In the Matter of CLARK BROS. CO., INC. *and* UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, CIO

*Case No. 3-C-775.—Decided August 26, 1946*

*Mr. Francis X. Helgesen*, for the Board.

*McAfee, Grossman, Hanning & Newcomer*, by *Mr. Maurice F. Hanning*, of Cleveland, Ohio, and *Messrs. Thomas L. Moody* and *James A. Hughes*, of Cleveland, Ohio, for the respondent.

*Mr. Peter J. Zanghi*, of Buffalo, N. Y., for the CIO.

*Mr. Ralph Winkler*, of counsel to the Board.

## DECISION

AND

## ORDER

On November 15, 1945, the Trial Examiner issued his Intermediate Report in the above-entitled proceeding, finding that the respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the respondent filed exceptions, with a supporting brief, to the Intermediate Report. On February 14, 1946, the Board at Washington, D. C., heard oral argument in which the respondent participated; the Union did not appear.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and brief, the contentions advanced by the respondent at the oral argument, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, with the following additions and modifications.[1]

[1] On October 3, 1945, the CIO filed with the Board another petition for certification, and following a hearing thereon the Board issued a Decision and Direction of Election on March 15, 1946 (66 N L R. B. 849). In connection with this representation case, the CIO waived, in writing, any right that it might have to protest the election on any of the grounds set forth in the complaint in the instant case. The election was held on April 9, 1946, and the Association was thereafter certified as the collective bargaining representative for the employees involved. On May 21, 1946, the respondent filed with the Board a Petition For Dismissal of the complaint in the present proceedings, stating as basis therefor that the issues had been rendered moot by virtue of the representation proceeding. We do not agree that the respondent's unfair labor practices are rendered moot by the resolution of the question concerning representation. Accordingly, the Petition For Dismissal is hereby denied.

1. The Trial Examiner found that the respondent violated Section 8 (1) of the Act by promulgating and enforcing Shop Rule 6, insofar as this rule proscribed union solicitation on company premises by the employees during their non-working time. The Trial Examiner also found that the respondent discriminatorily enforced this rule by denying to the CIO the privilege of distributing union literature on company premises during non-working time while extending such a privilege to the Association, a rival organization, and distributing its own anti-CIO literature at the plant during working time. We agree with the Trial Examiner that, by the prohibition contained in Shop Rule 6 against union solicitation on company premises during the employees' non-working time and by its discriminatory application of this rule, the respondent violated Section 8 (1) of the Act.

2. The Trial Examiner found that Thomas L. Moody, the respondent's labor relations director, engaged in surveillance by visiting a drinking establishment on several occasions for the specific purpose of overhearing employee conversations regarding the organizational campaign of the CIO. We agree that such conduct is violative of the Act. It is not a defense to such action, as the respondent asserts, that the employees may have been without knowledge of the surveillance. "Any real surveillance by the employer over the union activity of employees, whether frankly open or carefully concealed, falls under the prohibitions of the Act." [2]

3. The Trial Examiner also found that the respondent injected itself into the then pending run-off election for the purpose of insuring the defeat of the CIO and obtaining the selection of the Association; that it was "determined," as its labor relations director conceded, "to conduct an aggressive campaign against the CIO"; that in furtherance of this objective the respondent, within a span of 5 days, mailed anti-CIO leaflets to its employees, inserted paid advertisements hostile to the CIO in the local newspaper, made anti-CIO speeches which included suggestions of the possibility of job insecurity through its officials at the plant during working hours and required its employees to hear these speeches, and distributed anti-CIO statements to the employees on company premises during working hours; that it promulgated and enforced the afore-mentioned shop rule unlawfully prohibiting union solicitation at the plant during non-working time; that it discriminated against the CIO by disparate treatment of that organization in regard to the distribution of organizational literature; and that it engaged in surveillance of the CIO. This occurred in a situation in which there were two competing unions, so that there was especially little justification for the respondent's intrusion as a "participant" in the preelection

[2] *N. L. R. B.* v. *Collins & Aikman Corporation*, 146 F. (2d) 454, 455 (C. C. A. 4), enforcing 55 N. L. R. B. 735, 736.

campaign. We agree with the Trial Examiner that, by the totality of such acts and statements, as more fully revealed in the Intermediate Report, the respondent interfered with, restrained, and coerced its employees in the exercise of their self-organizational rights. We also find, in agreement with the Trial Examiner, that the respondent's campaign statements (most of which went far beyond what might have been thought necessary to reply to possible misstatements of fact by pro-CIO campaigners), viewed in the setting in which they were made, constitute an integral and inseparable part of the respondent's coercive course of conduct violative of the Act.[3]

4. The Trial Examiner also found that, in one instance a mere hour before the polls were to open for the run-off election between the CIO and the Association, the employees were compelled by the respondent to assemble at the plant during working time to listen to anti-CIO campaign speeches of the respondent's officials. The speeches were made on the premises during working hours and were broadcast throughout the entire plant. The power and engines were shut down. All plant operations were suspended and the employees were directed by the respondent, through some foremen and by the public address system, to assemble to listen to the speeches. Thus, the employees were required to listen to these speeches because the respondent controlled the manner in which the employees were to occupy their time. The only way the employees could have avoided hearing the speeches would have been for them to leave the premises, which they were not at liberty to do during working hours. The Trial Examiner concluded on these facts that the respondent, by its control over its employees during working hours, not only paid its employees for listening to its anti-CIO solicitation, but that the manner of exercising such control gave the respondent, under the stated circumstances, assured and, during working hours, exclusive access to its employees in a matter relating to their organizational activities. We agree.

We are also of the opinion, and find, that the conduct of the respondent in compelling its employees to listen to a speech on self-organization under the circumstances hereinabove outlined and as more fully revealed in the Intermediate Report, independently constitutes interference, restraint, and coercion within the meaning of the Act. Section 7 of the Act guarantees to employees the "right to self-organization, to form, join, or assist labor organizations" and

[3] *Peter J. Schweitzer, Inc* v. *N. L R. B.*, 144 F (2d) 520, 524–525 (App. D C.) ; *N. L. R. B.* v. *American Laundry Machinery Company*, 152 F. (2d) 400 (C C. A 2) ; *N. L. R B.* v. *Trojan Powder Company*, 135 F (2d) 337 (C. C A. 3), cert. denied 320 U S. 768 ; *Reliance Manufacturing Company* v. *N. L R B* , 143 F. (2d) 761, 763 (C C. A 7) The *Reliance* case, like the instant one, concerned an election in which two competing unions were on the ballot.

"to bargain collectively through representatives of their own choosing." 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." [4] 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. And this is so, wholly apart from the fact that the speech itself may be privileged under the Constitution.

The compulsory audience was not, as the record shows, the only avenue available to the respondent for conveying to the employees its opinion on self-organization. It was not an inseparable part of the speech,[5] any more than might be the act of a speaker in holding physically the person whom he addresses in order to assure his attention. The law may and does prevent such a use of force without denying the right to speak. Similarly we must perform our function of protecting employees against that use of the employer's economic power which is inherent in his ability to control their actions during working hours.[6] Such use of his power is an independent circumstance, the nature and effect of which are to be independently appraised. We conclude, therefore, that the respondent exercised its superior economic power in coercing its employees to listen to speeches relating to their organizational activities, and thereby independently violated Section 8 (1) of the Act.[7]

We do not believe that the *American Tube Bending* case [8] is dispositive of the issue. It is true, as our dissenting colleague points out, that there happened in that case to have been a "captive audience." But following the then existing precedents (1942), the Board had not considered whether the employer's action in compelling an audience was, taken by itself, an unfair labor practice, and it made no independent findings of unfair labor practice on that point.[9] Hence, the Circuit Court of Appeals did not consider the point, even if it could.[10] In applying for a writ of certiorari, the facts were mentioned, but the point was not separately briefed or urged as an independent ground for

[4] *Matter of Harlan Fuel Company*, 8 N. L. R. B. 25, 32.

