A SURVEY: INTERFERENCE WITH ELECTIONS AS VIOLATIVE OF THE NLRA BAN ON INTERFERENCE, RESTRAINT, AND COERCION WITH RIGHT OF SELF ORGANIZATION AS INTERPRETED BY THE NLRB

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Freedom of choice is the essence of self-organization and collective bargaining through which industrial peace may be secured.

The right to organize is given employees by Section (7) of the NLRA which right is protected against employer interference by Section 8 (a) (1) of the act. Section 8 (a) (1) declares it to be an unfair labor practice "to interfere, restrain, or coerce employees in the exercise of the right to self organization, to form, join or assist labor organizations, to bargain collectively and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection."[1] It should be noted that a violation of any of the subsections (2) - (5) of Section 8 (a) is technically a violation of 8 (a) (1), although certain activities are violative of Section 8 (a) (1) alone. Among these is interference with representation elections—the subject of this paper.

The achievement of unionization by employees is generally attained by means of a free election. The right to review conduct of representation elections rests solely with the NLRB. Since Congress invested the Board with control over elections it has been asserted that this power conveys with it an inherent duty to maintain the integrity of the election process.[2] As the Board stated in the case of *General Shoe Corporation,* its function in election procedings is "to provide a laboratory in which an experiment may be conducted under conditions as nearly ideal as possible to determine the uninhibited desires of the employees."[3] The question has often arisen as to how far the employer may go to forestall the union movement. If an employer interferes with a representation election, such election may be set aside and the employer may be faced with an unfair labor practice charge. In regard to this issue the Board's original stand was to commit the employer to a position of strict neutrality, the view being that the choice of a representative for collective bargaining was up to the employees alone. Illustrative of this is the *Crosley Corporation* case

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1. NATIONAL LABOR RELATIONS ACT §8 (a) (1), 49 Stat. 449 (1935).
2. P. D. Gwaltney, Jr. and Co., 74 NLRB 371 (1947).
3. In re Matter of General Shoe Corporation, 77 NLRB 124 (1948).

in which the Board stated, "the selection of a bargaining representative is the exclusive concern of the employees, and the employer, during and before the representation election, must observe the policy of scrupulous neutrality."[4] It should be noted that Section 8 (c) of the amended act, know as the Free Speech Provision, withdraws certain pre-election conduct of the employer, which would have previously been violative of the Act, from the scope of 8 (a) (1). It provides that no statements of views or opinions shall constitute an unfair labor practice or evidence of an unfair labor practice unless it contains a threat of reprisal or force or promise of benefit.[5] Thus, the employer is given the right to oppose unionization.

An interesting question has confronted the courts as to whether Section 8 (c) applies to representation elections. In the early case of *General Shoe Corporation,* employees were brought in small groups to the employer's office on the day before election to hear an anti-union address and were also propagandized in their homes. While declining to find the employer guilty of an unfair labor practice the Board set the election aside declaring, "Conduct which creates an atmosphere which renders improbable a free choice will warrant invalidating an election even though that conduct may not constitute an unfair labor practice."[6] In a later case in which similar meetings of small groups were held on company time and property just prior to an election to present anti-union views the Board stated that, "The issue in represenation cases is whether the conduct of the type involved interfered with employee's freedom of choice in elections, but the issue in unfair labor practice cases is whether such conduct interfered with employees in the exercise of their rights guaranteed in Section (7)."[7] In *Metropolitan Life Insurance Company*[8] the Board further recognized the principle that 8 (c) does not prevent the Board from finding in a representation case that an expression of views, whether or not protected by 8 (c), has in fact interfered with employee's freedom of choice in an election so as to require that such election be set aside. It is seen from the foregoing cases that the criteria applied by the Board to determine if certain conduct interfered with an election was not the same as that used in finding whether an unfair labor practice had been committed. However, the trend of modern decisions seems to be to the contrary, particularly where speech is the conduct complained of. In such cases the Board recognizes 8 (c) and generally refuses to set aside an election in absence of an unfair labor

4. Crosley Corporation, 60 NLRB 623 (1945).
5. NATIONAL LABOR RELATIONS ACT §8 (c), as amended by the LABOR MANAGEMENT RELATIONS ACT, 61 Stat. 136 (1947).
6. In re Matter of General Shoe Corporation, 77 NLRB 124 (1948).
7. Hicks Hayward Co., 11 NLRB 695 (1957).
8. Metropolitan Life Ins. Co., 90 NLRB 937, 938 (1950).

practice.[9] Nevertheless, certain situations still exist where conduct will invalidate an election but will not constitute an unfair labor pracice. Among these are violation of the *Peerless Plywood* rule, misrepresentation of material facts, polling employees, conduct of third persons which creates an atmosphere of fear and confusion, and racial propaganda of an intense degree.

