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Labor Law - Labor Management Relations Act - Linking "Employer Free Speech" to No-Solicitation Rule

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LABOR LAW—LABOR-MANAGEMENT RELATIONS ACT—LINKING “EMPLOYER FREE SPEECH” TO NO-SOLICITATION RULE—During an organizational campaign the employer prohibited any dissemination of literature on company property and soliciting or campaigning on company time by employees while itself distributing within the plant non-threatening, anti-union literature. General Counsel for the NLRB contended that by this conduct the employer “interfered with, restrained or coerced” employees in their exercise of the right to self-organization.¹ This contention was rejected by the NLRB,² but on appeal was accepted by the Court of Appeals for the District of Columbia.³ On certiorari to the United States Supreme Court,

¹ Labor-Management Relations Act, 1947, 61 Stat. 141, 140, 29 U.S.C. (1952) §§158(a)(1); 157.

² *Nutone, Inc. and United Steelworkers of America, CIO*, 112 N.L.R.B. 1153 (1955).

³ *United Steelworkers of America, CIO v. NLRB, Nutone, Inc., Intervenor*, (D.C. Cir. 1956) 243 F. (2d) 593.

held, reversed, two justices dissenting. Even if an employer could commit an unfair labor practice by enforcing an otherwise valid no-solicitation rule while itself engaging in solicitation activities that would violate the rule if engaged in by employees, there is no basis in the record for such a finding here. *NLRB v. United Steelworkers of America, CIO*, 357 U.S. 357 (1958).

The Supreme Court had not previously faced the question whether employer distribution coupled with enforcement of a no-solicitation rule, each activity being valid if examined individually, could constitute unlawful activity. In two recent cases, however, circuit courts had ruled on a similar combination of enforcement of a valid no-solicitation rule, delivery of a non-threatening, anti-union speech, and denial of union requests for equal opportunity to address employees. The Second Circuit in *Bonwit Teller, Inc. v. NLRB*⁴ held that such conduct was an unfair labor practice; the Sixth Circuit in *NLRB v. F. W. Woolworth Co.*⁵ held that it was not. The basic cause of this divergence was disagreement on the applicability of section 8(c),⁶ the "employer free speech" provision of the amended National Labor Relations Act. Although courts had recognized non-coercive partisan expression by employers as lawful before enactment of this section,⁷ they had been quick to find statements of opinion coercive, originally by considering coercion as inherent in an employer's economic power⁸ and later by relating such statements to a coercive course of conduct.⁹ Moreover, speech was found unlawful because delivered on company property during working hours to a "captive audience."¹⁰ Section 8(c) was designed, in part, to prevent the Board from holding speech unlawful under the "captive audience" theory¹¹ and from connecting it with unrelated unfair labor practices.¹² However, the section left un-

⁴ (2d Cir. 1952) 197 F. (2d) 640, cert. den. 345 U.S. 905 (1953).

⁵ (6th Cir. 1954) 214 F. (2d) 78.

⁶ Labor-Management Relations Act, 1947, 61 Stat. 142, 29 U.S.C. (1952) §158(c). This section provides that expression or dissemination of any views "shall not constitute or be evidence of an unfair labor practice . . . if [it] contains no threat of reprisal or force or promise of benefit."

⁷ *NLRB v. Virginia Electric & Power Co.*, 314 U.S. 469 (1941), re-hearing, 319 U.S. 533 (1943); *NLRB v. J. L. Brandeis & Sons*, (8th Cir. 1944) 145 F. (2d) 556; *NLRB v. American Tube Bending Co.*, (2d Cir. 1943) 134 F. (2d) 993, cert. den. 320 U.S. 768 (1943).

⁸ E.g., *NLRB v. Federbush Co.*, (2d Cir. 1941) 121 F. (2d) 954.

⁹ E.g., *NLRB v. Virginia Electric & Power Co.*, note 7 supra.

¹⁰ E.g., *Clark Bros. Co.*, 70 N.L.R.B. 802 (1946). Affirmed on narrower grounds in *NLRB v. Clark Bros. Co.*, (2d Cir. 1947) 163 F. (2d) 373.

