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Labor Law--Employer Free Speech--Use of the Gissel Guidelines in Determining Predictions or Threats

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constructed, the Oregon statute should serve as a guide to those interested citizens seeking an end to litter and mounting solid waste.

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Labor Law—Employer Free Speech—Use of the Gissel Guidelines in Determining Predictions or Threats

The first amendment of the United States Constitution and section 8(c) of the National Labor Relations Act[1] (hereinafter referred to as the NLRA or the Act) guarantee to employers and unions the right to freedom of speech. Questions concerning the extension of this right, however, provide a substantial field of litigation, both before the National Labor Relations Board (hereinafter referred to as the NLRB or the Board) and the federal courts.[2]

In 1941, the decision in *NLRB v. Virginia Electric & Power Co.*[3] recognized the employer's first amendment right of free speech. That ruling "abolished the assumption that the employer's position made his expressions in the organizing context coercive per se . . . ."[4] The Board could continue to regulate employer speech, but only as part of a totality of employer activity that "restrain[s] or coerce[s] his employees in their free choice . . . ."[5]

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[1] 29 U.S.C. § 158(c) (1958).

[2] Pokempner, *Employer Free Speech Under The National Labor Relations Act*, 25 MD. L. REV. 111 (1965).

[3] 314 U.S. 469 (1941).

[4] Note, *Restrictions On the Employer's Right Of Free Speech During Organizing Campaigns And Collective Bargaining*, 63 NW. U.L. REV. 40, 44 (1968). Initially, the Board required employers to maintain strict neutrality. "This approach was based on the belief that an employer's statements could not be divorced from his position of economic power over his employees, so that no matter how innocent the speech itself, the employees would be under pressure to follow the express desire of their employer." *Id.* at 43-44. "The Board reasoned that the choice of a bargaining representative was the workers' exclusive concern, in which the employer had no more interest than the employees would have in participating in the choice of the company's board of directors." A COX & D. BOK, LABOR LAW CASES AND MATERIALS 170 (7th ed. 1969).

[5] NLRB v. Virginia Elec. & Power Co., 314 U.S. 469, 477 (1941). The Court in remanding the case instructed the Board to examine the speech (and bulletin posted by the employer appealing to employees to bargain with the company directly) in the totality of the employer's conduct, taking account of the surrounding circumstances, such as discriminatory discharges, acts of hostility, and general employer opposition to unions, in determining whether such speech was "coercive." *Id.* at 479-80.

From the decision in *Virginia Electric* until the Taft-Hartley amendments of 1947, the Board continued to adhere in principle to the "totality of conduct" approach.[6] In 1947, Congress reaffirmed the employer's right to comment on union organizational efforts by adding subsection (c) to section 8 of the original Wagner Act:[7]

> 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 Act, if such expression contains no threat of reprisal or force or promise of benefits.[8]

In order to find an unfair labor practice based on an employer's expression, the Board must first find that such expression interfered with, restrained or coerced the employees in the exercise of their section 7 rights, including the right to form, join, or assist labor organizations. "[T]he crux of the matter is not what is or is not 'free speech' but rather what is a threat of reprisal or force or promise of benefit."[9]

Although it seems clear that Congress intended to broaden the range of permissible employer communication, the NLRB in 1948, in the *General Shoe Corp.*[10] case, construed the section 8(c) language literally, holding that it applied only to unfair labor practice cases and not to representation cases. Thus the Board formulated a doctrine that employer speech, though privileged under section 8(c), could be used to set aside an election, even though no part of the speech could be found to constitute an unfair labor practice. Despite this decision, the Board has usually evaluated the content of the employer's speech in terms of whether the speech itself exceeds the section 8(c) privilege. If the content of the speech fails to exceed the statutory limitations, the Board will then look to circumstances surrounding the speech to determine if the effect was coercive. Only on rare occasions has the Board set aside an election purely on grounds of the content of an employer's speech which comes within the section 8(c) privilege.[11]

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[6] Pokempner, *supra* note 2, at 113.
[7] *See* Linn v. Plant Guard Workers Local 114, 383 U.S. 53, 62 (1966).
[8] 29 U.S.C. § 158(c) (1958).
[9] Pokempner, *supra* note 2, at 112.
[10] 77 N.L.R.B. 124 (1948).
[11] *See* Miller-Charles & Co., 146 N.L.R.B. 405 (1964).

