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## The Future of NLRB Doctrine on Captive Audience Speeches<sup>†</sup>

PAUL M. SECUNDA<sup>\*</sup>

*“The Board is . . . entitled to suspicion when faced with an employer’s benevolence as its workers’ champion . . . .”*<sup>1</sup>

### INTRODUCTION

Under the National Labor Relations Act (NLRA or “Act”),<sup>2</sup> as interpreted by the courts and the National Labor Relations Board (NLRB or “Board”) over the last sixty years, employers have been permitted to give captive audience speeches at work to employees contemplating unionization.<sup>3</sup> Employees must attend such meetings, may not be able to question the employer representative, and may not have the union come to the workplace to present opposing views.<sup>4</sup> Not surprisingly, these speeches are one of the most effective anti-union weapons that employers currently have in their arsenal.<sup>5</sup>

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<sup>\*</sup> Associate Professor of Law, Marquette University Law School. I would like to thank Professor Kenneth G. Dau-Schmidt and the Indiana Maurer law faculty for inviting me to participate in this Symposium on *Labor and Employment Law Under the Obama Administration: A Time for Hope and Change?* I am indebted to Michael Duff, John Higgins, Jeff Hirsch, Joe Slater, and Andrew Strom for their insightful and helpful comments on earlier drafts of this article. I dedicate this article to my law students, who have been a constant source of enjoyment, inspiration, and pride over the years.

1. *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 790 (1996).
2. 29 U.S.C. §§ 151–69 (2006).
3. *See, e.g., Babcock & Wilcox Co.*, 77 N.L.R.B. 577 (1948).
4. *See NLRB v. Prescott Indus. Prod. Co.*, 500 F.2d 6, 8, 10–11 (8th Cir. 1974); *Litton Sys., Inc.*, 173 N.L.R.B. 1024, 1030 (1968); *Hicks Ponder Co.*, 168 N.L.R.B. 806, 811–12, 815 (1967).
5. Although there is an older study by William Dickens suggesting that captive audience speeches have statistically significant effects on voting in union certification elections, William T. Dickens, *The Effect of Company Campaigns on Certification Elections: Law and Reality Once Again*, 36 INDUS. & LAB. REL. REV. 560, 574–75 (1983) (concluding that employers’ written communications, captive audience speeches, threats, and actions taken against union supporters all have statistically significant effects on voting in union certification elections), perhaps even more illuminating are recent statistics establishing the percentage of employers who use such tactics and how often they use them, KATE BRONFENBRENNER, *UNEASY TERRAIN: THE IMPACT OF CAPITAL MOBILITY ON WORKERS, WAGES, AND UNION ORGANIZING* 73 (2000), <http://digitalcommons.ilr.cornell.edu/reports/3/> (report indicating that 92% of 400 employers engaged in captive audience meetings during union organizational campaigns and that employees were subject, on average, to eleven captive audience meetings during such campaigns). *See also* William B. Gould IV, *Independent Adjudication, Political Process, and the State of Labor-Management Relations: The Role of the National Labor Relations Board*, 82 IND. L.J. 461, 484 (2007) (citing *San Diego Gas & Elec.*, 325 N.L.R.B. 1143, 1146–47 (1998)) (“[T]he captive audience technique, in which employees are called together on company time and

In previous articles, I have alternatively argued that states should be able to legislate against such captive audience meetings free from NLRA preemption;<sup>6</sup> that such employer meetings amount to coercive conduct against employees in derogation of their section 7 right to organize;<sup>7</sup> and that in light of the U.S. Supreme Court campaign finance decision in *Citizens United v. FEC*,<sup>8</sup> employers will likely expand the use of captive audience speeches from the union campaign context into the political campaign context, and thus, federal legislation is required to prevent this from happening.<sup>9</sup> These prior articles sought to establish the danger to employee-workplace rights caused by permitting unfettered, employer captive audience meetings at the workplace. In response to these concerns, I have set forward different approaches that the federal government, states, courts, and the NLRB could take to eliminate or minimize the impact that this type of employer conduct has on employee rights.

This contribution to the Symposium, *Labor and Employment Law Under the Obama Administration: A Time for Hope and Change?*, focuses on perhaps a more pragmatic issue: the likely future of Board doctrine in the area of employer captive audience speeches. Not only does this not involve the more difficult questions concerning NLRA preemption when states seek to legislate in this area, but it also does not discuss whether Supreme Court decisions in the election law area have made the workplace riper for employers to give labor, political, and/or religious captive audience speeches and the consequent need for protective federal legislation in this context.

This Article seeks to answer a series of narrower, and yet more practical questions, now that the Board has both a quorum and a Democratic majority.<sup>10</sup> The

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company property, has proved to be an extremely devastating technique in organizational campaigns. It is so devastating a technique that when the Board instituted postal ballots in limited circumstances in the 1990s, emphatic dissents were registered by the Board's Republican members on the ground that balloting over an extended period of time, which would allow the employees to get their ballots at their home addresses, would deprive the employer of an opportunity to use anti-union speech.”).

6. See Paul M. Secunda, *Toward the Viability of State-Based Legislation to Address Workplace Captive Audience Meetings in the United States*, 29 COMP. LAB. L. & POL'Y J. 209 (2008). I have also advocated for the validity of the Oregon anti-captive audience meeting law in *Associated Oregon Industries v. Avakian*, No. CV 09-1494-MO, 2010 WL 1838661 (D. Or. May 6, 2010). See Brief of Law Professors as Amicus Curiae in Support of Defendants' Opposition to Motion for Summary Judgment, No. 09-CV-1494-MO, 2010 WL 1838661 (D. Or. Dec. 12, 2009). The case was eventually dismissed in favor of defendants on non-substantive standing grounds. See *Associated Or. Indus.*, 2010 WL 1838661, at \*5.

7. See Paul M. Secunda, *The Contemporary "Fist Inside the Velvet Glove": Employer Captive Audience Meetings Under the NLRA*, 5 FLA. INT'L. U.L. REV. 385 (2011).

8. 130 S. Ct. 876, 885 (2010) (holding “that the Government may not suppress political speech based on the speaker's corporate identity,” and that “[n]o sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations”).

9. See Paul M. Secunda, *Addressing Political Captive Audience Workplace Meetings in the Post-Citizens United Environment*, 120 YALE L.J. ONLINE 17 (2010).

10. The Board operated for twenty-seven months with a two-member Board and decided over 500 cases. Press Release, NLRB, NLRB Case Production in FY 2010: Rising Numbers in an Eventful Year 1 (Oct. 7, 2010), <http://nlrb.gov/news-media/news-releases/archive-news>. The U.S. Supreme Court in *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635, 2644–

first question in this series of inquiries must be: what is the likelihood that the Board will hear a case concerning captive audience speech in the near future? Second, if the Board reviews such a case, what are the chances that a Board majority will limit the rights of employers to engage in captive audience speeches? Third, and perhaps most interesting and difficult to predict: if the Board overturns, to some extent, current doctrine concerning this type of employer activity, what will be the reasoning that the Board utilizes to reach its conclusion?

On the first question, it is difficult to speculate when, or if, a captive audience case will make its way to the Board for decision, although there do appear to be at least a few case presenting captive audience issues currently pending NLRB review.<sup>11</sup> Uncertainty also arises in this area because of the way in which Board procedures work<sup>12</sup> and because it is unclear how long the Board will remain with a Democratic Board majority.<sup>13</sup> Of course, chances for review also depend on whether the Board will again become incapacitated through not having the required three-person quorum,<sup>14</sup> and how long President Obama remains in office.<sup>15</sup>

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45 (2010), invalidated those decisions based on the Board not having at least a three-member quorum of its normal five-member complement. As of October 2011, the Board has three members including two Democratic members (Chairman Pearce and Member Becker) and one Republican member (Member Hayes). *See The Board: The Members of the National Labor Relations Board*, NLRB, <https://www.nlr.gov/who-we-are/board>.

11. *See* Newburg Eggs, Nos. 3-CA-27834 & 3-RC-11918, at 11–12, 14 (A.L.J. Div. Apr. 27, 2011), <https://www.nlr.gov/search/advanced/all/%28case%3A03-CA-027834%29> (finding violations occurring during captive audience meetings and setting aside election); 2 Sisters Food Grp., Inc., No. 21 CA 38915, at 18–19 (NLRB, June 10, 2010), <http://www.nlr.gov/case/21-CA-038915>. The union in *2 Sisters Food Group, Inc.*, actually asked the Board to completely outlaw captive audience meetings. No. 21 CA 38915 at 18 (“[T]he Board should use this opportunity to prohibit captive audience meetings by the employer during the critical period.”).