¹¹ For particular reaction to the *Clark Bros.* decision, note 10 supra, see H. Rep. 245, 80th Cong., 1st sess., p. 33 (1947). See, generally, S. Rep. 105, 80th Cong., 1st sess., pp. 23-24 (1947); H. Conf. Rep. 510, 80th Cong., 1st sess., p. 45 (1947); 93 CONG. REC. 6443-6447, 6859-6860 (1947).

¹² See *Monumental Life Insurance*, 69 N.L.R.B. 247 (1946). See also the pre-enactment material, note 11 supra.

certain¹³ whether the unlawfulness of expression was to be determined solely by language used or also by examination of the circumstances.¹⁴ Thus, as might be expected, varying interpretations of section 8(c) were employed in the principal and analogous cases. Under the *Bonwit Teller*¹⁵ view enforcement of a no-solicitation rule is unfair or "discriminatory" if the employer uses the plant forum and denies union requests for the same opportunity. The court there found that section 8(c) was inapplicable since the question raised was the employer's right to use unfair campaign methods, not its right to deliver an anti-union speech. It also stated that the denial of "equal opportunity" for union speech at the plant necessarily established serious interference with organizational activity since exclusive use of the plant forum implied a tremendous practical advantage that could not be counteracted by alternative means of communication. On the other hand, the *Woolworth*¹⁶ view denies that the employer must allow the union "equal opportunity." The court there believed that so to link speech and action would place on the employer's right to speak a limitation not found in section 8(c) and that only limitations expressed in that section could be recognized. Further, it felt that the employer's refusal to share its plant forum could not be "interference" unless the union showed the inadequacy of alternative communication facilities. The Supreme Court has taken a middle-ground position. First, it has accepted the *Bonwit Teller* theory that employer expression closely related to action within a course of conduct is not protected by section 8(c). Such an interpretation appears more reasonable than an absolute-right view of the section, especially since employees will be influenced by the joint impact of such employer conduct. Second, the Court follows the *Woolworth* view that employer speech plus enforcement of a no-solicitation rule, when combined, are not necessarily unlawful. Activity is "unfair" under the act only when it interferes with the exercise of organizational rights. The Court takes the logical position that interference cannot invariably be presumed but should be based on a Board evaluation of

¹³ For discussion of the general success of §8(c) in clarifying the extent of protection accorded employer speech, see note, 43 GEO. L. J. 405 (1955); Kovar, "Reappraisal of Employer Free Speech," 3 DEPAUL L. REV. 184 (1954); note, 38 VA. L. REV. 1037 (1952).

¹⁴ The enacted version of §8(c) omitted both the House qualification on "contains" of "by its terms" and the Senate specification of "under all the circumstances." For use of the House version see *NLRB v. F. W. Woolworth Co.*, note 5 supra; for approval of the Senate approach see *NLRB v. Kropp Forge Co.*, (7th Cir. 1950) 178 F. (2d) 822.

¹⁵ *Bonwit Teller, Inc. v. NLRB*, note 4 supra. *Accord*, *NLRB v. American Tube Bending Co.*, (2d Cir. 1953) 205 F. (2d) 45. See also dissenting opinions in *NLRB v. F. W. Woolworth Co.*, note 5 supra, and *Livingston Shirt Corp.*, 107 N.L.R.B. 400 (1953). For discussion of the importance of the plant forum, see *Livingston* dissent and note, 61 YALE L. J. 1066 (1952).

¹⁶ *NLRB v. F. W. Woolworth Co.*, note 5 supra. *Accord*, *Livingston Shirt Corp.*, note 15 supra (no-solicitation rule confined to working hours). See also dissenting opinion in *Bonwit Teller, Inc. v. NLRB*, note 4 supra.

industrial actualities. Although presumptions of a refusal of equal opportunity and of the inadequacy of alternative communication channels may be justified, especially where the more extensive impact of a no-solicitation (as contrasted with a no-distribution) rule is involved, again it appears more practical for the Board rather than the judiciary to apply these presumptions. Thus, the Court in the principal case has clarified the function of section 8(c). It has indicated that the section does not provide absolute protection for employer speech but instead allows expression linked with closely related action to constitute an unfair labor practice *if*, under the circumstances, an actual interference with opportunities for organizational communication can be clearly demonstrated.

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