The discussion here will be limited to just one of the most frequent problem areas — employer predictions of the consequences of unionization. Are his expressions actual "predictions," or are they veiled threats of his course of action should the company become unionized?

Both employers and unions have the right, within the limitations of the NLRA, to communicate all relevant information to the employees so that they may make a knowledgeable, independent decision of whether or not they wish to become unionized. Frequent problems arise when the employer, during a pre-election campaign, seeks to predict the effects of unionization on his company and to express his legal position toward the union if it wins the election. The pervading question is whether employer expressions constitute actual "predictions" of the consequences of unionization, or whether they constitute hidden threats of his course of action when faced with unionization.

By the early 1950's "the Board began to give greater latitude to employer speeches . . . ."[12] During the 1960's, Professors Cox and Bok, among others, suggested that the prevailing rule (prohibiting employer "threats" during organizational campaigns, but permitting "predictions") unduly inhibited the employee's right to associate.[13] It was suggested that "the power that the employer holds over the livelihood of his employees . . . which distinguishes him from the ordinary speaker . . . justifies special limitations on his right to communicate."[14] Bok further stated:

> In principle, the policy was sound enough, for when the employer simply pointed out the adverse consequences which might lawfully result from unionization he provided the employees with information that was clearly pertinent to the decision they were called upon to make. In practice, however, the policy gave hostile employers great leeway to indulge in dire predictions in order to dissuade the employees from supporting the union.[15]

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[12] A. Cox & D. Bok, *supra* note 4, at 176-77.

[13] See A. Cox, Law and the National Labor Policy 42-43 (1960); Bok, *The Regulation Of Campaign Tactics In Representation Elections Under The National Labor Relations Act,* 78 Harv. L. Rev. 38, 75 (1964). Both writers made the point that the economic dependence of the employee conditioned his reaction to the employer's words.

[14] Bok, *supra* note 13, at 70.

[15] *Id.* at 75.

It was contended that it was difficult to administer the prohibition against predicting exaggerated or fabricated economic consequences of unionization, such as plant shutdown or loss of business. The factors involved in such predictions were often complex, conflicting, and speculative, and the ultimate decision was usually a matter of subjective judgment. As a result, the Board could rarely disprove the employer's predictions without an unjustifiable expenditure of agency resources.[16]

It was argued that the application of the "total context" approach in determining the coercive nature of employer statements "places both unions and employers in a position of uncertainty as to what may properly be said during the pre-election campaign," and there was a need for "definite guidelines."[17]

The United States Supreme Court made an apparent effort to supply the needed guidelines in *NLRB v. Gissel Packing Co.*[18] in 1969. Although the remedies adopted in *Gissel* differed somewhat from those suggested by the critics, "[i]t seems demonstrable that the applicable rules governing employer speech have been greatly altered by that case."[19]

At the outset, the Court rejected the notion that an employer during an organizational campaign is free to confront his employees with the uninhibited, robust speech appropriate in other contexts. "[I]n the context of a nascent union organizational drive . . ." the Court held, "employers must be careful in waging their anti-union campaign."[20] It also stated that

> [A]n employer's rights cannot outweigh the equal rights of the employees to associate freely . . . . And any 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

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[16] *Id.* at 81.

[17] Cuneo, *NLRB's Totality of Conduct Theory in Representation Elections and Problems Involved in its Application,* 7 DUQUESNE L. REV. 229, 238, 243-44 (1968).

[18] 395 U.S. 575 (1969).

[19] Browne & Sachs, *The Suppression Of Employer Free Speech — A New Ban On "Conscious Overstatements" And A Caveat Against "Brinkmanship,"* 15 VILL. L. REV. 588, 599 (1970).