12. Only the NLRB General Counsel can issue a complaint upon a formal charge that the employer or union engaged in an unfair labor practice. 29 U.S.C. § 153(d) (2006). Of the 24,720 unfair labor practice (“ULP”) charges filed in 2005, only 38.5% were found to have merit and resulted in the General Counsel issuing a complaint. *Charges and Complaints*, NLRB, <http://www.nlr.gov/chartsdata/chargeComp#chart1tag>. In FY 2010, the Board issued 315 decisions in contested cases. *See* Press Release, NLRB, *supra* note 10. Moreover, it is even more difficult to have an election objection reviewed by the Board given the deferential review standards in this context. 29 C.F.R. § 102.67(c) (1965) (outlining the limited basis for Board review of Regional Director's decisions in the representation case context).

13. Board members are either appointed for five-year terms, or the president appoints them through the recess appointment process. 29 U.S.C. § 153(a) (2006). At the end of their appointment period, their Board service ends, or they are appointed for an additional term. *See id.* Members serve staggered five-year terms; a different majority may be appointed within three years of the appointment of a new president. *Id.* More recently, Board appointment has become a highly partisan process. *See* Joan Flynn, *A Quiet Revolution at the Labor Board: The Transformation of the NLRB, 1935–2000*, 61 OHIO ST. L.J. 1361, 1398 (2000) (maintaining that partisan Board appointments have become the norm at the NLRB over the last thirty years).

14. *See* Press Release, NLRB, *supra* note 10 (describing how the Board can become incapacitated if its numbers drop below an acceptable quorum of three members).

15. Chairman Liebman's third term expired on August 27, 2011 and Member Becker's

Nevertheless, assuming for present purposes that the Board decides such a case with the current Democratic majority, my prediction about the future of board doctrine in this area may be simultaneously unsurprising and surprising. Unsurprising, on the one hand, because I do believe the Democratic majority will seek to limit the number and frequency of captive audience speeches based on the view that such conduct substantially limits the ability of employees to freely decide whether they wish to join a union. Surprising, on the other hand, because I believe the Board will likely not prohibit all captive audience meetings as they could, and should, under current law.<sup>16</sup> Rather, the Board is likely to engage in a more restrained approach based on already-existing doctrines and cases, given the Board's desire to avoid the misimpression that it is merely engaging in politically motivated flip-flopping.<sup>17</sup>

In short, I believe the Board will choose to take one of two paths, depending on how the captive audience speech issue comes to the Board. First, the case could come to the Board primarily as an election case, where the Board determines whether a group of employees wishes to be represented by a union. If there are objections by the union to the running of the election based on employer captive audience speeches and their impact on the "laboratory conditions" of the election,<sup>18</sup> the Board could intervene and force a rerun of the election, or even order bargaining between the parties in an especially egregious case.<sup>19</sup> In fact, under the

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recess appointment expires at the end of 2011. *Board Members Since 1935*, NLRB, <http://www.nlr.gov/who-we-are/board/board-members-1935>; *Craig Becker*, NLRB, <http://www.nlr.gov/who-we-are/board/craig-becker>. At that point, there is a possibility that the Board may again fall below the three-person quorum necessary to decide cases. *See* NLRB Chair's Departure Raises Questions About Agency's Future, HRHERO.COM (Aug. 30, 2011), <http://blogs.hrhero.com/hrnews/2011/08/30/nlr-chairs-departure-raises-questions-about-agencys-future/> ("In addition to [Chairman] Liebman's departure, member Craig Becker's term ends December 31. Those developments leave many questioning whether the NLRB will be left crippled in a political environment not conducive to replenishing the membership.").

16. *See* Secunda, *supra* note 6, at 409–10 ("Based on employee free choice, the conduct/speech distinction, and the threadbare nature of NLRB precedent in this area, the Board should return to its *Clark Bros.* doctrine and make employer captive audience meetings a *per se* violation of Section 8(a)(1) of the NLRA.").

17. Adjudicatory agencies like the NLRB need to have credibility with parties on both sides of the dispute. *See* Paul M. Secunda, *Politics Not As Usual: Inherently Destructive Conduct, Institutional Collegiality, and the National Labor Relations Board*, 32 FLA. ST. U. L. REV. 51, 54 n.11 (2004) ("Board decisions driven by political considerations negate the Board's claim of superiority in deciding labor disputes based on industrial experience and expertise and compromise its stature as a neutral independent agency.").

18. *General Shoe Corp.*, 77 N.L.R.B. 124, 127 (1948) ("[T]he Board's function [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.").

19. The ability of the Board to order an employer to recognize a union and bargain in good faith with it on a contract is referred to as a "Gissel Bargaining Order" (GBO). *See* *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 610–16 (1969). As Professor Weiler aptly observed many years ago, however, GBOs tend to be ineffective. *See* Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1794–95 (1983). They only give the union the right to bargain, not the right to "direct the employer to make a reasonable contract offer." *Id.* at 1794. In any event, even Democratic

*Peerless Plywood* doctrine,<sup>20</sup> the Board has already articulated an election rule that neither the employer nor the union may give a captive audience speech twenty-four hours before a representation election. So, if the Obama Board wishes to provide additional protection against employer captive audience speeches, including anti-union speech by supervisors, it could move to extend the period during which captive audience speeches are prohibited from the current twenty-four-hour rule to a week or two before the actual holding of the election.<sup>21</sup>

In doing so, the Board could choose to focus on an aspect of its historical treatment of captive audience meetings that has been largely ignored over the last fifty years. For example, in *Economic Machinery Co.*, the Board held that “the technique of calling the employees into the [e]mployer’s office individually . . . is, in itself, conduct calculated to interfere with . . . free choice . . . regardless of the noncoercive tenor of an employer’s . . . remarks.”<sup>22</sup> In subsequent cases, the Board expanded this doctrine to find employer conduct objectionable “where it can be said on reasonable grounds that, because of the small size of the groups interviewed, the locus of the interview, the position of the interviewer in the employer’s hierarchy, and the tenor of the speaker’s remarks, [the Board is] not justified in assuming that the election results represented the employees’ true wishes.”<sup>23</sup> Although the Board in *Mead-Atlanta Paper Co.* held that large group meetings did not have the same coercive influence as small group meetings,<sup>24</sup> fifty years of caselaw involving captive audience speeches have provided adequate empirical data that such an observation may need to be revisited by the Obama Board.<sup>25</sup> Surely, the Board would be free now to rely upon industrial experience in this area post-*Mead-Atlanta* to conclude that it was previously wrong in finding that larger meetings would foster “free and open discussion.” Indeed, it is well within the discretion of the Board to find “as a matter of industrial experience”<sup>26</sup> that the policies of the Act are not effectuated by allowing unfettered employer

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Boards have been reluctant to issue GBOs in recent years. See Jeffrey M. Hirsch, *Yes, Virginia, There Still Are Gissel Bargaining Orders*, WORKPLACE PROF BLOG (Nov. 21, 2007), [http://lawprofessors.typepad.com/laborprof\\_blog/2007/11/yes-virginia-th.html](http://lawprofessors.typepad.com/laborprof_blog/2007/11/yes-virginia-th.html).

20. *Peerless Plywood Co.*, 107 N.L.R.B. 427 (1953).

21. To the extent that Congress enacts some form of expedited election legislation, expanding the *Peerless Plywood* doctrine could be quite effective.

22. 111 N.L.R.B. 947, 949 (1955).

23. *E.g.*, *NVF Co.*, 210 N.L.R.B. 663, 664 (1974).

24. 120 N.L.R.B. 832, 834 (1958) (“It is the isolation of individuals, or of small groups of employees, most often just a few, from the bulk of their fellow workmen into the locus of managerial authority which supports the inference that company expressions of anti-union sentiment in these circumstances borders too closely upon coercive influence over their choice later expressed in the election.”).

25. See *Secunda*, *supra* note 7, at 391–99 (discussing captive audience meeting cases post-Taft-Hartley).

26. See *NLRB v. United Steelworkers*, 357 U.S. 357, 363 (1958). Twenty years later, an acquaintance who had been subjected to successive captive audience speeches remarked that when he attended blue collar captive audience meetings during organizing drives it was the first time the employer had ever held a massed, all hands on deck meeting of any kind. As a result, many of his coworkers were simply terrified and it took them the better part of several days to restore *esprit de corps*.

captive audience speeches to large groups of employees in the critical period before the election.

Second, a case may come to the Board primarily as an unfair labor practice case challenging the use of captive audience tactics. In that instance, the issue would instead be whether the nature of speech under section 8(c) of the Act causes it to fall under one of the exceptions to employer free speech protection.<sup>27</sup> If the speech in question can be seen as either a “threat of reprisal or force or promise of benefit,”<sup>28</sup> existing Supreme Court and Board precedent permit a finding of an unfair labor practice under section 8(a)(1) against the employer.<sup>29</sup> Of course, this finding would not only cause an election to be rerun, but would also lead to the granting of other forms of appropriate relief, which might include a more liberal use of access remedies<sup>30</sup> for the union to speak to employees on company premises.<sup>31</sup>

This unfair labor practice approach to captive audience speech would be different from current Board practice in two meaningful ways. First, the Board would more closely scrutinize challenges to employer speeches made in captive audience settings to determine the coercive nature of the speech under the specific circumstances of the case, rather than simply rely on the conclusory statement that such speeches are permitted under current Board precedent. Second, the Board could apply a presumption of employer coercion where employees are faced with losing their jobs if they decide to leave the meeting, or where they are refused the ability to interact with and question the speakers.<sup>32</sup> This presumption of coercion

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27. Labor Management Relations (Taft-Hartley) Act § 8(c), 29 U.S.C. § 158(c) (2006).

