-29 *supra* and accompanying text.

51. Several commentators have observed that the mandate of *Nutone* could probably be avoided through the use of presumptions and by phrasing unfair labor practice findings in terms of a factual analysis. See Aaron, *supra* note 1, at 46; Cox, *supra* note 33, at 26-29; Koretz, *supra* note 1, at 409. *But see* May Dep't Stores v. NLRB, 316 F.2d 797 (6th cir. 1963), wherein the court refused to accept presumptions or "magic words" as substitutes for factual findings.

52. A similar situation is created by the effect of the *Nutone* decision upon the tests applicable to no-solicitation and no-distribution rules. Relying upon *Nutone*, employers have argued that the traditional presumptions are no longer valid and that the legality of a rule must depend on a case-by-case "alternative channels"

rejecting this argument, the Board intially distinguished *Nutone* by pointing out that, in *Excelsior*, the opening to the union of the desired communications channel would not result, as it would have in *Nutone*, in the invasion of any substantial employer interest.[53] Obviously, this distinction would not be applicable to the captive audience situation in which the employer's property rights are very definitely involved. However, the Board added that *Nutone* was also inapposite because it dealt with the circumstances under which the Board might find that an employer had committed an unfair labor practice, whereas *Excelsior* posed the substantially different issue of the circumstances under which the Board might set aside an election.[54] The Board thus indicated that in a representation case it need not investigate the existence or availability of alternative channels but rather that it could establish simplified rules for general application.

As noted earlier, satisfactory control of the captive audience speech depends upon the development of a regulatory standard that will draw an administratively practical line between the circumstances in which an equal reply is necessary in order to maintain a balance of communications opportunities and the circumstances in which this desired balance can be secured by the union through the use of traditional alternative channels. In *McCulloch*, the crucial factors which could designate the co-ordinates of such a line were touched upon but ultimately ignored by the Board. Perhaps inspired by Professor Derek Bok's analysis of the captive audience problem,[55] the Board originally stipulated three questions as a focus for argument: (1) Can a free and fair election be held when an employer delivers a captive audience speech and the union is denied an equal opportunity to reply? (2) If an equal reply is necessary, what is the crucial time period prior to the election in which such a reply should

---

analysis. One circuit has accepted this argument. NLRB v. Rockwell Mfg. Co., 271 F.2d 109 (3d Cir. 1959). The Board and two other circuits have expressly rejected it. United Aircraft Corp., 139 N.L.R.B. 39 (1962); NLRB v. United Aircraft Corp., 324 F.2d 128 (2d Cir. 1963); NLRB v. Time-O-Matic, 264 F.2d 96 (7th Cir. 1959). The opinion of the Second Circuit in *United Aircraft* reveals the fundamental problem of the ad hoc "alternative channels" analysis:

> It might be suggested that it would be harmless to require the Board to make findings in all no-solicitation cases. But in addition to being an appreciable increase in the Board's already unwieldy work load, this would simply be an incitement to litigation and casuistry.

324 F.2d at 130.

53. The absence of a significant employer interest is evidenced by the fact that the employer in *Excelsior* based his strongest argument upon the possibility of invasion of *employee* rights.

54. The Board also suggested a third distinction between *Excelsior* and *Nutone:* while *Nutone* was unlimited in scope of application, *Excelsior* was to be applied only to situations in which a representation election had been directed.

55. Professor Bok proposed that "in elections involving seventy-five or more employees, the employer could not deliver to his employees during working time within the last seven days of the campaign." Bok, *supra* note 1, at 102; see *id.* at 96-103.

be required? (3) Is the size of the employee unit material?[56] This analytical framework suggests an approach to the problem which has been clearly foreshadowed by the preceding discussion: When an employee unit is small and the captive audience speech is delivered well in advance of the election, an equal reply should not be necessary to maintain the desired balance; conversely, when the unit is large and the speech delivered immediately prior to the election, use of alternative channels cannot be relied upon to counter the effect of the speech.

With these propositions as a foundation, it is submitted that the following regulatory standard would be both attuned to the realities of the captive audience situation and workable from an administrative standpoint: When a representation election has been directed in an employee unit exceeding in size a certain designated number (to be determined by the Board) and the employer delivers a captive audience speech within a set number of days prior to the election (to be determined by the Board), a presumption will arise in favor of election interference unless the employer honors the union's request for an equal opportunity.[57] Although the purposes of administrative convenience would be best served by an absolute rule, it seems more commensurate with the realities of the situation to allow the employer an opportunity to rebut the presumption. However, the opportunity for rebuttal should not provide a springboard for a full-blown case-by-case analysis, for such a result would defeat the purpose of the rule. Instead, the Board should construe the presumption as conclusive in the absence of a showing by the employer that, in fact, the union did have extended personal contact with a a substantial majority of the employees through professsional union organizers at a time sufficiently close to both the election and the employer's speech to indicate the existence of a real equality of opportunity.[58]

Since *McCulloch* was a representation case and since the Board actually had the conceptual framework upon which to build a satisfactory regulatory standard, it is unfortunate that the Board did not

56. Excelsior Underwear Inc., 156 N.L.R.B. No. 111, 61 L.R.R.M. 1217 (1966).

57. Several other possible solutions have been suggested: Extend the *Peerless Plywood* rule to seven days or, alternatively, change the rule to make an equal reply mandatory within the seven-day period. See Gould, *supra* note 1, at 147. Presume an unfair labor practice whenever an employer refuses to allow a union equal opportunity, but allow the employer an opportunity to rebut the presumption. See Burke, *supra* note 1, at 288-90. An interesting practical solution was achieved recently without the aid of the NLRB by an employer who, wishing to avoid the restrictions placed on pre-election conduct by the NLRB, challenged the campaigning union to a debate on neutral territory. The debate was held, the employer won the election, and the union had no complaint. Transport Topics, April 18, 1966, p. 1.

58. So limited, the rebuttal opportunity would serve to preclude the situation in which a union could use the proposed rule to invalidate an election despite the fact that it did have the equivalent of an equal opportunity to reply.

seize the opportunity to develop finally a realistic and workable treatment of the captive audience speech.[59]

59. Applying the proposed formula to the two cases consolidated within the *McCulloch* decision produces an interesting result. In *McCulloch*, there were 1,315 eligible voters and the employer's captive audience speech was delivered two days prior to the election. In *General Elec. Co.*, there were 72 eligible voters and the speech was delivered seven days before the election. It is probable that the proposed rule would call for an equal reply in the former case but not in the latter.