[20] 395 U.S. at 616.

might be more readily dismissed by a more disinterested ear."[21]

The Court then formulated specific standards for evaluating the impact of employer statements during an organizational campaign. An employer may freely state "his general views about unionism or any of his specific views about a particular union . . ." subject only to the general statutory limitation of "threat of reprisal or force or promise of benefit."[22]

However, a stricter standard is applied to an employer's "prediction as to the precise effects he believes unionization will have on his company."[23] Such predictions "must be *carefully phrased* on the basis of *objective fact* to convey an employer's belief as to *demonstrably probable consequences beyond his control* . . . ."[24]

By requiring that the employer's prediction be based upon "objective facts," from which it appears that the predicted consequence of unionization is "demonstrably probable," and one that is "beyond [the employer's] control," the Court established clear, largely objective criteria that should assure that a permitted prediction reflects the employer's bona fide judgment concerning the effects of unionization itself. The purpose of the additional requirement that the prediction be "carefully phrased" to convey the employer's belief is to assure that the *hearer* will *know* that the employer's statement is a bona fide prediction and not a threat.[25]

The guidelines set forth in *Gissel* should provide assistance to the Board and the courts in handling the problem of employer "predictions." However, like most guidelines, they are subject to varying interpretations. A look at several recent federal court decisions illustrates the point that *Gissel* did not eliminate all of the confusion.

In *NLRB v. Lenkurt Electric Co.*,[26] the court, refusing to enforce the Board's order, held that an employer could predict unfav-

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[21] *Id.* at 617.
[22] *Id.* at 618.
[23] *Id.*
[24] *Id.* (emphasis added). The Court added, "or to convey a management decision already arrived at to close the plant in case of unionization" to provide for the special situation dealt with in Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263, 274, n. 20.
[25] NLRB v. Lenkurt Elec. Co., 438 F.2d 1102, 1109 (9th Cir. 1971) (dissenting opinion).
[26] 438 F.2d 1102 (9th Cir. 1971). In conversations with the printing department employees, employer's manager, Linka, suggested that if the employees were to unionize, it was possible that a more strict regimentation

orable consequences which it believed would result from unionization. Such predictions had to have some reasonable basis of fact and had to be in fact predictions, rather than veiled threats to retaliate against the employees should the union prevail.

The court based its decision upon *Gissel,* reading that decision as establishing two standards by which an employer's statements could be objectionable. "[A]n employer may not impliedly threaten retaliatory consequences within his control, nor may he, in an excess of imagination and under the guise of prediction, fabricate hobgoblin consequences outside his control which have no basis in objective fact."[27]

The court found nothing in the expressions of the company supervisor constituting an express or implied threat of retaliatory action by the company. In determining whether the employer's statements constituted permissible argument or prohibited threats, the statements were considered in the context of the factual situation in which they were made, and in view of the totality of employer conduct.[28]

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of working hours would be implemented. He said company policy with respect to coffeee breaks, lunch hours and conversation while working had been fairly casual in the printing department, while controls in the unionized departments of the plant were much stricter. Linka also explained that if they became unionized and the basis of compensation changed from monthly salary to hourly rates, which were the basis of compensation of other union employees in the plant, a more strict observance of working time might result.

Linka further suggested that working conditions might be made more difficult by unionization because the company might seek to reduce operating costs by using less expensive paper stock in the printing department. The use of lower quality stock might cause more problems for the operators of the machines.

Linka also stated that sick leave and other fringe benefits, particularly the policy of providing working smocks and laundry service to the employees, might be changed by unionization. Such changes were described as potentially necessary to reduce costs and remain competitive.

Two female employees were told that their lack of diversified experience in operating the printing machines might work to their disadvantage in the event of unionization. These women could only operate one or two machines in the print shop. It had been company policy when the machines they operated broke down or when work was slack to move these women to other departments to complete their work day. Linka told them that based on his observation of union shops, unions were adverse to temporary transfer of employees outside of their primary department, and thus the company might be unable to continue its past policy. It might become necessary, if these women were unable to work in other departments, to lay them off temporarily during periods when they were unable to work in the printing department.