28. *Id.*

29. Labor Management Relations (Taft-Hartley) Act § 8(a)(1), 29 U.S.C. § 158(a)(1) (2006); *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617–19 (1969) (“[A]n employer is free only to tell ‘what he reasonably believes will be the likely economic consequences of unionization that are outside of his control,’ and not ‘threats of economic reprisal to be taken solely on his own volition.’” (quoting *NLRB v. River Togs, Inc.*, 382 F.2d 198, 202 (2d Cir. 1967))); *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964) (“The danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove.”).

30. See generally Robert M. Worster, III, *If It's Hardly Worth Doing, It's Hardly Worth Doing Right: How the NLRA's Goals Are Defeated Through Inadequate Remedies*, 38 U. Rich. L. Rev. 1073, 1076 (2004) (“‘Access remedies’ allow unions to communicate with employees free from employer reprisals, whereas ‘notice remedies’ inform ‘employees of their statutory rights and the legal limits on the [e]mployer’s conduct’ while assuring them that ‘further violations will not occur.’” (alteration in original) (quoting *Teamsters Local 115 v. NLRB*, 640 F.2d 392, 399–400 (D.C. Cir. 1981))).

31. It has been observed in some professional circles that captive audience speech coupled with the inability of the union to reply to this speech makes the situation hypercoercive. An access remedy like the one issued in *Beverly California Corp. v. NLRB*, 227 F.3d 817 (7th Cir. 2000), may well provide a partial remedy to this hypercoercive situation.

32. The adoption of an employer coercion presumption in this context would effectively overturn *NLRB v. Prescott Industrial Products Co.*, 500 F.2d 6, 9–11 (8th Cir. 1974) (refusing to enforce an NLRB decision holding that disallowing employee questioning during a captive audience meeting constituted an unfair labor practice); *Litton Systems, Inc.*, 173 N.L.R.B. 1024, 1030 (1968) (indicating that “[a]n employee has no statutorily protected

could be applied based on the recognized power disparities between employers and employees,<sup>33</sup> based on unions' lack of access to employer property to disseminate pro-union messages,<sup>34</sup> and based on the fact that neither the First Amendment nor section 8(c) of the Act give employers the right to compel unwilling employees to listen to non-work-related speeches they do not wish to hear.<sup>35</sup> The employer, however, could overcome this presumption by satisfying a modified form of the *Struksnes* polling test<sup>36</sup> to assure the noncoercive nature of such captive audience speeches. Such a showing would ensure that employees were told the purpose of such meetings, were assured against retaliation for asking questions during these meetings, and were not otherwise intimidated by their employer's speech or conduct.

In all, then, this Article predicts that the Obama Board will seek in some manner to more closely regulate employer captive audience speeches. Part I provides a general background on employer captive audience speeches in the labor law context. Part II considers how the Obama Board might respond to an election case raising captive audience issues. Part III alternatively explores how the Obama Board might deal with an unfair labor practice case involving employer captive audience tactics, and suggests, in the process, the adoption of a presumption of employer coercion where employer captive audience speeches are utilized. In all, it is likely that the Obama Board will change the contours of its captive audience speech doctrine for the first time since *Babcock & Wilcox*,<sup>37</sup> the Board decision that first established the legality of employer captive audience speeches in 1948.<sup>38</sup>

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right to leave a [mandatory antiunion captive audience] meeting"); and *Hicks Ponder Co.*, 168 N.L.R.B. 806, 815 (1967) (upholding an employer's right to eject vocal pro-union workers who speak out once captive audience meetings have begun).

33. See *Gissel*, 395 U.S. at 617 ("[A]ny balancing of [Section 8(a)(1) and 8(c)] rights must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear."); see also *NLRB v. United Steelworkers*, 357 U.S. 357, 368 (1958) (Warren, C.J., dissenting in part and concurring in part) ("Employees during working hours are the classic captive audience."); J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 423 (1990) ("Few audiences are more captive than the average worker").

34. See *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956) (holding that an employer may prohibit non-employee union solicitation on its property unless the location of the plant is so remote that the union is unable to communicate with employees through its own reasonable efforts); see also *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 538–39 (1992) (holding that the *Babcock* inaccessibility exception is narrow and generally only applies to remote locations such as logging camps, mining camps, and mountain resort hotels).

35. See *Rowan v. U.S. Post Office Dep't*, 397 U.S. 728, 738 (1970) ("[N]o one has a right to press even 'good' ideas on an unwilling recipient."); *Thomas v. Collins*, 323 U.S. 516, 537–38 (1945) (finding that employers may have the right to persuade their employees, but "[w]hen to this persuasion other things are added which bring about coercion, or give it that character, the limit of the [employer's First Amendment] right has been passed").

36. See *infra* text accompanying notes 140–45 (explaining how *Struksnes* employee polling standards could be modified to apply to captive audience meetings in the labor context).

37. 77 N.L.R.B. 577 (1948).

38. For criticisms of the Board's reasoning in *Babcock & Wilcox*, see Secunda, *supra*



## I. EMPLOYER CAPTIVE AUDIENCE SPEECH AND CONCEPTS OF COERCION

A. *The History of Board Treatment of Employer Captive Audience Speech*

In its initial form as the Wagner Act of 1935,<sup>39</sup> the NLRA did not protect employer speech rights during an organizational campaign.<sup>40</sup> As a result, most employers initially remained neutral while unions sought to organize their employees.<sup>41</sup> Consequently, when the Board first specifically addressed the legality of employer captive audience speeches in the 1946 case of *Clark Brothers Co.*,<sup>42</sup> it was not surprising that the Board adopted a rule that employer captive audience speeches during work time amounted to a *per se* violation of employee section 7 rights to organize<sup>43</sup>:

The Board has long recognized that “the rights guaranteed to employees by the Act include the full freedom to receive aid, advice, and information from others, concerning those rights and their enjoyment.” Such freedom is meaningless, however, unless the employees are also free to determine whether or not to receive such aid, advice, and information. To force employees to receive such aid, advice, and information impairs that freedom; it is calculated to, and does, interfere with the selection of a representative of the *employees’* choice.<sup>44</sup>

Because the mandatory attendance policy was not concerned with the company’s speech on unionization, the Board regulated the employer’s captive audience speech as inherently coercive.<sup>45</sup>

This state of affairs quickly changed as a result of the passage of the Taft-Hartley Act of 1947.<sup>46</sup> The Taft-Hartley Act recognized that employers expressly enjoy free speech protection for their noncoercive speech. Section 8(c) now provides:

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note 6, at 409 (maintaining that “*Babcock & Wilcox* is simply irreconcilable with the Act’s policy of employee free choice”).

39. National Labor Relations Act of 1935, ch. 372, 49 Stat. 449 (1935) (current version at 29 U.S.C. §§ 151–69 (2006)).

40. See Alan Story, *Employer Speech, Union Representation Elections, and the First Amendment*, 16 Berkeley J. Emp. & Lab. L. 356, 367 (1995) (“[D]uring the 1935 House debates on the Wagner Act, an amendment which would have guaranteed an employer’s right to free speech was rejected ‘as having no place in this bill.’” (quoting H.R. Rep. No. 1371, 74th Cong., 1st Sess. 6 (1935))).

41. See JOHN E. HIGGINS, JR., *THE DEVELOPING LABOR LAW* 94 (5th ed. 2006) (explaining that the Board under the Wagner Act took the position that any partisan employer involvement would inevitably interfere with the section 7 rights of employees).

42. 70 N.L.R.B. 802 (1946).

43. See *id.* at 804–05.

44. *Id.* at 805 (emphasis in original) (footnote omitted) (quoting Harlan Fuel Company, 8 N.L.R.B. 25, 32 (1938)).

45. *Id.*

46. Labor Management Relations (Taft-Hartley) Act, 29 U.S.C. §§ 141–144, 167, 172–187 (2006).

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, *if such expression contains no threat of reprisal or force or promise of benefit.*<sup>47</sup>

As a result of this language, and somewhat controversially, the Board reversed its *Clark Brothers* approach to captive audience speech and specifically found that the holding of such meetings did not violate section 8(a)(1).<sup>48</sup> In coming to this holding, the Board merely stated that, “the language of section 8(c) of the amended Act, and its legislative history, make it clear that the doctrine of the *Clark Bros.* case no longer exists as a basis for finding unfair labor practices [based on captive audience speeches].”<sup>49</sup> Former NLRB Chairman William Gould has remarked that the shift in doctrine was done “reluctant[ly].”<sup>50</sup> Yet, the Board has consistently, and as recently as 1998, refused to revisit its captive audience speech doctrine.<sup>51</sup>

47. *Id.* at § 158(c) (emphasis added).