[5] Cf. *Thomas* v. *Collins*, 323 U. S 516

[6] Cf. *People of New York* v. *Ford Motor Co.*, decided June 26, 1946, N Y. Sup. Ct, App Div. (3rd Dep't).

[7] In so holding, however, we do not rest our finding upon or adopt that portion of the Intermediate Report which refers to a "constitutional right of non-assembly."

[8] *N. L. R. B.* v. *American Tube Bending Co.*, 134 F. (2d) 993 (C. C. A 2), cert denied 320 U. S. 768.

[9] 44 N. L. R. B. 121.

[10] Cf *S. E. C.* v. *Chenery Corp.*, 318 U S. 80, 87–88.

reversal; it could not have been, in that posture of the case.[11] We therefore consider the question an open one.

5. We agree with all of the opening paragraph of Mr. Reilly's dissent except the last sentence. We cannot leave unanswered his suggestion that the majority is insensitive to the importance of the First Amendment,[12] or the apparent attempt to convert a difference as to the emphasis to be given certain facts into a basic disagreement concerning a constitutional axiom. No less than our dissenting colleague, we recognize that, in a sense, "it is a constitution we are expounding."[13] 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 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.

The record makes it clear that there were coercive acts here, and not mere expressions of opinions. Nothing in the facts or in the Supreme Court's decisions in the two *Virginia Electric* cases[14] suggests that this Board is required, on this particular record, to depart from established doctrine or to abdicate its function of protecting employees from employer interference and coercion of such unreserved character.

6. In Section G of the Intermediate Report, the Trial Examiner referred to certain testimony by employees which was offered to demonstrate that the respondent's activities had their intended coercive effect upon the employees. This testimony related generally to the employees' "feelings" and, in some instances, to action taken by the employees as a result thereof. The test of interference, restraint, and coercion under Section 8 (1) of the Act does not turn upon the success or failure of the attempted coercion, but rather upon whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the exercise of employee rights under the Act. Accordingly, we do not rely upon such testimony and believe that it should not have been received as part of this record.

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[11] *Ibid.*

[12] See, for example, the following recent cases where we found that certain anti-union statements did not constitute interference, restraint, and coercion within the meaning of the Act. *Matter of Oval Wood Dish Corporation*, 62 N. L R B. 1129, 1138; *Matter of Mississippi Valley Structural Steel Company*, 64 N. L. R. B 78, 80; *Matter of The Ebco Mfg Co.*, 67 N. L. R. B. 210; *Matter of Strathmore Packing House Company*, 68 N. L. R B 214; *Matter of Philadelphia Gear Works, Inc.*, 69 N L. R B. 11.

[13] Marshall, C J., in *McCulloch* v *Maryland*, 4 Wheat. 316, 407.

[14] *N. L. R. B.* v. *Virginia Electric & Power Co.*, 314 U. S. 469; *Virginia Electric & Power Company* v. *N. L. R B.*, 319 U. S. 533.

## ORDER

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the respondent, Clark Bros. Co., Inc., Olean, New York, and its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Engaging in surveillance of its employees' self-organizational activities upon behalf of United Automobile, Aircraft and Agricultural Implement Workers of America, CIO, or any other labor organization;

(b) Promulgating or enforcing a rule prohibiting union solicitation on company premises during non-working time;

(c) Discriminating against United Automobile, Aircraft and Agricultural Implement Workers of America, CIO, by denying to it the privilege of distributing union literature at the plant while at the same time granting such privilege to Employees Association, Inc., of Clark Bros. Co.;

(d) Compelling its employees during working time to listen to speeches relating to self-organization and the selection of a bargaining representative;

(e) Interfering with its employees in the exercise of the right to self-organization, and to join or assist United Automobile, Aircraft and Agricultural Implement Workers of America, CIO, or any other labor organization.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Rescind immediately Shop Rule 6 insofar as it prohibits union solicitation on the respondent's premises during the employees' non-working time;

(b) Mail to each of its employees a copy of the notice attached hereto, marked "Appendix A";

(c) Post at its plant at Olean, New York, copies of the notice attached hereto, marked "Appendix A." Copies of said notice, to be furnished by the Regional Director of the Third Region, shall, after being duly signed by the respondent's representative, be posted by the respondent immediately upon receipt thereof, and maintained by it for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the respondent to insure that said notices are not altered, defaced, or covered by any other material;

(d) Notify the Regional Director for the Third Region, in writing, within ten (10) days from the date of this Order, what steps the respondent has taken to comply herewith.

## APPENDIX

### NOTICE TO ALL EMPLOYEES

Pursuant to a Decision and Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

1. We will not engage in surveillance of our employees in their self-organizational activities upon behalf of United Automobile, Aircraft and Agricultural Implement Workers of America, CIO, or any other labor organization.

2. We hereby rescind Shop Rule 6 insofar as it prohibits union solicitation on our premises during the employees' nonworking time.

3. We will not discriminate against United Automobile, Aircraft and Agricultural Implement Workers of America, CIO, by denying to it the privilege of distributing union literature at the plant, while at the same time granting such privilege to Employees Association, Inc., of Clark Bros. Co.

4. We will not compel our employees during working time to listen to speeches relating to self-organization and the selection of a bargaining representative.

5. We will not interfere with our employees in the exercise of the right to self-organization and to join or assist United Automobile, Aircraft and Agricultural Implement Workers of America, CIO, or any other labor organization.

6. All our employees are free to become or remain members of United Automobile, Aircraft and Agricultural Implement Workers of America, CIO, or any other labor organization.

CLARK BROS. CO., INC.,

By _____
(Representative) (Title)

Dated _____

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

MR. GERARD D. REILLY, dissenting:

I have always conceived that the duty of applying the Constitution, as interpreted by the Supreme Court of the United States, rests as heavily upon administrative agencies of the executive branch of the Government as it does upon State courts and the lower courts of our Federal judicial system. Once a broad principle on a disputed issue of

constitutional law has been determined by the highest court, it would seem incumbent upon tribunals which have followed another rule of decision to acquiesce in the ultimate judicial pronouncement, even though the litigants aggrieved by lack of conformity on the part of the inferior tribunal may appeal to the higher courts for redress. It is submitted that the majority opinion is in derogation of this well established canon of judicial procedure.

Until recent years this Board had always assumed that an employer had no right to express his opinions to his employees with respect to a union which might be seeking to act as their representative. Numerous decisions of the Board laid down the principle that it was the duty of an employer to remain completely neutral so far as his utterances in the plant were concerned. Consequently, any appeals by employers against unions or in favor of particular unions which were made in verbal addresses to the employees or reduced to written form and distributed on plant bulletin boards, in handbills, or in envelopes which reached the workers were considered to be violations of Subsection 8 (1) of the Act, on the theory that such arguments were "an interference" with the right of self-organization guaranteed to employees by Section 7 of the Act. Although I always thought that this doctrine was somewhat questionable, as a matter of sound labor relations policy, since employees have an indirect stake in the continued financial success of the company which employs them, this principle has been enunciated so repeatedly that I concurred in it the first 2 years I was a member of this agency on the theory of *stare decisis*.