[27] *Id.* at 1106.

[28] *See* NLRB v. Virginia Elec. & Power Co., 314 U.S. 469 (1941); P. R. Mallory & Co. v. NLRB, 389 F.2d 704 (7th Cir. 1967).

The court in *Lenkurt* found no background of anti-union animus on the part of the employer. The supervisor's statements were held to be "predictions of possible disadvantages which might arise from economic necessity or because of union demands or union policies."[29] It was also held that each of the challenged statements was based on objective facts, and the supervisor's predictions were, under all the circumstances, demonstrably probable consequences which might be anticipated as the result of unionization. The majority stated that the exercise of free speech in organizational compaigns should not be unduly restricted by narrow construction. The court felt it was most desirable that employees hear all sides of the question in order that they could exercise an informed and reasoned choice.

Judge Browning dissented in *Lenkurt* on the basis of the United States Supreme Court holding in *Universal Camera Corp. v. NLRB.*[30] In that case, the Court held that the Board's findings within its field "carry the authority of expertness which courts do not possess and therefore must respect."[31] He also cited *Gissel* for the proposition that "a reviewing court must recognize the Board's competence in the first instance to judge the impact of utterances made in the context of the employer-employee relationship."[32] He felt that even "if it were not within the Board's special competence to determine whether [the supervisor's] statements conveyed an implied threat to employees, it would still be improper for a reviewing court to displace the Board's 'choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo.' "[33] The Board had concluded that the supervisor's statements were not sufficiently supported by objective facts, and because of this lack of objective factual support, the employees would naturally tend to take the statements as a threat.

In *NLRB v. General Stencils, Inc.,*[34] the Board's finding of an unfair labor practice was upheld. In that case the employer's general manager made statements to the effect that if the union got in, there would be a stricter policy concerning, *inter alia,* smoking, lateness, layoffs, loans to employees, and coffee breaks (statements similar

[29] 438 F.2d at 1107 (citing cases).
[30] 340 U.S. 474 (1951).
[31] *Id.* at 488.
[32] 438 F.2d at 1109 (quoting *Gissel,* 395 U.S. at 620). *See also Virginia Elec. & Power Co.,* 314 U.S. at 479.
[33] 438 F.2d at 1109 (quoting *Universal Camera,* 340 U.S. at 488).
[34] 438 F.2d 894 (2d Cir. 1971).

to those made in *Lenkurt*). The court recognized that the Board could regard such statements not as good faith predictions of what was sincerely believed the company would be compelled to do in the event of unionization, but rather as threats not rooted in any business purpose designed to dissuade union support.

The Board's special competence was also upheld in *NLRB v. Tom Wood Pontiac, Inc.*[35] Tom Wood's labor relations consultant told one of the employees that he was pretty certain that the employees would "be out on the street by the first of January" if the union won the organizational election.[36] The Board decided that this statement amounted to interference with, restraint, and coercion of employees in their organizational effort in violation of the NLRA. Enforcing the Board's order, the court held that the Board could properly infer from the statement a threat of discharge if the union won the election. This inference was found proper even though the statement viewed in isolation could reasonably have been construed as meaning that if the union won, it would pull the employees out on strike. Since either inference was reasonable, the court stated it could not reject the Board's inference of a threat by the company "to throw employees out of work regardless of the economic realities."[37]

In *NLRB v. Raytheon Co.*,[38] the Ninth Circuit Court of Appeals (which earlier had decided *Lenkurt*) recognized the Board's expertise in this area and refused to say its conclusion was wrong, even though the court experienced difficulty with the trial examiner's appraisal of the quality and impact of the employer's statements. The Board had adopted the trial examiner's opinion that the employer's statements exceeded the bounds of permissible predictions and conveyed to its employees the distinct impression that economic reprisal would follow a union victory. The court stated that an employer during an organizational campaign who wishes to express to his employees his views on unions or the consequences of unionization "must exercise extreme care not only in what he says but also in gauging the import of what he says."[39]

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[35] 447 F.2d 383 (7th Cir. 1971).