In the *Peerless Plywood Company* case the Board stated the rule that employees and unions will be prohibited from making election speeches on company time to massed assemblies of employees within 24 hours before the scheduled time for conducting an election. Violation of this will cause the election to be set aside when valid objections are filed.[10] The Board's objection seems to be to the last minute character of the speech and the fact of its being made on company time, irrespective of the fact that the content of the statement may be privileged. In its opinion the Board explained that "last minute speeches by either employers or unions delivered to massed assemblies 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."[11]

Deliberate misrepresentation of material facts by an employer or union and deceptive campaign tactics have been held by the Board sufficient to invalidate an election. The cases in this area seem to be concerned chiefly with the employees' ability to evaluate the propaganda involved. As stated in *Radio Corporation of America,* "the Board adheres to its new established policy of not policing the parties election propaganda absent coercion or fraud, unless it appears from all the circumstances that the employees could not properly evaluate the propaganda involved."[12] In the *Gummed Product Company* case the election was voided because the union's handbills gave false figures on wages at a nearby plant where the union was bargaining agent. The employer announced the correct figures to employees. Pursuant to this the union issued another handbill explaining those set forth by employer to be the rates under the old contract and averring the existence of a new contract. In fact there was no new contract and the rates set forth by the employer were correct. The election was set aside because it was thought that petitioner was in an authoritative position to know whether a new contract had been signed and whether it contained higher wage rates.[13] In determining whether employees are capable of evaluating such propaganda the Board considers the total picture, particularly where the party asserting had

9. National Furniture Mfg. Co., 106 NLRB 1300 (1953).
10. Peerless Plywood Co., 107 NLRB 427 (1953).
11. *Ibid.*
12. Radio Corp. of America, 106 NLRB 1393 (1953).
13. Gummed Products Co., 112 NLRB 1092 (1955).

knowledge of the facts asserted thus making it more likely that employees would rely on them, and whether the other party had an opportunity to rebut the false assertion. Generally, where the union responds, it is held that the employees are capable of evaluating the employer's campaign propaganda.[14]

In cases dealing with employee interviews or polling, which in connection with other activities tends to interfere with employee free rights, the trend seems to be in accordance with the principle announced in *General Shoe Corporation*. This is true where the employer endeavors to influence the outcome of the election by interviewing a substantial number of employees individually or in small groups at places of authority for the purpose of urging them to vote against the union. The content of the employer's statements on such occasions is thought to be immaterial.[15] In one case the employer sent out notices that copies of its company policy would be available for discussion at its offices. The Board held these notices, which resulted in individual visitation, were calculated to induce employees to come to the office for the purpose of being propagandized.[16]

It is an established principle that an election will be set aside because of prejudicial conduct whether or not such conduct is attributable to one of the parties. In one case it was found that third parties created a hostile atmosphere through their conduct and publications. However, there existed no evidence to link the employer with such conduct. In setting aside the election the Board declared, "This is not an unfair labor practice proceeding, but an investigation to ascertain employees desires concerning their choice of a bargaining representative."[17] It was found that the election in the case was not held in a atmosphere conducive to the free choice contemplated by the act. In another case dealing with the question it was held that "the determinitive factor is that conduct has occured which created an atmosphere in which a free choice of a bargaining representative was impossible."[18]

Another situation in which the Board has set aside elections even though the complained of propaganda is protected from being an unfair labor practice by Section 8 (c) is in the case of racial propaganda. In a recent case involving extremely inflamatory propaganda the Board set the election aside. It appears in the case that two weeks before the election there was sent to each employee a large photograph of an unidentified negro man dancing with an unidentified white lady, captioned,

14. Motec Industries, Inc., 136 NLRB 711 (1962).
15. National Caterers of Va., Inc., 125 NLRB No. 10 (1959). Jasper Wood Produce Co., Inc., 123 NLRB 28 (1959).
16. Aragon Mills, 135 NLRB 859 (1962).
17. National Caterers of Va., Inc., 125 NLRB No. 10 (1959).
18. Lake Catherine Footwear, Inc., 133 NLRB 443 (1961).