48. *Babcock & Wilcox*, 77 N.L.R.B. 577, 578 (1948).

49. *Id.* For a while after *Babcock & Wilcox*, unions were able to make similar speeches in reply. *See Bonwit Teller, Inc.*, 96 N.L.R.B. 608, 611 (1951). However, even this equal access rule was short-lived, and the Board reversed its course in *Livingston Shirt Corp.*, 107 N.L.R.B. 400, 406–09 (1953).

50. *See Gould, supra* note 5, at 484 n.111.

51. *See id.* (citing *Beverly Enterprises-Hawaii, Inc.*, 326 N.L.R.B. 335, 361 (1998) (Gould, Chairman, dissenting); *see also Beverly Enterprises-Hawaii*, 326 N.L.R.B. at 352 (Brame, Member, concurring) (“[T]he legislative history is explicit that, with the insertion of Section 8(c) in the law, Congress overruled the Board’s *Clark Bros. Co.* decision, in which the Board had banned employers from making noncoercive captive audience speeches.”). Member Brame, concurring in *Beverly Enterprises-Hawaii*, stated the applicable precedent concerning employer speech and section 8(c) this way:

1. An employer has the right to express its views about labor issues and unionization in noncoercive terms; put another way, Congress may not restrict an employer’s noncoercive speech. *NLRB v. Virginia Electric & Power Co.*, 314 U.S. 469, 477 (1941); *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969); Section 8(c) of the Act; First Amendment, U.S. Constitution.

2. [The employer’s] free speech right embraces the right to address employees in mandatory meetings held on company time without affording equal time to the union or to prounion employees. *Livingston Shirt Corp.*, 107 NLRB 400 (1953); *NLRB v. F. W. Woolworth Co.*, 214 F.2d 78 (6th Cir. 1954); *May Co. v. NLRB*, 316 F.2d 797 (6th Cir. 1963); *Boaz Spinning Co. v. NLRB*, 395 F.2d 512 (5th Cir. 1968); *Guardian Industries Corp. v. NLRB*, 49 F.3d 317, 319 (7th Cir. 1995); *see also* Section 8(c) of the Act and its legislative history, S.Rep. No. 105, 80th Cong., 1st sess. 23–24 (1947); 13 NLRB Ann. Rep. 49 (1948).

*Id.* at 350 (formatting in original). I believe that pro-employer Board members and practitioners continue to see the applicable precedent and law in this matter. It is the second point that, for the reasons discussed below, I believe the Obama Board is ready to revisit.

*B. The Threat and Benefit Clause Under Section 8(c)*

It would be another fifteen years after Taft-Hartley and the promulgation of section 8(c) before the U.S. Supreme Court gave its views about the meaning of the threat and benefit language and recognized employees' heightened vulnerability to coercion in the context of employer promises during organizing campaigns. In the 1964 case of *NLRB v. Exchange Parts Co.*, the Boilermakers union told the company that it had majority support from the proposed bargaining unit, but the union ended up filing a petition for an election and an election was held.<sup>52</sup>

Two weeks before the election, the company sent a letter in an envelope detailing all the benefits it had granted to employees since 1949, and further stated that "[t]he Union can't put any of those things in your envelope—*only the Company can do that.*"<sup>53</sup> The company also created "a new system for computing overtime during holiday weeks which had the effect of increasing wages for those weeks, and a new vacation schedule which enabled employees to extend their vacations."<sup>54</sup> This short time before the election was the first time that the employer announced these changes in policies to benefit employees.<sup>55</sup> Subsequently, the union ended up losing the election and filed Unfair Labor Practice (ULP) charges.<sup>56</sup> The question presented to the U.S. Supreme Court concerned the scope of the Act's limits on an employer's ability to confer economic benefits on its employees shortly before a representation election.<sup>57</sup>

The Court reversed the Fifth Circuit.<sup>58</sup> It reinstated the Board's order that the employer's conduct had coercively interfered with the employees' organizational rights under section 7 of the Act, even though the increased wages and vacation benefits were granted unconditionally and on a permanent basis.<sup>59</sup> Instead, it agreed with the Board that the employer conferred these new benefits to induce employees to vote against the union.<sup>60</sup> The Court observed that section 8(a)(1) prohibits "conduct immediately favorable to employees which is undertaken with the express purpose of impinging upon their freedom of choice for or against unionization and is reasonably calculated to have that effect."<sup>61</sup> The famous and vivid phrase from the case further explained that "[t]he danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove."<sup>62</sup>

Five years later, in the 1969 decision of *NLRB v. Gissel Packing Co.*, the Court considered the contours of a nonprotected employer speech under the "threats"

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52. 375 U.S. 405, 406 (1964).

53. *Id.* at 407 (emphasis in original) (internal quotation marks omitted).

54. *Id.*

55. *Id.* ("Although Exchange Parts asserts that the policy behind the latter two benefits was established earlier, it is clear that the letter of March 4 was the first general announcement of the changes to the employees.")

56. *Id.*

57. *Id.* at 405–06.

58. *Id.* at 405.

59. *Id.* at 409–10.

60. *Id.*

61. *Id.* at 409.

62. *Id.*

clause in section 8(c).<sup>63</sup> *Gissel* involved four consolidated cases raising common issues of alleged employer coercion during organizing campaigns.<sup>64</sup> In one case, the Teamsters began to organize at two Sinclair-owned companies by obtaining authorization cards from eleven of the fourteen employees they sought to represent.<sup>65</sup> The Teamsters demanded recognition based on having received authorization cards from the majority of bargaining unit members, but Sinclair refused to grant recognition.<sup>66</sup> The Teamsters then petitioned for an election.<sup>67</sup>

During the ensuing election campaign, Sinclair made references to a previous strike that resulted in the employees throwing out the union.<sup>68</sup> The president of Sinclair also emphasized that election of the union could put Sinclair out of business, that the company was “on ‘thin ice’ financially,” and that reemployment would be difficult because of the employees’ ages and skills.<sup>69</sup> Lastly, the president of Sinclair sent out threatening letters, which spoke ill of the Teamsters.<sup>70</sup> After the union ended up losing the election by a vote of seven to six, it filed ULP charges and objections to set aside the election.<sup>71</sup>

The Board held that Sinclair’s communications were reasonably understood to *threaten* loss of jobs if the union was elected, and therefore found a violation of section 8(a)(1).<sup>72</sup> The Board also ordered the election to be set aside.<sup>73</sup> The U.S. Supreme Court enforced the Board’s findings in *Gissel* and held that “an employer is free to communicate to [its] employees any of [its] general views about . . . a particular union, so long as the communications do not contain a ‘threat of reprisal or force or promise of benefit.’”<sup>74</sup> Specifically, the Court observed that “an employer is free only to tell ‘what [it] reasonably believes will be the likely economic consequences of unionization that are outside [its] control,’ and not ‘threats of economic reprisal to be taken solely on [its] own volition.’”<sup>75</sup>

In short, the Court made a distinction between an employer “prediction” and an employer “threat.” An employer may predict the likely effects it expects unionization to have on the company. The prediction, however, “must be carefully phrased on the basis of objective fact to convey an employer’s belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization.”<sup>76</sup>

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63. See 395 U.S. 575 (1969).

64. *Id.*

65. *Id.* at 587.

66. See *id.*

67. *Id.*

68. See *id.* at 587–88.

69. *Id.*

70. *Id.* at 588.

71. *Id.* at 589.

72. See *id.* at 589, 619–20.

73. *Id.* at 589.

74. *Id.* at 618.

75. *Id.* at 619 (quoting *NLRB v. River Togs, Inc.*, 382 F.2d 198, 202 (2d Cir. 1967)).

76. *Id.* at 618.