[36] *Id.* at 385.

[37] *Id.* (citing *Gissel*, 395 U.S. at 619).

[38] 445 F.2d 272 (9th Cir. 1971).

[39] *Id.* at 273.

Two differing conclusions arising out of strikingly similar employer expressions are found in *Central Hardware Co. v. NLRB*, and *NLRB v. Aerovox Corp.*[40] In *Central Hardware* the employer's vice president informed employees that they were receiving greater benefits than those paid to employees in comparable unionized stores, and that if employees were to select the union as their bargaining representative, "all bets would be off" and bargaining would "start from scratch." This speech was held not to constitute an unfair labor practice because the speech viewed as a whole did not constitute a threat of reprisal and there was no evidence that employees were intimidated by it.

In *Aerovox* the employer sent a personal letter to each employee which stated that the union could not guarantee that present benefits would continue under a union contract, that bargaining "starts from scratch," and that with a union, employees must be willing to accept a serious possibility of a strike with all its hazards. This language was held coercive and not protected. Taking into account the economic dependence of employees on their employers, the court held the Board might reasonably infer a threat arbitrarily to discontinue present benefits including present wage scales. The Board also inferred from the language a suggestion that Aerovox would surely become an "unwilling employer" thus enhancing the prospect of a strike.

In another recent decision,[41] it was held that employer predictions of unfavorable consequences resulting from unionization do not exceed the bounds of permissible campaign tactics, so long as the incidents referred to as the basis for the prediction are completely truthful. In this case speeches by company officials referred to incidents at other plants where unionization coincided with the disruption of the plants' traditionally friendly relations with their employees. The speeches were tempered, however, by statements that the plants referred to did not close or lose business because of union presence, but they closed because they were no longer able to operate and compete effectively in the textile industry.

These federal court decisions had the benefit of the guidelines established in *Gissel*. However, the apparent inconsistencies make questionable the worth of the *Gissel* standards in supplying unifor-

[39] 439 F.2d 1321 (8th Cir. 1971).
[40] 435 F.2d 1208 (4th Cir. 1970).
[41] Boaz Spinning Co. v. NLRB, 439 F.2d 876 (6th Cir. 1971).

mity and certainty in the area of employer predictions. It often appears as though the difference between a threat and a prediction lies in the employer's semantics. The problem is proving the *intent* of the employer — by making a "prediction" of the consequences of unionization, does he intend to coerce or restrain the employees in the exercise of their section 7 rights? In answering this primary question, the Board and the courts still rely on the *General Shoe* "totality of conduct" approach. It is well established that the language itself cannot be evidence of an unfair labor practice, but the language may be found to constitute a part of an illegal course of conduct, and thus subject to regulation.

The employees have a legitimate interest in learning of the advantages and disadvantages of unionization. It is therefore important that both the union and employer be free to advise the employees of all the factors which should be considered in reaching a rational decision. However, it is recognized that the employer has a unique relationship of economic dependence with his employees, and thus must be most careful in both his selection of appropriate language to convey his thoughts and the background in which such expressions are made. If the employer's expressions or actions convey a meaning to the employees that the employer will *cause* the adverse conditions in the event of unionization, the protection of section 8(c) has been exceeded and such "predictions" are not privileged.

Gissel established a stricter standard applicable to an employer's prediction of precise effects he feels unionization will have on his company. Such predictions "must be *carefully phrased* on the basis of *objective fact* to convey a employer's belief as to *demonstrably probable consequences beyond his control . . . .*"[42]

The apparent inconsistencies in recent federal decisions illustrate that perhaps in dealing with employer predictions it is not possible to create precise guidelines of proper conduct. The continued application of the "totality of conduct" approach makes precision difficult, but may provide the most equitable means of deciding these cases. It must be remembered that during a pre-election campaign, the determination of the employees' uninhibited desires is of utmost importance.

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[42] 395 U.S. at 618 (emphasis added).