"Union leader James B. Carey Dances with a Lady Friend." The employer also sent a letter calling attention to the union's support of the NAACP and CORE. It further emphasized the racial issue by distributing to employees copies of a publication called "Militant Truth." The Board felt this propaganda to have no purpose except to inflame the racial feelings of the voters and set the election aside. Its position may be summarized as follows: "Employer's propaganda so inflamed and tainted the atmosphere in which the election was held that a reasoned basis for choosing or rejecting a bargaining representative was an impossibility."[19] It should be observed that the Board makes a distinction between racial propaganda which is moderate, truthful, and relevant and that which is presented for the sole purpose of inflaming employees.[20] The former is treated merely as being informative. The latter will invalidate the election.

Certain conduct of the employer is violative of Section 8 (a) (1) of the act as well as constituting grounds for invalidating an election. The Board has established that threats or favors may constitute unlawful interference with employee organizational rights. The granting of benefits may be timed so as to influence the results of an election.[21] In the case of *Joy Silk Mills* the employer made promises of benefits just prior to an election which included rest periods and shift rotation. In its ruling the Board pointed out that promises of benefit are as efficacious as threatened detriment when attempting to discourage union activity. It further considered that one of the basic purposes of the Labor-Management Relations Act is to insure employees free choice concerning their representative in negotiating with their employer. The Board stated that because of this, "employers may not, under the guise of merely exercising their right of free speech, pursue a course of conduct designed to restrain and coerce their employees in exercise of rights guaranteed by the act."[22] Although an employer is not precluded from introducing benefits during an organizational period, he may not use such benefits as an inducement not to join the union. The Board's view seems to be that interference is no less interference because it is accomplished through allurements rather than by coercion. In the *Silk Mill* case the promises were made in a context of speeches making clear the employer's anti-union views. In finding that such promises were reasonably calculated to induce employees not to join the union the Board considered the entire situation and felt that the action interfered with the right of self organiza-

19. Sewell Mfg. Co., 138 NLRB No. 12 (1962).
20. Sharney Hosiery Mills, 120 NLRB 750 (1958). Allen Morrison Sign Co., 138 NLRB 73 (1962).
21. Koehler's Wholesale Restaurant Supply Co., 139 NLRB No. 74 (1962).
22. Joy Silk Mills v. NLRB, 185 F.2d 732 (1950).

tion by emphasizing to the employees that here was no necessity for a collective bargaining agent. Originally the Board interpreted interference so as to preclude all employer action relating to a union campaign and held any expression of preference coercive by virtue of the very nature of the employer-employee relationship.[23] Later the Board in *Matter of Hudson Hosiery Company* developed the test that, "what is unlawful under the act is the employer's granting or announcing such benefits for the purpose of causing employees to accept or reject union representation."[24] However, this still enabled the employer to engage in activity which had the effect of interfering with self-organization. Later the Board came to prohibit all employer conduct which "it may reasonably be said, tends to interfere with the free exercise of employee rights under the act."[25] Thus, a labor practice is fair or unfair according to the probable effect of the employer's conduct on his employees. In the case of *Exchange Parts Company*[26] the question arose as to whether the employer may grant employee benefits during a union organizational campaign with intent to persuade employees to vote against the union. There it appears, that two weeks before the election a letter was written to employees announcing more favorable methods of computing holiday pay and vacation periods. The company informed the employees that benefits had been increased 20% and urged them to vote against the union. The union lost the election and filed an unfair labor practice charge. The Board held the employer activity reasonably tended to interfere with employee's choice of a representative and found a violation of 8 (a) (1). It may be observed that the Board apparently makes no distinction between persuasion and coercion. It also declined to give much weight to the company's long history of granting benefits. The Board followed the same line of reasoning in the *Dal-Tex Optical Company* case. There the conduct complained of was that respondent through supervisors threatened the employees with loss of employment because of union activity and promised them economic benefits if they remained "loyal" by opposing the union. The question presented was whether respondent engaged in conduct which interfered with employees' freedom of choice within the meaning of 8 (a) (1). Quoting from the Board's opinion, "The test is whether the conduct charged was reasonably calculated to interfere with employees free choice as to whether they desired to be represented by the union for the purpose of collective bargaining. Interference, restraint, and coercion is not measured by the em-

23. International Ass'n of Machinists v. NLRB, 311 U.S. 72, 78, 61 S.Ct. 83, 85 L.Ed. 50 (1940).
24. Matter of Hudson Hosiery Co., 72 NLRB 1434 (1947).
25. American Freightways, 124 NLRB 146, 147 (1959).
26. Exchange Parts Co., 131 NLRB 806 (1961).