During this period, our rule of decision was frequently criticized by employers affected by it, as well as by such interested outside organizations as the American Civil Liberties Union, on the ground that such a construction of the Act was repugnant to the guarantee of freedom of speech in the First Amendment yet it was not for several years that any case squarely presenting this issue reached the Supreme Court. To be sure the issue had been litigated many times on enforcement orders in Circuit Courts of Appeals, and while some conflicts had resulted,[15] an authoritative opinion of the Circuit Court for the Second Circuit,[16] written by Judge Learned Hand, was generally regarded by the bar as having settled the point in the Board's favor.

This doctrine was repudiated, however, in 1942 when the Supreme Court in the *Virginia Electric & Power* case[17] passed upon a bulletin posted by the company containing arguments against joining outside unions and appealing to the employees to form an inside union of their

[15] Cf. *Federbush* case of the Second Circuit with *Ford* case of the Sixth Circuit (*N. L. R. B.* v. *Federbush Co., Inc.*, 121 F. (2d) 954 (C. C. A. 2), enf'g 24 N. L. R. B. 829; *N. L. R. B.* v. *Ford Motor Company*, 114 F. (2d) 905 (C. C. A. 6), enf'g in part, 14 N. L. R. B. 346.)

[16] *N. L. R. B.* v. *Federbush*, footnote 15, *supra*.

[17] *N. L. R. B.* v. *Virginia Electric & Power Company*, 314 U. S. 469.

own. In this case the Court specifically held that an employer's right to express his opinion to the workers in his plant with respect to issues of labor organization was protected by the First Amendment, if it fell short of being coercive. It remanded the case to the Board for consideration of the question as to why any language in this bulletin was coercive in fact. Upon reconsideration of the case, the Board found that the language contained in the posted notice inviting the employees to form a union of their own was part of a scheme of the company to form and dominate a labor organization in violation of Subsection 8 (2) (the case contained an independent allegation of a violation of this Subsection), and, so viewed, was indeed an interference with their organizational freedom. In this posture the case again went to the courts and the Board's order was sustained.

In the meantime, another Board decision had come to the Circuit Court of Appeals of the Second Circuit for review.[18] In this case an employer on the eve of an election had assembled his employees during working hours to listen to a paper which he read advising them against voting for a union in the coming election. The text of this speech contained arguments implying that outside organizers were insincere in their expressed solicitude for the welfare of the employees. It implied that the company would never sign a closed-shop agreement, and appealed to the employees who wished to continue the friendly relationship which existed between themselves and the company to vote for the employer (that is, vote "No") rather than for the union. The Board held the employer's conduct unneutral and issued an order requiring him to desist from such "interference." The Circuit Court of Appeals held that this order was improper in the light of the *Virginia Electric & Power* case,[19] although it conceded that under its own ruling expressed in the *Federbush* case[20] such an order would have been valid. It therefore overruled the *Federbush* case. The Board then petitioned for certiorari, advancing many of the identical arguments which were advanced in this case.[21] The petition was nevertheless denied. Within a few months other Circuit Courts of Appeals which had previously supported the Board's point of view changed their positions.[22]

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[18] *N L R B* v *American Tube Bending Co*, 134 F. (2d) 993 (C. C. A 2) 1943, cert. denied 320 U. S. 768.

[19] See footnote 17, *supra.*

[20] See footnote 15, *supra.*

[21] For example, the compulsory audience feature and the superior economic power feature were points (1) and (2) in the Board's brief.

[22] See *Peter J Schweitzer, Inc.* v *N. L. R B*, 144 F (2d) 520 (App D. C), enf'g as mod. 54 N. L R. B 813. Sept 23, 1944 (App. D C), rehearing denied; *Budd Manufacturing Company* v *N L. R B.*, 138 F. (2d) 86 (C C. A 3), enf'g 41 N. L R. B. 872, 321 U. S 773 cert. denied; and decision of 7th Circuit in *Reliance Mfg. Co.* v. *N. L. R B*, 125 F. (2d) 311 (C. C. A. 7), which stands out as an exception.

Of course a denial of certiorari is not necessarily conclusive of the views of the Supreme Court, although certainly its action in this case was already foreshadowed not only by its pronouncement in *Virginia Electric & Power* but also in its decision in the *Hague* case, in which the Court said, "The right to discuss and inform people concerning the advantages and disadvantages of unions and joining them is protected not only as part of free speech, but as part of free assembly." [23]

Whatever doubt remained on the point was dissipated by the Supreme Court's decision the following term in the case of *Thomas* v. *Collins*,[24] in which a majority of the Court held unconstitutional a State statute placing certain restrictions upon union organizers when applied to a speech made by a trade union official during an organizing campaign preceding a Labor Board election. In its decision the majority opinion made it clear that the right to make arguments for or against unions was fully privileged by the First Amendment, and that it applied to employers as well as to employees and union organizers.[25] In order to remove all doubt the Court noted with approval the *American Tube Bending* [26] ruling. This Board eventually acquiesced in this decision and for a time ceased to set aside elections or to issue cease and desist orders against employers who made anti-union speeches or circulated anti-union literature, if they refrained from threats or intimidatory conduct.

Recently, however, there has been a disturbing tendency by the Board to return to its old line of decisions on the theory that because there was some minor aspect of interference, a speech should be viewed as part of a "pattern of coercive conduct," even in cases where it was clear that the offending speech was only coercive or "inextricably intertwined" in the most highly metaphorical sense.[27] Such findings have been made even where employers were confronted with highly inflammatory union literature, although one of the foremost labor lawyers in the country recognized, in a recent article in the official organ of the A. F. of L., that "if freedom of speech is to survive for trade unions and their members, it must not be denied, directly or indirectly, to employers." [28]

The case at bar resembles the "pattern of conduct" cases in that the Board relies somewhat upon findings (based on no more than a scin-

[23] *Hague* v. *Committee for Industrial Organization*, 307 U. S. 496.

[24] 323 U. S 516.

[25] The court noted with approval the decisions of the Second and Sixth Circuit Courts of Appeals, respectively, in which the original ruling of the Board was repudiated.

[26] Footnote 18, *supra*.

[27] *Matter of Goodall Company*, 68 N. L. R. B. 252, issued May 28, 1946; *Matter of Monumental Life Insurance Co.*, 67 N. L. R. B. 244, issued April 11, 1946.

[28] Joseph Padway, Esq., in "The Federationist." June 1944, p. 28.

tilla of evidence) that there was disparity of treatment as between competing labor organizations in the distribution of campaign literature in the plant,[29] and a finding that one of the company officials engaged in surveillance.[30]

But this decision is more retrogressive than the general run in that it finds the mere fact that the employees were assembled in the plant during working time to listen to anti-CIO campaign speeches of respondent's officials was itself a violation of the Act, the theory being that the employees were not at liberty during working hours to avoid hearing the speeches. It must be remembered, however, that these were the same circumstances under which the crucial speech in *American Tube Bending* case was made and virtually the identical argument in support of the Board's disapproval of it was urged unsuccessfully upon the courts. It ignores the fact that the whole Board doctrine of employer neutrality developed with respect to employers using the plant facilities as channels for their propaganda. It was this doctrine of the Board that the courts repudiated, not some notion that an employer did not have access to public media of expression, for no Board decision had ever held this to be illegal *per se*.