If there is any implication that an employer may or may not take action solely on [its] own initiative for reasons unrelated to economic necessities and known only to [the employer], the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment.<sup>77</sup>

Thus, an employer must avoid conscious overstatements that will likely mislead its employees.<sup>78</sup>

So at least since 1969, the Supreme Court has recognized that both threats of reprisal and promises of benefit by the employer during a representation election campaign coercively interfere with employees' freedom to choose if they wish to unionize. Yet, the Board has chosen not to revisit its *Babcock & Wilcox* decision finding that employer captive audience speeches do not constitute coercive speech.<sup>79</sup> This Article takes the view that, given the current membership of the Obama Board, a good chance exists that the Obama Board will re-examine how *Exchange Parts* and *Gissel* impact the future treatment by the Board of employer captive audience speech during union organizational campaigns.<sup>80</sup>

So, why has the Board concluded that captive audience speeches are not inherently coercive, and thus subject to the threat and benefit language in the last clause of section 8(c)? Do that section and Supreme Court precedent not clearly state that employer free speech rights in the labor context are not absolute?<sup>81</sup> Section 8(c) expressly permits employers to state their opinions on unionization in a noncoercive fashion. The NLRA, however, does not permit employers to coercively force employees to attend non-work related meetings, and the statute does not grant employers the right to coercively force employees to attend meetings and listen to those views as unwilling participants.<sup>82</sup> Clearly, one could argue, and

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77. *Id.*

78. *Id.* at 620.

79. See notes 50–51 and accompanying text.

80. The Board has only revisited the legality of employer captive audience meetings on a few occasions. For instance, in *Litton Systems, Inc.*, the Board merely reiterated the same conclusory language found in *Babcock & Wilcox*: “[T]he Board has held as long ago as 1948, that such a finding [of a ULP in a captive audience context] is barred by ‘the language of Section 8(c) of the amended Act and its legislative history.’” 173 N.L.R.B. 1024, 1031 (1968) (quoting *Babcock & Wilcox Co.*, 77 N.L.R.B. 577, 578 (1948)); see also *F.W. Woolworth Co.*, 251 N.L.R.B. 1111, 1113 (1980) (permitting an employer to exclude pro-union employee’s from asking questions during captive audience meetings). It is interesting to note that although *Exchange Parts* had been decided when the Board decided *Litton Systems*, the U.S. Supreme Court had not yet weighed in on the meaning of coercive threats by employers as it later would in the 1969 *Gissel Packing* case.

81. See *Gissel*, 395 U.S. at 617 (“Any assessment of the precise scope of employer expression, of course, must be made in the context of its labor relations setting. Thus, an employer’s rights cannot outweigh the equal rights of the employees to associate freely, as those rights are embodied in § 7 and protected by § 8(a)(1) and the proviso to § 8(c).”).

82. See Alan Story, *Employer Speech, Union Representation Elections, and the First Amendment*, 16 BERKELEY J. EMP. & LAB. L. 356, 405 (1995) (“[T]he NLRB and the courts overlook and/or permit many election statements and interventions by employers which are,

other commentators already have,<sup>83</sup> that the exceptions to section 8(c) for “threats of reprisal or force and promise of benefit” come into play and serve as another basis for limiting section 8(c) protections for employers who engage in captive audience speech.<sup>84</sup>

There may not be a good explanation as to why *Gissel* has not yet been specifically applied to the captive audience setting and why the Board continues to adhere to the idea that Taft-Hartley unequivocally overturned the *Clark Bros.* doctrine.<sup>85</sup> As I have analyzed in some detail in an earlier article, the legislative history of Taft-Hartley and the language of section 8(c) simply do not support such an unequivocal conclusion.<sup>86</sup> In that previous article, I wrote:

As far as the phantom “legislative history” to which *Babcock & Wilcox* refers in deciding that Taft-Hartley permits captive audience meetings, one can make the educated guess that the Board was obliquely referring to statements made in the Senate Report during the Congressional debates over Taft-Hartley. Apparently, some legislators believed that *Clark Bros.* inappropriately “restricted” or “limited” the Supreme Court’s decision in *Thomas v. Collins*, which held, among other things, that employers had the same speech rights as unions to talk about labor issues. Additionally, although the Senate Report on the Taft-Hartley Act specifically disapproved of *Clark Bros.*, it only stated that the case stood for the proposition that employer speech was unlawful merely because it took place “in the plant on working time.” It appears though that the majority in *Clark Bros.* answered those same concerns when it responded to an argument by the dissenting Board member in *Babcock & Wilcox*: “We simply do not share his view that there is anything in the reasoning or language of the recent Supreme Court and Circuit Court decisions he cites [including *Thomas v. Collins*] which requires the Board to treat this particular respondent as though it had done no more than make an appeal to the reasoning faculties of its employees.” In other words, the *Clark Bros.* majority

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in fact, coercive and which have a tendency, as a result, to chill the exercise of employee rights of self-organization.”).

83. Story believes that captive audience speech is a paradigmatic example of such unrecognized coercive interventions. *See id.* at 422 (“[T]he very exercise of an employer’s legally-sanctioned right to hold such captive audience meetings, to prevent the union from holding them, to forbid the asking of questions at such meetings, and to discharge employees who ask ‘loaded questions’ is a manifestation of coercive power and domination.” (footnote omitted)).

84. *See* Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 MINN. L. REV. 495, 559 (1993) (“Although the Board ratified captive audience speeches on account of the free speech proviso, such conduct involves an element of coercion easily distinguishable from expression. The captive audience speech is diametrically opposed to the ‘free and open discussion’ the Board professes to promote.”). Of course, Member Becker is now a member of the Obama Board.

85. *See supra* note 51 and accompanying text (setting forth the common management reasoning underlying its unwillingness to regulate employer captive audience speeches in the labor context).

86. *See* Secunda, *supra* note 7, at 398–99 (describing in detail the threadbare nature of NLRB precedent in the captive audience speech area).

was responding to the coercive aspects of the captive audience meetings, not its speech elements.

Of course, it goes without saying that there is a complete absence in the text of Section 8(c) itself of any language that could be read to mandate that the Board post-Taft Hartley overturn *Clark Bros.* Indeed, to the extent that the language of Section 8(c) is unambiguous in protecting employer speech in the labor context, canons of construction would suggest that it is inappropriate to look for further meaning from the statute in legislative pronouncements. In this regard, Justice Scalia has maintained: “We have repeatedly held that such reliance on [legislative history] is impermissible where, as here, the statutory language is unambiguous.” On the other hand, to the extent that the language of Section 8(c) could be deemed ambiguous, other contemporaneous legislative debates cast significant doubt on whether Section 8(c) was ever supposed to address the permissibility of captive audience meetings. In short, conclusory assertions aside concerning inapplicable provisions and mysterious legislative history, the Board appears to have remained free to uphold *Clark Bros.* even after the enactment of Section 8(c).<sup>87</sup>

In the absence of more precise legislative history that Congress meant to leave employer captive audience speeches regulated, overturning *Babcock & Wilcox* would have the salubrious effect of “provid[ing] greater protection for employee free choice.”<sup>88</sup>

The next two Parts consider how the Board might modify its captive audience doctrine if such a case comes to be decided. Part II considers a “laboratory conditions” election case, while Part III explores a potential unfair labor practice case under section 8(a)(1).

## II. THE LABORATORY CONDITIONS APPROACH: EXTENDING *PEERLESS PLYWOOD*

In the 1948 case of *General Shoe Corp.*, shortly after the enactment of Taft-Hartley, the Board held that section 8(c) only applies in ULP cases, not election cases.<sup>89</sup> As a result, the Board can set aside and order new elections for communication or conduct that does not constitute a ULP (like coercive speech), but still makes an election unfair because the conduct interferes with an employee’s ability to decide freely if he or she desires union representation.

Indeed, the U.S. Supreme Court and Board have repeatedly observed the centrality of employee free choice under the NLRA. As recently, as *Chamber of Commerce v. Brown*, both the U.S. Supreme Court<sup>90</sup> and the Board<sup>91</sup> have

87. *Id.* at 395–97 (alterations in original) (footnotes omitted).

88. *See Dana Corp.*, 351 N.L.R.B. 434, 438 (2007) (using the same reasoning to overturn the forty-year-old voluntary recognition bar doctrine).

89. 77 N.L.R.B. 124, 127 n.10 (1948).

90. *See, e.g., Auciello Iron Works v. NLRB*, 517 U.S. 781, 790 (1996) (discussing the NLRA’s “command to respect ‘the free choice of employees’” to select bargaining representatives (quoting *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27,

repeatedly emphasized the NLRA's policy in favor of employee free choice. In *Chamber of Commerce v. Brown*,<sup>92</sup> the Court addressed whether a California statute was preempted by the NLRA where the statute prohibited employers who receive state funds from using those funds to promote or deter organization.<sup>93</sup> In the process of holding that the statute was preempted by the NLRA,<sup>94</sup> Justice Stevens reaffirmed that the Taft-Hartley Act demonstrated Congressional intent to favor representation elections because employee free choice can be thereby assured.<sup>95</sup>

To determine if employees are being permitted to exercise free choice when voting in favor of or against union representation, the Board created in *General Shoe Corp.* the "laboratory conditions" test:

In election proceedings, it is the Board's function 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. It is our duty to establish those conditions; it is also our duty to determine whether they have been fulfilled. When, in the rare extreme case, the standard drops too low, because of our fault or that of others, the requisite laboratory conditions are not present and the experiment must be conducted over again.<sup>96</sup>

In short, *General Shoe* held that communications during union campaigns do not constitute an unfair labor practice. Rather, because the employer had interfered with employee free choice, the Board ordered that the election be rerun.