ployer's intent or the effectiveness of his action, but rather whether the conduct is reasonably calculated, or tends to interfere with the free exercise of employee's rights under the act."[27] In connection with the case it is interesting that the Board pointed out that enticing employees by holding out benefits to those that are "loyal" is not an expression of views, arguments, or opinions within the meaning of 8 (c), but a verbal act whose legality under 8 (a) (1) is determined without reference to 8 (c). In the case the respondent was ordered to cease and desist from interfering and a new election was scheduled. The test applied by the Board is further illustrated by a later case in which the employer's conduct consisted of paying a certain sum of money to an employee while urging him to vote against the union. It also appears that he gave money to other employees instructing them to buy beer for all, while again urging their vote against unionization. The Board set the election aside on the ground that "The giving of things of value to employees in circumstances which reasonably would lead the donees to believe it was given to influence their vote is conduct which interferes with a free choice."[28]

Pre-election threats which tend to influence an employee's vote are recognized as unfair labor practices and constitute grounds for setting aside the election. In an early case it was held that an employer's pre-election statement concerning unionism would not be violative of 8 (a) (1) unless on its face there was evidence of coercion or that it in association with other acts involving restraint and coercion, violated the act. The Board found that if statements occured in a context of coercion they would constitute a violation. In its opinion the Board stated, "If the total activities of the employer restrain or coerce employees in their free choice those employees are entitled to protection under the act."[29] By 1953, the Board had taken a broader view of what employers were permitted to say; as speeches were allowed that implied if employees elected a union, certain benefits would not be forthcoming or that the plant might have to close down or move away.[30] Although threats of economic reprisal sufficient to invalidate an election may be express or implied, it is vital to distinguish a threat from a mere prophesy, the latter of which comes within the 8 (c) provision concerning free speech. An employer may predict undesriable consequences of unionization, or state any legal position he may take in future dealings with the union as long as he does not threaten to use his economic power to make such prediction come true. Illustrative of the ability of the employer to state

27. Dal-Tex Optical Co., 130 NLRB No. 142 (1961).
28. Coca-Cola Bottling Co. of Memphis, 132 NLRB 481 (1962).
29. NLRB v. Virginia Electric and Power Co., 314 U.S. 469, 62 S.Ct. 344, 86 L.Ed. 348 (1941).
30. GREGORY, LABOR AND THE LAW 356-357 (2d rev. ed. 1961).

his legal position is a case in which the employer threatened to discontinue existing benefits in the event the union won the election. The employer stated that contract negotiations would start from scratch, as he refused to carry over any existing benefits. The Board held that the employer was merely expressing his legal position that it did not have to start bargaining from the level of existing benefits.[31] It was held in the *Neco Electrical* case, that where employees are told that if the union comes in the employer will lose two of its biggest customers thus necessitating a cut back in operations, that these statements are no more than predictions of future action of third parties. Since they contained no threat that the employer would take any action they were found privileged under 8 (c).[32] In a recent case a similar statement was made by a supervisor to an employee to the effect that they had been told by customers that they would not continue to be the sole source of supply if the company became unionized due to the possibility of work stoppage as the result of strikes or walkouts. The Board considered such statements as constituting substantial interference in that they contained a clear threat of loss of employment if the employees selected the union.[33] In that case the respondent employer was found to have misrepresented material facts when the statement was made to employees that "some of the customers" had so informed them, when in fact only one had disclosed such information. It was regarded as highly significant by the majority that respondent failed to name the customers involved or to supply any other information. Also having an important bearing on the Board's decision was the fact that these statements made to employees by high ranking supervisors were during the strenuous pre-election anti-union campaign. Constant references were made to a withdrawal of orders to implant fear in the minds of the employees that loss of jobs would follow a union victory. The dissenting opinion took the position of the *Neco Electrical* case *supra,* and emphasized the fact that the statement contained no threat that employees would lose anything by reason of any action respondent might take, but rather informed the employees of what others might do if the employees elected the union. Three prior cases were considered by the dissenting judge. In the *Aeronca* case during pre-election period a representative of the employer stated to employees that a union victory would result in loss of the principal customer and others who would withdraw orders, thus causing loss of production and jobs. The Board held that the employer's failure to support its assertions by names of customers and other information compelled the employees to accept the statement at face value and prevented them

31. Universal Producing Co., 123 NLRB 548 (1959).
32. Neo Electrical Product Corporation, 124 NLRB No. 54 (1959).
33. Haynes Stellite Co., 136 NLRB 95 (1962).