Similarly, the idea that there was some interference because the employer himself distributed literature on the premises, despite the "no solicitation" rule, is equally unconvincing, for the rule was not directed at the management.

Although the majority opinion professes to reject the ingenious theory advanced by the Trial Examiner with respect to the existence of a constitutional right of non-assembly, it really, in effect, adopts this doctrine by propounding the idea that the exercise of constitutional rights on time paid for by another is an unconditional one. This argument was disposed of some years ago by Holmes, J., *McAuliffe* v. *Mayor, City of New Bedford*, 29 N. E. 517, with the statement that "A policeman may have a Constitutional right to talk politics, but he does not have a Constitutional right to be a policeman."

The policy grounds upon which the majority opinion is rested seem to be equally unpersuasive. I refer to the premise that since the respondent had "superior economic power," the fact that it paid the workers for the time they listened to the speech should be appraised as interference with their organizational activities. Granted that this company, like most industrial concerns, has greater economic power than its own employees, such an analogy, when referring to an election contest undertaken by one of the most powerful CIO unions, is falla-

[29] This conclusion is reached despite a finding of the Trial Examiner that after the Direction of Election issued, neither organization was permitted to distribute any literature on the premises

[30] How this surveillance could be viewed as "context" in which the employees might interpret the speech as coercive, in view of the fact that the employees were ignorant of it, is not explained.

cious. We have frequently frowned upon employers adopting the notion that in a Board election the employer and the union are rival candidates,[31] but it is no more far-fetched than viewing the employees themselves as candidates. The employees are the voters, the "candidates" are the choices on the ballots. This Board knows from its own experience the vast amount of money spent in organizing campaigns and it is doubtful that any concerns, other than the largest corporate enterprises, can match the financial resources which are available to national industrial unions like the petitioner in such contests.

I therefore feel, as a matter of policy as well as established judicial precedent by which we should be guided, that this case should be dismissed.

## INTERMEDIATE REPORT

*Mr. Francis X. Helgesen*, for the Board.

*McAfee, Grossman, Hanning & Newcomer*, by *Mr. Maurice F. Hanning*, of Cleveland, Ohio, and *Messrs Thomas L. Moody* and *James A. Hughes*, of Cleveland, Ohio, for the respondent.

*Mr. Peter J. Zanghi*, of Buffalo, N. Y., for the CIO

### STATEMENT OF THE CASE

Upon a charge duly filed by United Automobile, Aircraft and Agricultural Implement Workers of America, C. I. O, herein called the CIO, the National Labor Relations Board, herein called the Board, by the Regional Director for the Third Region (Buffalo, New York), issued its complaint dated June 11, 1945, against Clark Bros. Co. Inc, herein called the respondent, alleging that the respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8 (1) and Section 2 (6) and (7) of the National Labor Relations Act, 49 Stat. 449, herein called the Act. Copies of the complaint, accompanied by a notice of hearing, were duly served upon the respondent and the CIO.

With respect to the unfair labor practices, the complaint alleged in substance that from on or about January 19, 1945, to February 8, 1945, on which latter date an employee election was conducted under the supervision of the Regional Director, the respondent (1) by compelling its employees to listen to speeches delivered by the respondent's officers at its plant during working hours, by newspaper advertisements, and by publications prepared by the respondent and distributed and communicated to its employees, urged, persuaded, warned, and coerced its employees to refrain from assisting, becoming, or remaining members of the CIO or any other nationally affiliated labor organization, or voting for the CIO in the election referred to, vilified, disparaged, and expressed disapproval of the CIO and all other nationally affiliated labor organizations, and threatened its employees with loss of employment if they aided, became, or remained members of or voted for the CIO; (2) forbade activity on behalf of, solicitation of funds for, or membership in, the CIO, by its employees at the respondent's plant on the employees own time; (3) assisted, promoted, contributed support to, solicited membership for, and campaigned in behalf of Employees Association, Inc., of Clark Bros. Co. Inc., herein called the Association; and (4) by such acts engaged in unfair labor practices within the meaning of Section 8 (1) of the Act.

[31] *Matter of American Tube Bending Co*, 44 N. L. R. B. 121.

Pursuant to notice, a hearing was held from June 28 to July 5, 1945, at Olean, New York, before Arthur Leff, the undersigned Trial Examiner duly designated by the Chief Trial Examiner. The Board and the respondent were represented by counsel and the CIO by an official representative. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues was afforded all parties. During the Board's case, the undersigned granted a motion of counsel for the Board to amend the complaint by adding an allegation that the respondent, from on or about July 1, 1944 to February 8, 1945, engaged in surveillance of the activities of the CIO, and of the union activities of its employees. At the close of the Board's case, the undersigned granted a motion of counsel for the Board to conform the pleadings to the proof with respect to names, dates, and other minor variances. At the close of the Board's case, the undersigned denied with leave to renew a motion by the respondent to dismiss the complaint for want of proof; and upon renewal of the motion at the close of the entire case, reserved decision thereon. The motion is hereby denied. At the conclusion of the hearing, counsel for the Board and counsel for the respondent argued orally before the undersigned. Subsequent to the hearing, counsel for the respondent filed a brief with the undersigned.

Upon the entire record in the case and from his observation of the witnesses, the undersigned makes the following:

## FINDINGS OF FACT[1]

### I. THE BUSINESS OF THE RESPONDENT

The respondent, Clark Bros. Co., Inc., a wholly owned affiliate of Dresser Industries, Inc., is a New York corporation, maintaining its principal office and place of business at Olean, New York, where it is engaged in the design, manufacture, sale, and distribution of gas engines, compressors, and related products. During 1944, the respondent in the course and conduct of its business operations purchased for use at its Olean plant raw materials, consisting principally of steel, copper, aluminum, brass, and copper wire, valued in excess of $1,000,000, of which approximately 10 percent was transported to its Olean plant from States other than the State of New York. During the same year, the respondent manufactured at its Olean plant products valued in excess of $1,000,000, of which approximately 90 percent was transported into and through States other than the State of New York.

The respondent admits that it is engaged in commerce within the meaning of the Act.

### II. THE ORGANIZATIONS INVOLVED

United Automobile, Aircraft and Agricultural Implement Workers of America, affiliated with the Congress of Industrial Organizations, and Employees Association, Inc., of Clark Bros. Co., affiliated with the Confederated Unions of America, are labor organizations, admitting to membership employees of the respondent.

### III. THE UNFAIR LABOR PRACTICES

#### A. *Introduction*

The respondent with approximately 1,200 persons on its pay roll is the largest employer of labor in Olean, a city populated by about 22,000 and located in a rural

[1] Unless otherwise indicated, the findings of fact are based upon admitted facts or uncontradicted evidence which the undersigned credits.

section of western New York. There are only some 6 other employers in the community employing 100 or more. At one time the Pennsylvania Railroad maintained shops in Olean employing approximately 3,000, but following a strike and other labor disturbances, about 20 years ago, the operation of these shops was substantially discontinued, and the shops did not reopen until about 1940.

For some years the respondent and the Employees Association Inc., of Clark Bros. Co., herein called the Association, have enjoyed contractual relations. The Association, although now affiliated with the Confederated Unions of America, regards itself as an "independent" union,[2] as distinguished from an "outside" union, and it is similarly regarded by the respondent and its employees.