Shortly thereafter, the Board applied the *General Shoe* doctrine to captive audience speeches. Under *Peerless Plywood*, neither employers nor unions may make captive meeting speeches to massed groups of employees within twenty-four hours of an election.<sup>97</sup> In that case, the Board stated that it was "institut[ing] [the

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38 (1987)); *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 607-08 (1969) (discussing the Board's obligation to ensure employee free choice in the use of authorization cards); *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964) (holding that section 8(a)(1) prohibits employer conduct that inhibits employees freedom of choice); *Garment Workers' Union v. NLRB*, 366 U.S. 731, 737 (1961) ("[T]he Wagner Act guarantees employees' freedom of choice and majority rule."); *Brooks v. NLRB*, 348 U.S. 96, 99-100 (1954) (observing that secret ballot union representation elections safeguard employee free choice).

91. See, e.g., *Dana Corp.*, 351 N.L.R.B. 434, 441 (2007) ("[Employee] free choice is, after all, the fundamental value protected by the Act."); *Madison Square Garden Ct., LLC*, 350 N.L.R.B. 117, 117, 119 (2007) (setting aside the representation election because a supervisor's conduct coerced and interfered with employee free choice); *Electromation, Inc.*, 309 N.L.R.B. 990, 993 (1992) (discussing the Wagner Act's ban on employer dominated labor organizations as furthering Congress' goal of promoting employee free choice when selecting a labor organization); *Midland Nat'l Life Ins.*, 263 N.L.R.B. 127, 133 (1982) (recognizing that deceptive practices that interfere with employee free choice are grounds to set an election aside).

92. 554 U.S. 60 (2008).

93. *Id.*

94. *Id.* at 66.

95. See *id.* at 74 ("The NLRB has policed a narrow zone of speech to ensure free and fair elections under the aegis of § 9 of the NLRA . . .").

96. 77 N.L.R.B. at 127 (footnote omitted).

97. 107 N.L.R.B. 427, 429 (1953). See also *Livingston Shirt Corp.*, 107 N.L.R.B. 400,



twenty-four-hour] rule pursuant to [its] statutory authority and obligation to conduct elections in circumstances and under conditions which will insure employees a free and untrammelled choice.”<sup>98</sup>

After *Peerless Plywood*, objectionable employer conduct was extended to apply to additional captive speech situations. For example, two years after *Peerless Plywood*, in *Economic Machinery Co.*,<sup>99</sup> the Board held that “the technique of calling the employees into the Employer’s office individually” is itself “conduct calculated to interfere with . . . free choice . . . regardless of the noncoercive tenor of an employer’s actual remarks.”<sup>100</sup> So, to the extent that the captive audience speech involves a one-on-one conversation between a supervisor and an employee concerning the union, Board law appears to favor finding a violation of the election’s laboratory conditions.

But going even further than that, the Board expanded its doctrine on captive audience speeches in the laboratory conditions context where the employer sought to meet with small groups of employees on its terms and in its territory. For instance, in *NVF Co.*, the Board found employer conduct objectionable “where it can be said on reasonable grounds that, because of the small size of the groups interviewed, the locus of the interview, the position of the interviewer in the employer’s hierarchy, and the tenor of the speaker’s remarks” the employee is no longer able to freely express his or her wishes concerning union representation.<sup>101</sup>

Now, it is true that in the 1958 case of *Mead-Atlanta Paper Co.*,<sup>102</sup> the Board held that large group meetings, like the modern captive audience meetings of today, do not have the same coercive influence as one-on-one meetings or the smaller meetings described in *NVF*. According to the Board in *Mead-Atlanta*, this is because “[w]hen employees are gathered . . . in open areas of the plant . . . there results free and open discussion with both management and employees enjoying the confidences and assurances which are normal aspects of collective and group activities.”<sup>103</sup> Of course, the last fifty years of experience have been filled with cases in which employees are not permitted to engage in a “free and open discussion” with their employer about unionization and, in fact, may be terminated from employment if they seek to speak or wish to leave the meeting.<sup>104</sup> Surely, the

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408 (1953) (“The rule laid down in *Peerless Plywood* is a rule of conduct governing Board elections and, in our opinion, constitutes a narrow and reasonable limitation designed to facilitate the holding of free elections in the atmosphere of relative tranquility conducive to a sober choice of representative.”).

98. *Peerless Plywood*, 107 N.L.R.B. at 429.

99. 111 N.L.R.B. 947 (1955).

100. *Id.* at 948.

101. 210 N.L.R.B. 663, 664 (1974); *see also* *Flex Products, Inc.*, 280 N.L.R.B. 1117, 1118 (1986).

102. 120 N.L.R.B. 832 (1958).

103. *Id.* at 833.

104. *See, e.g.*, *NLRB v. Prescott Indus. Prod. Co.*, 500 F.2d 6, 8, 10–11 (8th Cir. 1974) (refusing to enforce an NLRB decision holding that disallowing employee questioning during a captive audience meeting constituted an unfair labor practice); *Litton Sys., Inc.*, 173 N.L.R.B. 1024, 1030 (1968) (stating that an employee has no statutorily protected right to leave a mandatory anti-union captive audience meeting); *Hicks Ponder Co.*, 168 N.L.R.B. 806, 811–12, 815 (1967) (upholding an employer’s right to eject vocal pro-union workers who speak out once captive audience meetings have begun).

Board should be free now to rely upon fifty years of industrial experience post-*Mead-Atlanta* to conclude that the Board was previously wrong in finding that larger meetings would foster free and open discussion. Indeed, it is well within the discretion of the Board to find “as a matter of industrial experience” that the policies of the Act are not effectuated by allowing unfettered employer captive audience speeches to large groups of employees in the critical period before the election.<sup>105</sup>

More recently, current Board doctrine treats communications by pro-union supervisors as similarly coercive as that speech made by anti-union supervisors. The Board found in *Harborside Health Care, Inc.* that such speech is capable of leading to a *General Shoe* laboratory conditions test violation.<sup>106</sup> Although the Board made clear that supervisor pro-union speech is not objectionable in and of itself,<sup>107</sup> the 3-2 Republican majority reaffirmed long-held Board precedent that pro-union supervisory conduct may be grounds for setting aside an election without there being an explicit threat of reprisal or promise of benefit.<sup>108</sup> More specifically, the Board adopted a rule that supervisory solicitation of union authorization cards is inherently coercive absent mitigating circumstances.<sup>109</sup> More recent holdings suggesting that management agents have more rights to coerce employees in this regard are simply wrong.<sup>110</sup>

As far as what the Obama Board might do if an election case with employer captive audience speeches arises, the Board may move to set aside such an election if the captive audience meeting occurs close in time to the actual election. The proximity of the employer speech to the election is an important consideration, since if the union has an effective chance to respond to the employer’s views on unionization, the coercive nature of the employer speech may be minimized. Thus, it is possible that the Board will seek not to completely ban such captive audience speeches as inherently coercive. Rather, the Board may expand the *Peerless Plywood* period to reflect modern-day realities as far as how likely it will be that the union can effectively respond, outside of the workplace, to the employer’s captive audience speech.

One possibility as far as extending the no-captive-speech time period would be an approach based on the realities of the fast-paced, technologically driven workplaces of the twenty-first century, in which employees are inundated with vast amounts of workplace information. In such modern-day workplaces, a different standard may be necessary to assure that the union can respond to the employer’s

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105. *See* *NLRB v. United Steelworkers*, 357 U.S. 357, 363 (1958).

106. *See* *Harborside Healthcare, Inc.*, 343 N.L.R.B. 906, 916 (2004) (reversing precedent and liberalizing standard for finding pro-union supervisory conduct objectionable in context of representation elections).

107. *Id.* at 911.

108. *Id.* at 909.

109. *Id.* at 911.

110. *See, e.g.*, *Aladdin Gaming, L.L.C.*, 345 N.L.R.B. 585 (2005) (finding lawful a management official’s interruption of off-duty employees’ conversation about signing union authorization cards); *Werthan Packaging, Inc.*, 345 N.L.R.B. 343 (2005) (finding no objectionable election conduct where manager interrogated employee and stated that voting for union was not in best interests of employee and her family).

speech to the employee in a meaningful way. A larger buffer zone between captive audience speeches and the holding of an election would also give employees the necessary time to digest the information provided by both the employer and employee. A shorter buffer zone between captive audience meetings and the election would tip the scales unfairly in the employer's favor.