from making an independent evaluation. The statement was held coercive and the election was set aside.[34] In the *Nebraska Bag* case it was also found that the respondent violated 8 (a) (1) and the election was set aside. There the supervisor stated that if the union came in employers would go "wholesale" and lose the business of a large customer.[35] The dissent felt that the *Neco Electric* case, the third case considered, overruled the prior two. It was based on the fact that the statements contained no threat that respondent would take any steps to induce the happening of predicted future events. In another case the employer, in a pre-election address, made unsupported assertions that a previous business decline was due to the union's organizational efforts, and that employment conditions improved when the union lost the election two years ago. He further stated that since customers had learned that the petitioning union had started up its "agitation," the employer again had been having trouble obtaining contracts. The Board was of the opinion that the employer's speech, considered in light of all the circumstances of the case, had generated a fear of economic loss in the event petitioner prevailed.[36] Where an employer built up a pool of replacements before an election and emphasized this fact to employees through campaign speeches, the Board found that such conduct could reasonably be interpreted to mean that bargaining would be of no avail and that a strike would lead only to employees being replaced. According to the Board, such statements were calculated to intimidate the employees, thus rendering a free choice impossible. It conveyed to employees the message that selection of a bargaining representative would result in loss of employment. Also contributing to produce this effect upon employees' free choice was the employer's unsupported statements that in the event of a union victory customers would cut down their orders and business would be adversely affected. "Such statements generate a fear of economic loss among employees about to vote on the question of self representation and constitute a basis for setting aside the election results."[37] In connection with pre-election threats it is interesting to note several recent cases in which two situations are set forth wherein the Board has declined to find a violation of 8 (a) (1) although the propaganda involved threats. In one it was held that the foreman's pre-election statement to employees that raises if secured by the union might require the company to cut down overtime were predictions of effect of unionization upon earnings and hours rather than threats of reprisal and were protected by 8 (c). The decision seems to be based on the fact that only seven or ten employees

34. Aeronca Manufacturing Corp., 118 NLRB 461 (1957).
35. Nebraska Bag Processing Co., 122 NLRB 654 (1958).
36. R. D. Cole Mfg. Co., 133 NLRB 1455 (1962).
37. Storkline Corp., 135 NLRB 1146 (1962).

at one plant could have been affected out of the total number of one hundred and fifty-five employed at all plants.[38] Thus, where the threats are so isolated and affect only a small number of employees, the Board will generally decline to make a finding of interference. In another case it was held that the employer's letter to employees three weeks before the election pointing out the disadvantage of a union did not sufficiently impair the employees' freedom of choice so as to warrant setting aside the election. The employer was merely answering prior union propaganda concerning the benefits of unionization. The employer's contention that such could be properly evaluated by the union as propaganda was sustained. It was thought that the employer's statement was not coercive when considered in the context of the total election campaign.[39]

It may be deduced from the foregoing authorities that elections are conducted by the Board in accordance with strict standards so as to assure the employees a free and untrammeled choice in selecting a representative. This is pointed up by the fact that the Board will invalidate an election where evidence has shown promises of benefit just prior to voting, threats of economic reprisals or loss of employment, misrepresentation of material facts by the employer which renders employees incapable of proper evaluation, cases of intense appeals to racial prejudice, and where the Board has found a general atmosphere of fear and confusion created by a member of the general public. It should also be observed that in determining whether certain conduct has violated the act the test applied by the Board is whether it is reasonable to conclude that the conduct tended to prevent the free expression of the employee's choice. Thus it is seen that the Board in its application of the NLRA in connection with the election process endeavors to effectuate the basic purpose and policy of the act which, as stated in the preamble, is "to preserve to employees an atmosphere in which they have full freedom of choice with respect to collective bargaining and the designation of a bargaining representative."[40] It has been said that the Board in applying the act is dealing with a "clear legislative policy to free the collective bargaining process from all taint of employer's compulsion, domination or influence."[41]

38. Middleton Mfg. Co., and International Union of Electrical Radio and Machine Workers, AFL-CIO, 141 NLRB No. 25 (1963).
39. Decorated Products, Inc. and International Chemical Workers Union, AFL-CIO 140 NLRB No. 31, 63-1 CCH NLRB §12, 091 (1963).
40. NATIONAL LABOR RELATIONS ACT, Preamble, 49 Stat. 449 (1935), as amended by 61 Stat. 136 (1947) and 73 Stat. 519 (1959).
41. International Ass'n of Machinists v. NLRB, 311 U.S. 72, 78, 61 S.Ct. 83, 85 L.Ed. 50 (1940).