### B. *The 1944–1945 CIO campaign; the election of January 19, 1945*

After an unsuccessful campaign conducted in 1942–1943, the CIO in the early spring of 1944 launched a new drive to organize the respondent's employees. In conducting its drive, the CIO utilized the usual media of communication available to unions. By means of leaflets, bulletins, and other publications distributed outside the plant gates to employees who were free to accept or reject them, in public meetings which employees might or might not attend, on 2 or 3 occasions by advertisements inserted in the local press, and, on one occasion, in a radio address, the CIO sought by argument, traditional in form, to convince the respondent's employees of the advantages of collective bargaining through its agency. In broad outline, the CIO deprecated the effectiveness of independent labor organizations generally and the Association in particular; stressed the advantages of an "outside" labor organization; pointed to its own size, financial resources, and bargaining strength; criticized to some extent existing wages, working conditions and unsettled grievances at the plant; and offered to attain for employees greater job security, a more efficient and democratic grievance representation, improved working conditions, and elimination of favoritism in promotions and inequalities in pay. The CIO campaign as revealed by its campaign literature, advertisements, and radio addresses, all of which are in evidence, was, by and large, free of vituperation or intemperate attacks directed against the respondent or its officials.

By the year end, the CIO had succeeded to a point in its organizational drive where it was prepared to test its strength in an election. On December 22, 1944, it filed with the Board a petition for certification pursuant to Section 9 (c) of the Act. On January 2, 1945, the respondent and the Association joined the CIO in a consent election agreement.

The election, held on January 19, 1945, proved inconclusive. The CIO received 444 votes, the Association 448, and 34 votes were cast for neither organization. No choice on the ballot having received a majority of the votes cast, it became necessary under the terms of the consent election agreement to conduct a run-off election with the "neither" choice dropped from the ballot and the employees left with a choice only of one or the other of the two competing labor organizations. On or about January 25, 1945, the date of the run-off election was set for February 8, 1945

### C. *The respondent's determination to participate in the run-off election campaign*

The respondent, for many months prior to January 25, 1945, had kept itself closely abreast of the CIO campaign. Thomas L. Moody, the respondent's labor relations director, testified that he made it a point of learning what was being done and said, relying not only on CIO literature but on reports received from a

[2] Notwithstanding the testimony of an Association official to the contrary, this is clearly revealed by the Association's publications in evidence.

"multitude" of sources—"some came from employees, inquiries made of people throughout the plant, and statements repeated by one or another that were heard to have been made." On a "couple" of occasions, according to Moody, he even went to the point of visiting bars frequented by the respondent's employees for the express purpose of listening to (although not participating in) employee conversations bearing on the campaign. Principally, however, Moody testified, the respondent received information concerning the campaign from CIO literature and from reports of foremen who had been instructed not to make statements to employees or answer their questions, but merely to report to the personnel office all questions, conversations, comments, and criticisms overheard by them Although, according to Moody, this instruction to foremen was of general application and was not intended to relate specifically to union matters, the instruction was broad enough to have caused the supervisory forces to assume they were under the duty of reporting such matters. At times, Moody's testimony disclosed, the supervisors' reports contained information as to an individual employee's union activities.[3]

Notwithstanding its full knowledge of the almost year old CIO campaign, which did not thereafter alter in character or content, the respondent, prior to the January 19 election, maintained a "hands-off" policy and refrained from injecting itself into the election contest. It issued no literature, published no advertisements, and its representatives made no speeches. It abstained entirely from publicly expressing its preference as between the competing labor organizations, or for that matter, for the "neither" choice

At various times prior to the January 19 election there had been discussions between Moody[4] and Paul Clark, the respondent's president, concerning the advisability of presenting to the employees the respondent's position and answering CIO propaganda, but these discussions, according to Clark, had never gone beyond the point of casual consideration Several weeks before the January 19 election, Moody, according to his testimony, received a visit from certain unidentified A. F. of L. representatives who advised him that the A. F. of L was throwing its strength to the CIO in the forthcoming election, and that "they [the CIO] are going to knock you off this time." Admittedly prompted in part by this information, Moody, according to his testimony, came to the determination at that time, that the respondent should inject itself into the campaign. He so informed Clark, but Clark said, "Let's not do anything at present, until we see what occurs." A few days before the January 19 election, Moody, according to his further testimony, again spoke to Clark and told him that he thought "we made a mistake in not imposing [on the employees] the Company's views in this situation." Clark told him, "Maybe so, but there is nothing you can do about it now."

But once the results of the January 19 election became known and the date of the run-off election was set, the respondent promptly decided to embark upon an "aggressive" campaign in opposition to the CIO, and, correlatively, in support of the Association, the only other choice on the ballot. The decision was made at a conference of company officials, held in Olean immediately after Moody had

[3] Moody's testimony on this point was as follows:

Q These reports that you got from supervisors did they include any information as to who was active?

A. No, they did not There might have been—I would not say there might not have been some report at one time or another, the nature of which would have been that such a man is quite interested in the CIO and that he is spending a lot of time during working hours trying to organize; we did get reports of that character——

[4] Moody served as labor relations director of the respondent in a consultive capacity and on a part-time basis. His principal position was that of industrial relations director of Dresser Industries, Inc., the respondent's parent corporation.

returned from a meeting at the Regional Director's office in Buffalo where arrangements had been made for the holding of the run-off election. In a chance meeting with Peter J. Zanghi, CIO organizer, in a local hotel lobby on February 3, 1945, Moody told Zanghi, according to latter's undenied and credited testimony,

> "I don't mind telling you, Zanghi, we are going to go out to beat you We are going to answer some of your vicious literature, and we are going to retaliate in so far as your organization is concerned. We are satisfied with the Association, and we are going to do everything in our power to get the UAW [CIO] out of the plant"

### D. *The respondent's anti-CIO campaign*

The respondent's intention to participate in the election campaign was first announced to its employees on or about February 3, 1945 The respondent, in a letter signed by President Clark, after expressing its "deep interest" in the forthcoming run-off election and its desire that all employees vote, stated that its attitude was that the employees had a right to choose their bargaining agent, but that it desired "to make certain that all the facts and the record are put before the men so that they might make an intelligent selection" For that reason and because certain false charges implicating the respondent had been made, wrote Clark, the respondent proposed to put before the employees "certain information to give [them] the whole truth, untarnished by ulterior or selfish motives."

The respondent concentrated its entire campaign in the short span of approximately 5 days which intervened between Clark's announcement letter and the date of the run-off election. During that period the respondent (a) published and distributed by mail to the employees' homes four separate issues of a special publication entitled "The Facts and the Record"; (b) inserted an advertisement pertaining to the election in the local press on 2 separate days; and (c) assembled its employees during working hours on 2 separate occasions for the purpose of having them hear addresses by J. B. O'Connor, its vice-president, and Clark, its president. The respondent's printing, mailing, and advertising costs alone amounted to over $600.

#### (1) "The Facts and the Record"

The publication, *The Facts and the Record*, was in the form of a five-column tabloid size newspaper consisting of 1 or 2 pages. Its entire content was addressed to the election campaign The record does not disclose that the respondent at any time previously had ever issued to its employees a publication of any kind.

Only one of the approximately 30 columns of printed matter in the 4 issues of *The Facts and the Record* was addressed specifically to charges made by the CIO implicating the respondent's management. This column, characterizing the charges as "vicious, vindictive and false," took up specifically and denied two charges alleged to have been made by the CIO; one, a charge that the Company had some time ago taken advantage of a War Labor Board directive to grant wage increases for the purpose of defeating the CIO; the other, a charge (made in a letter dated January 11, 1944, more than a year previously) that the respondent had used "a few dirty tricks" and had written a coercive letter in order to intimidate employees in an election held in 1943. The column in question concluded with this admonition:

> Remember—no union ever made a job. It takes orders plus management—employee cooperation and harmonious relationship to keep any business going and growing. It would be a regrettable event if the harmonious relationship

that has prevailed in the Clark plant over the years were severed by an organization making false and malicious accusations of company management for their own selfish ends.

