Michigan Law Review

Volume 52 | Issue 7

1954

LABOR LAW--LABOR-MANAGEMENT RELATIONS ACT--"CAPTIVE AUDIENCE" DOCTRINE

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LABOR LAW—LABOR-MANAGEMENT RELATIONS ACT—"CAPTIVE AUDIENCE" DOCTRINE—The day before a representation election was to be held at respondents plant the employees were assembled on the premises during working hours to hear an anti-union address by respondent's president. The union requested but was refused a similar opportunity to address the employees, and it appeared that respondent had in force a rule prohibiting union solicitation on company property. The National Labor Relations Board decided that although the contents of the president's speech were within the privilege of section 8(c) of the amended National Labor Relations Act,[1] in refusing the union's request respondent had applied its no-solicitation rule in a discriminatory manner and had thereby violated section 8(a)(1) of that statute.[2] On petition for enforcement of the Board's order requiring respondent to cease and desist from interfering with its employees' rights "by discriminatingly applying its no-solicitation rule,"[3] *held*, enforcement granted. It is an unfair labor practice for an employer having a no-solicitation rule to make an anti-union address to his employees during working hours. *NLRB v. American Tube Bending Co.*, (2d Cir. 1953) 205 F. (2d) 45.

Where to strike the balance between an employer's right to speak freely and his employees' right to make their choice regarding unionism without interference by the employer is a perplexing problem. For the NLRB and the courts this problem involves the reconciliation of section 8(c) of the NLRA with section 8(a)(1), a matter of particular difficulty where the employer's speech is in itself unobjectionable but is made on company time and property. A literal interpretation of section 8(c) would seem to require that an employer's noncoercive remarks be held privileged even in this "captive audience" situation, but policy considerations probably make such a result undesirable, at least under certain circumstances.[4] When faced with this problem for the first time under the amended NLRA, the Court of Appeals for the Second Circuit reached a compromise position. It was indicated in *Bonwit Teller v. NLRB*[5] that although normally an employer is free to address his employees on company time and property even without granting the union an equal opportunity to

[1] "The expressing of any views, argument, or opinion . . . shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit." Labor-Management Relations Act, 1947, 61 Stat. L. 142 (1947), 29 U.S.C. (Supp. V, 1952) §158(c).

[2] 61 Stat. L. 140 (1947), 29 U.S.C. (Supp. V, 1952) §158(a)(1), which makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce" his employees in the exercise of their rights.

[3] The Board also set aside the election, which the union had lost. This action was not subject to review in the instant case, since it did not constitute a final order within the meaning of §10(f) of the NLRA. Bonwit Teller v. NLRB, (2d Cir. 1952) 197 F. (2d) 640, cert. den. 345 U.S. 905, 73 S.Ct. 644 (1953). The Board has taken the position that the existence of an unfair labor practice is not controlling with respect to the validity of a representation election. General Shoe Corp., 77 N.L.R.B. 124 (1948); Peerless Plywood Co., (N.L.R.B. 1953) 22 U.S. LAW WEEK 2283.

[4] For a conclusion that unions have "no real campaign equivalent to employer speechmaking during working hours," see 61 YALE L.J. 1066 at 1074 (1952).

[5] Note 3 supra.

reply, this privilege is lost when a no-solicitation rule is in effect; in such a case the employer's speech represents a discriminatory application of the no-solicitation rule and hence, under established principles, a violation of section 8(a)(1). The court quite reasonably considered the instant case ruled by its *Bonwit Teller* decision, since the only important difference between the two cases is that in *Bonwit Teller* the no-solicitation rule was held to be a valid one, while in the instant case the rule was assumed to be invalid.[6] But of more importance than the result reached in the principal case is Judge Learned Hand's statement by way of dictum that had it not been for the no-solicitation rule the Board's order could not stand. In *Livingston Shirt Corp.*,[7] decided shortly after the instant decision, the NLRB by a three-to-one vote abandoned its position that a non-coercive captive audience speech could be an unfair labor practice even though a no-solicitation rule was not involved, and in doing so placed some emphasis on Judge Hand's dictum.[8] Yet it is interesting to note that of the three judges who decided the principal case only Judge Hand would make the legality of captive audience statements turn on the existence of a no-solicitation rule. Instead, Chief Judge Swan would allow the speech in all cases, and, on the other hand, Judge Frank indicated that "much can be said"[9] for holding the speech unlawful unless the union was granted an opportunity to reply on company time and property. Thus, no matter what view eventually prevails in this area, the wide diversity of opinion indicated by the instant case and recent NLRB decisions[10] certainly suggests that the Congress has not in section 8(c) provided a clear and workable standard for settling the captive audience problem.

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[6] As a general proposition an employer may not forbid union solicitation on company premises during non-working hours. Republic Aviation Corp. v. NLRB, 324 U.S. 793, 65 S.Ct. 982 (1945). However, an exception to this rule exists with respect to retail stores. Bonwit Teller v. NLRB, note 3 supra.

[7] (N.L.R.B. 1953) 33 L.R.R.M. 1156.

[8] Member Peterson in particular seems to have reversed his position due to Judge Hand's dictum in the principal case.

[9] Principal case at 47.

[10] See, e.g., Metropolitan Auto Parts, Inc., 102 N.L.R.B. 1634 (1953), Chairman Herzog dissenting; Livingston Shirt Corp., note 7 supra.