The need for a longer time without captive audience speeches before election is also supported by the observation that many employees live far away from work. Board law is clear that unions, unlike employers, are generally not permitted to give speeches to employees at the workplace.<sup>111</sup> Even if the union does possess a hall or meeting space, an employer's right to give speeches at the workplace is a tremendous advantage in the modern-day workplace, where it is difficult for unions to gather far-flung employees after work.<sup>112</sup> One way to provide the union a meaningful time to reply to employer captive audience speech is to not permit any captive audience speeches a week or two before the election. To paraphrase *Livingston Shirt Corp.*, a Board case decided the same year as *Peerless Plywood*, such an extension would still "constitute[] a narrow and reasonable limitation designed to facilitate the holding of free elections in the atmosphere of relative tranquility conducive to a sober choice of representative."<sup>113</sup>

Moreover, for the reasons discussed in Members Liebman and Walsh's dissent in *Guard Publishing Co.*,<sup>114</sup> I think the Board is likely to view new workplace realities as requiring additional protections to allow employees to exercise free choice. In *Guard Publishing Co.*, the Board considered whether the employer violated section 8(a)(1) by maintaining a policy prohibiting the use of e-mail for all "non-job-related solicitations."<sup>115</sup> The Board held, in a 3-2 decision, that "the . . . employees have no statutory right to use the [employer's] e-mail system for Section 7 purposes," and, therefore, the policy did not violate section 8(a)(1).<sup>116</sup> The case came down to the Board majority's conclusion that "where the Board has addressed whether employees have the right to use other types of employer-owned property—such as bulletin boards, telephones, and televisions—for Section 7 communications, the Board has consistently held that there is 'no statutory right . . . to use an employer's equipment or media,' as long as the restrictions are nondiscriminatory."<sup>117</sup>

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111. *See* *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 538 (1992); *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956).

112. *See* *Story*, *supra* note 82, at 380 ("To equate heavy-handed union tactics of pressuring an employee to sign a union card with the range of tactics available to employers (e.g., firing, suspension, failure to promote, favoritism in work assignments, and so on) or to equate the 'rough and tumble' of some union halls and a union shop contract with hierarchical workplace relationships is to operate from a truly impoverished understanding of employer coercion and from a false assumption that unions and employer are equivalent . . .").

113. *Livingston Shirt Corp.*, 107 N.L.R.B. 400, 408 (1953).

114. 351 N.L.R.B. 1110, 1121–32 (2007).

115. *Id.* at 1111.

116. *Id.* at 1110.

117. *Id.* at 1114 (quoting *Mid-Mountain Foods* 332 N.L.R.B. 229, 230 (2000)).

Members Liebman and Walsh observed in the *Guard Publishing* dissent that e-mail has revolutionized communication within the workplace.<sup>118</sup> In a theme that Chairman Liebman later discussed in more detail in an academic article she penned, she and Member Walsh observed in the dissent to *Guard Publishing Co.* that e-mail has revolutionized business and personal communications. Liebman and Walsh argued that, by failing to carve out an exception for e-mail to settled principles regarding use of employer property, the Board was failing to adapt the Act to the changing patterns of industrial life and had thus become the “Rip Van Winkle of administrative agencies.”<sup>119</sup> Although captive audience speeches do not generally involve the use of e-mail as in *Guard Publishing Co.*, Democratic members of the Board have shown a willingness to change existing rules to reflect the changing realities of the new workplace. They assert that “[n]ational labor policy must be responsive to the enormous technological changes that are taking place in our society,”<sup>120</sup> and that there exists a “responsibility to adapt the Act to changing patterns of industrial life.”<sup>121</sup> Other changing patterns of industrial life include the increasing mobility of the workforce and the fact that employees tend not to remain for long periods of times in the same facility or with the same employer, traveling to many different locations in short periods of time.<sup>122</sup>

All of this suggests that a Democratic Board majority may decide to extend the *Peerless Plywood* period to make it less likely that employer captive audience speeches close to the election would undermine the laboratory conditions of the election. The longer the *Peerless Plywood* period, the better the chance that the union will have adequate time to craft a meaningful reply to the employer that most of the employees will be likely to hear.<sup>123</sup> The Board should be able to make this

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118. *Id.* at 1121. Chairman Liebman later wrote about this theme in more detail:

In this historical context, American labor law, enacted when the prototypical workplace was the factory, and the rotary telephone was “the last word in desktop technology,” increasingly appears out of sync with changing workplace realities. Yet the Board itself has made little sustained effort to adjust its legal doctrines to preserve worker protections in a ruthlessly competitive economy. In short, labor law policymakers and enforcers have done too little, too late.

Wilma B. Liebman, *Decline and Disenchantment: Reflections on the Aging of the National Labor Relations Board*, 28 BERKELEY J. EMP. & LAB. L. 569, 576 (2007) (footnotes omitted).

119. *Guard Publishing Co.*, 351 N.L.R.B. at 1121 (Liebman and Walsh, Members, dissenting) (quoting *NLRB v. Thill, Inc.*, 980 F.2d 1137, 1142 (7th Cir. 1992)).

120. *Id.*

121. *Id.* at 1125 (quoting *NLRB v. J. Weingarten*, 420 U.S. 251, 266 (1975)).

122. See Liebman, *supra* note 118, at 573–74.

123. Alternatively, the Board could reduce the incidence of captive audience speeches by reducing the time period between the filing of the election petition and the holding of the election. As of the writing of this Article, the Board has just introduced proposed rules that would shorten the campaign period. See Steven Greenhouse, *N.L.R.B. Rules Would Streamline Unionizing*, N.Y. TIMES, June 22, 2011, at B3, available at <http://www.nytimes.com/2011/06/22/business/22labor.html> (“In a move that pleased labor unions, the National Labor Relations Board proposed new rules on Tuesday to speed up unionization elections.”).

change consistent with its role of modifying Board doctrine to address the complexities surrounding modern industrial relations.<sup>124</sup>

### III. THE ULP APPROACH: REVITALIZING THE THREATS AND BENEFITS CLAUSE OF SECTION 8(C)

Of course, a case may not come to the Board as an election objection based on the laboratory conditions approach, but it may come as a more traditional ULP based on coercive employer communications.<sup>125</sup> In this circumstance, the Board would need to reexamine<sup>126</sup> its sixty-year-old *Babcock & Wilcox Co.* decision, which held captive-audience speeches to be permissible,<sup>127</sup> in light of the more recent Supreme Court decisions in *Exchange Parts* and *Gissel*.<sup>128</sup>

Actually, even before *Exchange Parts* and *Gissel*, evidence was available in 1948, when the Board issued *Babcock & Wilcox*, that a more searching inquiry beyond Taft-Hartley should have been completed, including whether the speech during a captive audience meeting was coercive (as far as containing an explicit threat or promise) and, therefore, not protected under section 8(c).

For instance, the U.S. Supreme Court, in the 1945 case of *Thomas v. Collins*,<sup>129</sup> could not have been clearer about the limits of employer free speech. Justice Rutledge, writing for the majority in *Thomas*, stated with regard to the right to persuade by speech: “When to this persuasion other things are added which bring about coercion, or give it that character, the limit of the [employer’s First Amendment] right has been passed.”<sup>130</sup> Justice Douglas concurred, stating: “[O]nce [a person] uses the economic power which he has over other men and their jobs to influence their action, he is doing more than exercising the freedom of speech protected by the First Amendment. That is true whether he is an employer or an employee.”<sup>131</sup>

124. See *Secunda*, *supra* note 17, at 56 (“By placing the enforcement mechanism of the Act within the NLRB, Congress expected that experienced officials with an adequate appreciation of the complexities surrounding industrial relations would make the decisions that would shape national labor policy.” (footnote omitted)).

125. I leave to my previous articles the observation that speech alone is not what is solely objectionable here, but the conduct of forcing employees to listen at pain of being fired for not attending the meeting or not complying with the meeting’s ground rules. See generally *Secunda*, *supra* note 6; *Secunda*, *supra* note 7.

126. See *supra* note 7, at 406 (“Board precedent is not sacrosanct, especially where the initial Board decision is not supported by a modicum of reasoned elaboration.”).

127. *Babcock & Wilcox Co.*, 77 N.L.R.B. 577, 578 (1948).

128. *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964) (“The danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove.”); *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 619 (1969) (“[A]n employer is free only to tell ‘what he reasonably believes will be the likely economic consequences of unionization that are outside his control’ and not ‘threats of economic reprisal to be taken solely on his own volition.’” (quoting *NLRB v. River Togs, Inc.*, 382 F.2d 198, 202 (2d Cir. 1967))).

129. 323 U.S. 516 (1945).

130. *Id.* at 537–38 (footnote omitted).

131. *Id.* at 543–44 (Douglas, J., concurring).