Principally, however, the several issues of *The Facts and the Record* were devoted to articles, statements, editorials, and cartoons disparaging the purposes, motives, and leadership of "outside" unions in general and the CIO in particular; suggesting that strikes and resultant economic loss could be expected as a natural and probable consequence flowing from the advent of an "outside" union in the plant; emphasizing the economic detriment to employees through dues and assessments levied by "outside" unions; discrediting the CIO campaign statements and promises concerning wages and working conditions; indicating that the CIO could obtain for employees no benefits or advantages which they did not already enjoy or which the respondent, in accordance with its established principles, would not otherwise be prepared to offer them; and implying that the injection of an "outside" union was almost certainly bound to create disruption in management-labor relations, interference with plant operations, loss of business, and consequent impairment of job security. Following are examples of the manner in which some of these subjects were presented:

The first issue of *The Facts and the Record* reproduced a full page of newspaper clippings about strikes called in other plants by outside unions, together with an insert, bearing the caption "Let's NOT Add Clark To This List", which read:

> With big noise and much ado the UAW-CIO is attempting to add Clark Brothers to a long list of companies who have suffered their attentions.
>
> Scanning the list President Paul Clark said, "Each Clark employee is free to cast his ballot in the coming election strictly according to the dictates of his own conscience."
>
> And, then, taking a paper from his desk, he remarked, "So far during this war, no Clark employee has lost a single day's work because of a strike. I hope, however, with all my heart, that Clark men and women will never add Clark Brothers to THIS list.

Subsequent issues repeated the theme that organization by outside unions led to strikes, and strikes to disruption of production, loss of orders, and idleness. Another issue was featured by a cartoon depicting a racketeer, labeled "outside unions," standing at the entrance of a toll bridge leading to the plant, marked "maintenance of membership" and "closed shop," and engaging in exacting tribute in the form of dues from unwilling workers as a condition to their right to work. The racketeer was saying to the employees, "Kick in chums." Still another issue had a lead article entitled "Unions Violate 'No Strike' Pledge But keep Maintenance of Membership Prize," which purported to describe maintenance of membership contracts, making it appear that *all* employees under such a contract would be required to pay dues as a condition of work, and which painted a picture of substantial assessments, in addition to dues, which would be checked off from an employee's wages for political as well as union purposes. The article added:

> After an election is won and negotiations start on a contract, *the first thing the international officers ask is maintenance of membership.*
>
> The unions appear to have an unwritten rule that they get the maintenance FIRST. The remainder of the issues such as *working conditions, hours, wages and vacations come later, if at all.*
>
> *The professional union leaders protect their own position first,* to be sure of a supply of dues money every month [5]

[5] Emphasis as in text.

No effort was made in the publications to conceal the respondent's hostility and opposition to the CIO. Thus, in an article entitled "Why Does Clark Oppose Outside Unions? Worker Asks," Clark was quoted as saying,

> We would be less than truthful unless we stated frankly our opinion that the injection of outside professional unionism into the affairs of this plant would cause interference with plant operation, introduce a discordant note into postwar plans and do nothing to make a better job for anyone.

Further, it was clearly implied that an employee's advocacy of the CIO would be construed by management not only as antagonistic to the interests of the respondent but as un-American and a reflection upon the employee's intelligence. In an editorial, entitled "Clark's Creed," appearing in bold face type, the following observations were made:

> We believe it is our duty to work for more production and to build a finer business, which is the only way to create better jobs, higher pay, greater job security.
>
> We believe that to obtain these objectives it is necessary to have understanding, harmony, decency and teamwork between worker and management.
>
> We believe that it is not only our right but our duty to resist with all our power any effort by outside forces to drive a wedge between labor and management.
>
> We believe in the American worker and think that he represents the highest type of honest-to-God American, and has a head full of common sense and that he will make the proper decision when he has all the facts and knows the truth.

At two points in *The Facts and the Record*, reference was made to the right and privilege of employees to choose their own representatives. But in each instance these statements were joined in context with other observations clearly reflecting the respondent's marked opposition to that course [6]

The Association was not specifically mentioned by name in any of the articles. Frequent reference was made, however, to the harmony, fellowship, and mutual trust which had prevailed in labor-management relations in the past and a desire was expressed for its continuance. Of the two choices on the ballot, only the CIO was made the object of the respondent's attack, and the employees were strongly urged not to fail to vote. The respondent's choice was thus made unmistakably clear.

(2) The advertisements

In a newspaper advertisement inserted in the *Olean Times Herald* on February 5 and 6, 1945, the respondent publicly declared its opposition and hostility toward the CIO and in effect appealed for community support in the campaign which it was waging against the CIO.

The advertisement accused "outside organizers" of misleading employees into believing that they were underpaid and underprivileged, of making "promises they cannot keep under the law" and of contending that "the progress the Company has made under peaceful harmonious conditions is a bad thing for men and women in the Clark organization who are your friends and neighbors." It then stated:

> Clark Brothers has no intent to suggest that its employees do not enjoy the unhampered right to select the bargaining agent of their choice but we do object to misleading and untruthful propaganda by self-serving professional organizers.

[6] One such instance is quoted above in conjunction with Clark's comments concerning the strike clippings

After pointing to the fact that the respondent had been a member of the Olean community for a long number of years and enjoyed a good reputation in the community, the advertisement referred to "the far reaching plans Clark Bros. has instituted for providing postwar work for all of its people and for others in the local area", emphasized the absence of labor disturbances and the wartime production record at its plant and concluded by stating—

> We know the citizens of Olean have a pride and interest in one of their neighbor groups with this record behind it and do not take lightly unsubstantiated charges by self seeking organizers that will hinder the continuance of the progress that has already been made
>
> We bring this message to the people of Olean so they will have full knowledge of the reason why the Company is opposing outside pressure groups whose salesmen seek to impose their organization on our employees through misrepresentation.

(3) The speeches

As noted above, both Vice President O'Connor and President Clark, as part of the respondent's counter-campaign, addressed the employees on the subject of the election. O'Connor's speech was made a day or two preceding the election. Clark's speech was made on the very day of the election, to the day shift within an hour of the time that the employees were to go to the polls.[7] The speeches were made on company premises during regular working hours, the employees being directed by announcement over the public address system, and in some instances by their foremen as well, to assemble on the shipping floor for the express purpose of listening to the speeches. The employees were paid for the time devoted by them in attendance at the speeches. While the speeches were being delivered, all manufacturing operations were suspended and the power and engines were shut down.[8] The speeches were also broadcast over the public address system which was audible throughout the plant On occasions in the past, the employees had been addressed in the plant on such matters as the Community Chest, the Red Cross and bond drives, but the addresses on such occasions had always been made during the regular lunch hour when employees were free to leave the plant.[9]

Copies of the two speeches were printed and distributed to the employees. O'Connor's speech was mailed to their homes Clark's speech, made on the day of the election, was distributed during regular working hours that morning to employees by their foremen on the plant floor.

O'Connor and Clark in their speeches, copies of which are hereto attached as Appendix A and Appendix B, respectively, again expressed the respondent's opposition to the CIO, and, for the first time, made explicit reference to the Association of which they spoke in terms of favor Among other things, the speeches adverted to the cooperative and peaceful relationship which had existed between "within the plant employee representation" and the respondent, and attributed to that "healthy relationship" the growth and prosperity of the business. At the same time, the speakers played on the employees' fear of job insecurity by further reference to the ideas to which the minds of the employees had already been conditioned through the respondent's barrage of campaign literature, making it appear that the advent of an outside union would lead to an impairment of management-labor relations, on which it was stated the respondent's continued

[7] O'Connor and Clark each delivered substantially the same speeches to both the night and the day shifts.

[8] The record shows that it was extraordinary to shut down the engines which were kept in operation even during the regular lunch hour when the men were not at work

[9] Although employees are paid for their lunch periods, the lunch period is not regarded as part of the regular working hours.

success and employees' job security were dependent The employees were warned that increases in the respondent's labor costs would impair its competitive position in the market, leading to loss of business and jobs They were, in effect, cautioned that although representation by an outside union would prove costly to them, they could not reasonably expect to gain anything in return. The CIO was disparaged expressly or by clear implication as being untruthful, self-seeking, insincere, and not interested in the welfare of the employees but only in dues. Throughout the speeches, as in the earlier literature, the respondent, in effect, identified itself with the Association as a candidate and distorted the election issue as a contest between the respondent and the CIO for the allegiance of the employees. Although expressly stating what the law requires, that there would be no discrimination or retaliation against employees because they favored any organization, the general tenor of the speeches, as well as the preceding literature, was such as to make it clear that the respondent considered an employee's support of the CIO not only as opposed to the interests of the Company, but as a serious reflection on the sound judgment and good sense of the employee as well The employees were urged to vote, and it was expressly recommended that they vote against the CIO

E. *The results of the run-off election*

The run-off election resulted in a decisive victory for the Association: Five hundred and eighty-five votes were cast for the Association, 394 for the CIO, and 14 votes were challenged. Contrasted to the January 19 election in which the Association received but 4 more votes than the CIO, the difference between the Association and the CIO vote in the second election was 191 Although 53 more employees voted in the second election, the CIO in that election received 50 votes less than in the earlier one.

F *The purpose and intent of the respondent's campaign*

In the announcement of its campaign, the respondent, as noted, disclaimed any "ulterior or selfish motives" and professed that its object was to answer certain "false" charges implicating the management and to aid its employees in making an intelligent selection. It is relevant to determine whether the facts and the record in this case support the validity of these assertions

It was the testimony of Clark that the respondent was motivated to inject itself into the campaign because of what it considered to be unfair statements made by the CIO. But Moody, who recommended the campaign and was the architect of its design, conceded while testifying that the decision to engage in the campaign was substantially motivated as well by information received by him that the CIO had a good chance of winning the election. It was the respondent's determination, further testified Moody, not to confine itself with "definite certainty to the answering of exact charges in all cases" but "to conduct an aggressive campaign against the CIO." Clark in his testimony admitted that he was "thoroughly opposed" to the organization of the respondent's employees into an outside union. And there is testimony of Moody to the effect that this general opposition to outside unions was considered and contributed to the respondent's determination to conduct an "aggressive" campaign. Moody's comments to Zanghi, quoted above, concerning the object of the campaign reveal that additionally contributing factors in the determination were the respondent's satisfaction with the Association as a bargaining agent and its desire to insure the defeat of the CIO.

An analysis and comparison of the campaign material issued by the CIO and that issued by the respondent shows, as Moody freely admitted, that the respondent in its campaign went far beyond the limits of answering the CIO statements

and campaign promises. Although Moody at the hearing pointed to a number of items in the CIO campaign literature which he claimed were untrue or misleading, he admitted that the respondent's literature and speeches left unanswered the greater portion of these. Significantly, the alleged false and misleading statements to which Moody pointed had been made and repeated for many months prior to the respondent's decision to enter the campaign, some, which Moody considered most damaging to the respondent, as much as a year before; yet the respondent made no effort to answer them until the eve of the run-off election, after the CIO strength had been disclosed in the original election and it had become obvious that the CIO chances for success were no longer remote. Significantly also, the respondent did not see fit to answer campaign statements made by the Association with respect to which, Clark and Moody both testified, the respondent had also taken exception.[10]

The foregoing circumstances, coupled with the form, character, and general content of the respondent's campaign literature, particularly *The Facts and the Record* as well as the volume and timing of the literature and speeches, impel the conclusion that, notwithstanding the contrary testimony of Clark and Moody, which is not credited, the respondent was not in fact motivated to engage in its anti-CIO campaign for the reasons expressed in its announcement letter. Rather, the undersigned is convinced, and finds on the basis of the entire record, that the respondent's pre-election campaign, described above, was intended, calculated, and designed solely for the purpose of insuring the defeat of the CIO in its election contest with the Association.

G. *Testimony as to effect of the respondent's campaign upon self-organization of its employees*

A number of employee witnesses called by the Board testified, in substance, that because of the respondent's marked hostility and opposition to the CIO, as reflected by the content, volume, and intensity of the respondent's literature and speeches, they were left with the impression that their job security would be endangered or their promotional and job opportunities limited if they continued openly to support the CIO, and this notwithstanding expressions by the respondent to the contrary.[11] At least one of these employees, Dominic Panado, as appears from his credited testimony, actually ceased all union activities and attendance at meetings because he was "scared" of his job as a direct consequence of the respondent's campaign.[12] Panado and two other employee witnesses for the Board testified that the literature mailed to their homes was read by members of their families who expressed the fear that their identification with a union to which their employer was opposed might endanger their job security, and who therefore urged them in the interests of family welfare to abandon their open CIO support. Employee witnesses for the Board further testified that immediately following the commencement of the respondent's campaign many of their fellow employees became unreceptive to and shied away

[10] See *Matter of Precision Scientific Company*, 53 N. L. R. B. 860.

[11] One of the Board witnesses, Joseph Scutella, explained his reaction as follows:

> Well, I thought I was no friend of the boss when he was fighting against the CIO. I figures when you monkey around with the boss you are no friend of his any more when you cross him up.

[12] Another witness, George Smith, likewise testified that he discontinued his union activities altogether; however, it appears from his over-all testimony that the proximate cause of his action was not the company campaign but what he considered to be job discrimination on account of his CIO activities, an issue neither pleaded nor litigated. The remaining witnesses who testified on this point, all active union members, admitted that despite their fears, they continued their union activity.

from the CIO and expressed themselves as being fearful of engaging in or continuing activity on behalf of the CIO. The testimony of these witnesses is to be considered in conjunction with that of President Clark who testified that he considered employees engaged in organizational work for outside unions as being engaged in activities opposed to the interests of the company and the plant as a whole. Clark further testified on the basis of his experience as an employer and as an employee, that an employee protects his job and secures advancement by being well thought of by his employer; that an employee who engages in union activity on behalf of an organization considered by his employer to be detrimental to the employer's interest and that of fellow employees does not enhance his popularity or reputation with the employer; and that, other things being equal, it would be a natural inclination for management to select first for lay-off the employee who has engaged in activities considered by the employer to be detrimental to the interests of the plant. The testimony of these witnesses is also to be considered in the light of the economic realities of the employer-employee relationship frequently recognized by the Board and the Courts.[13] So considered, this testimony with respect to the fears engendered in them and in their fellow employees by the respondent's campaign and the retarding effect of that campaign on CIO organizational activities cannot be said to be unreasonable. And since the Board's witnesses themselves impressed the undersigned as truthful, their testimony as above outlined is credited and accepted as fact.[14]

H. *The respondent's rule against solicitation; its interpretation and application*

Since on or before June 26, 1943, the respondent has had a plant rule, known as Shop Rule 6, which reads:

> No collecting, soliciting, selling, or visiting is permitted unless proper authorization is received.