Additionally, the Trial Examiner in the *Babcock & Wilcox* case discussed the coercive nature of such captive audience speeches. Specifically, in finding a section 8(a)(1) violation, he observed:

Standing individually, [the employer's] statements in his speeches to the employees . . . though openly anti-Union, contain no language that on the surface exceeds the bounds of free speech. If they constitute a violation of the Act, it is because coercion is to be imputed to them from the circumstances under which they were uttered and which affect their meaning.<sup>132</sup>

This insight is strikingly similar to the one made in *Gissel* some twenty years later when the Court wrote with regard to threatening, coercive speech: “[A]ny balancing of those rights must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear.”<sup>133</sup>

Thus, the Trial Examiner based his decision of illegality on the contextual and coercive nature of the captive audience speech. The Trial Examiner found that the employer exploited its ability to control employees during working hours by stressing its superior economic position.<sup>134</sup>

Under an approach more consistent with *Gissel* and *Exchange Parts*, the Board would more closely scrutinize challenges to employer speeches made in a captive audience setting to determine the coercive nature of the speech under the specific circumstances of the case. Additionally, it appears that this Board may be more willing than past Boards to pay closer attention to the realities on the ground as opposed to more formal concepts of free choice.<sup>135</sup> Such an approach would recognize how the power disparities between the parties<sup>136</sup> and the lack of equal

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132. *Babcock & Wilcox*, 77 N.L.R.B. at 595.

133. *Gissel*, 395 U.S. at 617.

134. *Babcock & Wilcox*, 77 N.L.R.B. at 578 (“With respect to the ‘compulsory audience’ aspect of the speeches, the Trial Examiner concluded from all the evidence that the notices of the meetings as well as the oral instructions given to the employees concerning these meetings removed the element of choice from the employees and, in effect, compelled them to attend in violation of the Act.”).

135. See Liebman, *supra* note 118, at 580 (“Increasingly, the Board has adopted a formalistic approach to interpreting the law, turning away from the real world and the challenges it poses for labor policy. This approach threatens to result in a loss of confidence in the Board’s decisionmaking, not simply in terms of the results reached, but also in the way those results are reached.” (footnote omitted)).

136. See *Gissel*, 395 U.S. at 617 (“[A]ny balancing of [section 8(a)(1) and 8(c)] rights must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear.”); see also *NLRB v. United Steelworkers of America*, 357 U.S. 357, 368 (1958) (Warren, C.J., dissenting in part and concurring in part) (“Employees during working hours are the classic captive audience.”); Jack M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 423 (1990) (“Few audiences are

union access to the workplace make these employer speeches hypercoercive.<sup>137</sup> As such, the Board might be willing to apply a presumption of coercion if employees are subject to coercive ground rules during such meetings, like the inability to decide to leave the meeting if it becomes coercive or the inability to interact and question the employer's speakers.<sup>138</sup> Such a presumption would also be based on the proposition that such conditions on employer speech do not interfere with the right to engage in noncoercive speech under section 8(c). After all, rights to free speech do not carry with them the right to compel unwilling employees to listen.<sup>139</sup>

As an evidentiary presumption, the employer would still be given a chance to rebut that presumption by proving by a preponderance of the evidence that the captive audience tactic did not interfere with the section 7 organizational rights of employees. Here, I suggest that the Board could borrow from existing Board law in the area of employee polling to show that their captive audience speech did not devolve into an intimidating or coercive environment in violation of the Act.

In *NLRB v. Lorben Corp.*, a company's plant superintendent polled employees to see if they wished to be represented by a union.<sup>140</sup> Although the Second Circuit majority found that the employer speech was not intimidating or coercive on its face,<sup>141</sup> Judge Friendly wrote a persuasive opinion in dissent. There, he wrote that, when an employer sets into motion a formal tabulation, it is not much to ask that he provide some explanation and assure his employees of no reprisals for their truthful answers.<sup>142</sup>

A couple years later, the District of Columbia Circuit adopted Judge Friendly's approach to pre-election employee polling. In *Struksnes Construction Co.*,<sup>143</sup> the owner of a construction company personally solicited signatures of employees as to

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more captive than the average worker.”).

137. See *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956) (employer may prohibit non-employee union solicitation on its property unless the location of the plant is so remote that the union is unable to communicate with employees through its own reasonable efforts); see also *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 538–39 (1992) (holding that the *Babcock* inaccessibility exception is narrow and generally only applies to remote locations such as logging camps, mining camps, and mountain resort hotels).

138. The adoption of the employer coercion presumption would effectively overturn *Litton Systems, Inc.*, 173 N.L.R.B. 1024, 1030 (1968) (indicating that employee has no statutorily protected right to leave a mandatory anti-union captive audience meeting); *NLRB v. Prescott Indus. Products Co.*, 500 F.2d 6, 10–11 (8th Cir. 1974) (refusing to enforce an NLRB decision holding that disallowing employee questioning during a captive audience meeting constituted an unfair labor practice); and *Hicks Ponder Co.*, 168 N.L.R.B. 806, 815 (1967) (upholding an employer's right to eject vocal pro-union workers who speak out once captive audience meetings have begun).

139. See *Rowan v. U.S. Post Office Dep't*, 397 U.S. 728, 738 (1970) (“[N]o one has a right to press even ‘good’ ideas on an unwilling recipient.”); *Thomas v. Collins*, 323 U.S. 516, 537–38 (1945) (finding that employers may have a right to persuade their employees, but “[w]hen to this persuasion other things are added which bring about coercion, or give it that character, the limit of the [employer's First Amendment] right has been passed.” (footnote omitted)).

140. 345 F.2d 346, 347 (2d Cir. 1965).

141. *Id.*

142. *Id.* at 349 (Friendly, J., dissenting).

143. 165 N.L.R.B. 1062 (1967).

whether they wished to be represented by the union.<sup>144</sup> The employer did not explain his purposes or promise no reprisal against employees voting for the union. Reversing the Board, the court believed that coercion was inherent in such polling and therefore directed the NLRB to develop appropriate policy considerations and to outline minimal standards to govern polling on union preferences.

On remand, the Board adopted the following five prong standard:

Absent unusual circumstances, the polling of employees by an employer will be violative of Section 8(a)(1) of the Act unless the following safeguards are observed: (1) the purpose of the poll is to determine the truth of a union's claim of majority, (2) this purpose is communicated to the employees, (3) assurances against reprisal are given, (4) the employees are polled by secret ballot, and (5) the employer has not engaged in [ULPs] or otherwise created a coercive atmosphere.<sup>145</sup>

The *Struksnes* standards for polling could readily be modified to ensure that captive audience speeches do not become coercive. First, the purpose of the captive audience speech would have to be to noncoercively inform employees of their employers' view on unionism in accordance with section 8(c). Second, that purpose must be communicated to employees during the captive audience speech. Third, the employer must assure employees that by asking questions or otherwise indicating pro-union views during such meetings, that no reprisal will be taken against them. The fourth prong of the *Struksnes* test would not apply in the captive audience context as it specifically involves the nature of polling activity. Finally, under the fifth prong of the current *Struksnes* test (and what would be the fourth factor under the modified test), the employer would have to show that the captive audience speech did not create a coercive environment. This could be readily done by permitting employees to speak during the meeting and by allowing employees to leave during the meeting without reprisal if they believe the meeting has become coercive or threatening.

In all, given the potentially coercive nature of captive audience meetings, the employer should have to meet a fairly high standard to convince a factfinder that such a meeting is consistent with employees being able to freely choose to join a union. One approach the Obama Board may adopt is the modified *Struksnes* standard to ensure that employee section 7 rights in this context are preserved.

#### CONCLUSION

This Article maintains that the Obama Board is likely to revisit the captive audience speech doctrine for the first time in decades. Because of modern workplace realities, the use of captive audience speeches by employers has become highly effective in interfering with the free choice rights of employees to decide whether to be represented by a union. Employees now deserve an extra layer of protection from this coercive employer tactic. To be clear, these are *not* normal

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144. *Id.* at 1062.

145. *Id.* at 1063.



staff meetings—the kind where everyone in the office gets together once a week and discusses something like organizational philosophy. These are out-of-the-ordinary, all-hands-on-deck meetings that simply terrify many employees, who are not able to leave or speak and who face termination if they break the employer's draconian ground rules.

The response of the Obama Board will likely depend on whether the future case presents itself as primarily an election case or one that also involves an allegation of an unfair labor practice. If an election case, the Board is more likely to expand the *Peerless Plywood* doctrine to provide additional insulation for employee free choice in light of modern workplace realities involving fast-paced and technology-driven workplaces and more widely dispersed labor forces.

If a union raises the captive audience speech issue in a case alleging a section 8(a)(1) ULP, the Board might reexamine its precedent and consider when exactly employer captive audience speech tactics become coercive under *Exchange Parts* and *Gissel*. This approach would require a more searching inquiry into the content of the speech. It might also lead the Board to adopt a presumption of employer coercion where employees are unable to leave such a meeting or ask questions of the employer's representative. An employer would be able to rebut such a presumption under a modified form of the *Struksnes* polling standards that would make clear the purpose of such meetings and assure employees against retaliation for not adhering to the employer's anti-union message.