Although not specifically expressed in the written rule itself, it appears from the testimony of President Clark and Industrial Relations Manager Moody, that union solicitation activities are deemed embraced within the scope of this rule.

Concerning the purpose and necessity for this rule, Moody testified as follows (and this is the only testimony on that point in the record):

> At one time we had a problem with the distribution of lottery tickets in the plant. We were trying to guard against that. We were likewise putting everyone on notice with respect to the distribution of union literature in the plant and the distribution of anything else in the plant or the soliciting of contributions or anything else without company sponsorship. That was the real purpose of the rule.

[13] See footnote 23, *infra*.

[14] In arriving at this determination, the undersigned has taken into account the testimony of the several witnesses called by the respondent to testify concerning their reaction to the campaign. One, Paul Nickel, secretary-treasurer of the Association, testified generally that the employees felt free to express their choice because of the secret ballot, but was neither questioned nor did he testify concerning the equally important consideration as to whether or not employees felt restrained from engaging openly in union activities. Another Association official, Arthur Forney, testified (unreasonably) that he understood that the respondent was merely proclaiming its neutrality and that he did not know what union it favored. A third witness, Walter Reinman, testified that he was impressed primarily by the fact that the respondent wanted all employees to vote, he admitted, however, that at the time he was not interested in either union and did not pay much attention to the campaign, and, further, that as an employee he would not do anything (such as passing out literature) to which his employer might be opposed. The fourth, Kearnon C. Lane, testified merely that he was impressed mainly by the fact that the respondent wanted its employees to vote, that he did not care much for either union, that nevertheless he voted in the run-off election (where there was no "neither" choice), although he did not vote in the first election.

Trial Examiner LEFF: Did you desire to accomplish any object from the point of view of plant efficiency or something of that kind?

The WITNESS: In a way, we were trying to prohibit the wasting of time by individuals in distributing various things or undertaking to take up collections of one kind or another, things of that sort, some of which had taken place prior to the issuance of this—as I say, we had a little trouble with raffles of or lottery tickets or something of that sort. I was never exactly certain of their exact nature. I could not get my hands on it, but the story came to me that there was some kind of raffle or lottery going on in the plant.

As noted above, the respondent, on the day of the run-off election, distributed to its employees on plant property during working hours printed copies of Clark's speech. The Association was freely permitted, except during the period immediately preceding the election (the period beginning on the posting date of the notice of election), to distribute inside the plant copies of its official monthly publication, *The Union Bulletin*.[15] Although distribution of *The Union Bulletin* was apparently made during nonworking hours, Shop Rule 6, according to Moody, prohibited the distribution of union literature in the plant at any time. The rule was actually so construed and applied in the case of Sam Alaimo under the circumstances narrated below.

Several weeks after the run-off election, employee Sam Alaimo entered the plant about 12 minutes before the start of the regular work day at 7 a. m. Between 6:48 a. m. and 7 a. m., according to his credited testimony, he distributed inside the plant copies of a CIO leaflet announcing that the election held on February 8, 1945, had been set aside by the "National Labor Relations Board";[16] he continued distributing the literature until the whistle blew at 7 a. m. at which time he immediately went to his station of work. Alaimo was observed by Paul Nickel, secretary-treasurer of the Association, who complained to the personnel office that Alaimo was passing out literature in the shop. Later that morning, Alaimo was summoned to the personnel office where, in the presence of the plant superintendent and the assistant foundry superintendent, he was reprimanded by Personnel Director Cases for his conduct in passing out the CIO leaflets and was told that this was a violation of Shop Rule 6. Despite Alaimo's protestations that he had distributed the leaflets on his own time and that Association publications as well as Clark's speech were permitted to be distributed in the plant, Alaimo was given a written warning slip charging him with violation of Shop Rule 6 and warning him that a repetition of that or other violations would lead to his suspension.[17]

### I. *Conclusions*

The record establishes, and the undersigned finds, that the respondent injected itself into the run-off election contest, the object of which was to determine what

[15] The contract between the respondent and the Association makes no provision for such distribution.

[16] The election was in fact set aside by the Board's Regional Director who was acting pursuant to authority vested in him under the consent election agreement.

[17] Except as otherwise noted, the facts set forth in this paragraph are based upon the undisputed and credited testimony of Alaimo. Although Nickel at one point in his testimony testified that Alaimo's distribution activities occurred after 7 a. m. his testimony in this respect was vacillating, at another point he testified that it was "before seven," and at a third point that it was "close to seven" Moreover, Nickel admitted that when he complained to Cases, he said nothing about Alaimo's distribution being on company time, that he "did not give a damn about that," and that "the only thing [he] was complaining about was the way the damned bulletin read" To the extent that Nickel's testimony indicates that the distribution was after 7 a. m., it is not credited, and it is found in any event that Alaimo was warned because he passed out union literature on company premises rather than on company time.

employee bargaining agent should sit with it at the bargaining table, and thereafter organized and conducted on the side of the Association an intensive and admittedly agressive campaign in opposition to the CIO, for the purpose and with the intent of insuring the defeat of the CIO and the selection of the Association, the only alternative choice on the ballot.[18] Had the respondent supplied the Association with its mailing list, paid for advertisements inserted by the Association in the local press, and, while denying like privileges to the CIO, allowed the Association the use of its time and property to conduct a campaign against the CIO, clearly its conduct would have been regarded as constituting illegal support and assistance to the Association and an interference with the self-organizational rights of employees guaranteed by the Act.[19] The question here is whether the respondent's course of conduct was any the less illegal because the respondent itself conducted that campaign against the CIO.

The respondent, standing on its constitutional right of free speech, asserts that as an employer it had a privilege equal to that of employees, to express its views concerning the choice by its employees of their bargaining representative and that since its campaign utterances contained on their face no explicit threats of discrimination or economic reprisal its conduct was not violative of the Act

It is unquestionably true that an employer in the exercise of the freedom of speech protected by the First Amendment is privileged to entertain and express his opinion on labor policies and problems.[20] But this privilege is not an absolute one It does not guarantee him who speaks immunity from responsibilities for the intended or reasonably foreseeable consequences of his utterances insofar as they may restrain or impair the rights of others.[21] Where the utterances themselves, viewed against the background of the employer's total activities, take on the character of coercion, or where, in conjunction with the speech, the employer otherwise makes use of his economic power over his employees to influence their action, the employer exceeds the protected limits of the right of free speech.[22] It thus becomes necessary in the instant case to determine, first, whether the respondent's campaign statements considered in context with its entire course of conduct assumed a coercive character, and, secondly (but not conditioned on the determination made with respect to the first point), whether the respondent did more than speak in its effort to defeat the CIO

In evaluating what the respondent said and did, it must be remembered primarily that it is the normal effect (proven by direct evidence or reasonably

[18] Since, as has been found above, the respondent's real purpose was not, as professed in its campaign, to answer campaign utterances of the CIO, it is not necessary to decide in the instant case whether, by what means, or to what extent the respondent was justified in correcting any misstatements of fact which the CIO may have made.

[19] *International Association of Machinists* v. *N. L. R. B.*, 311 U. S 72, 78 · "Known hostility to one union and clear discrimination against it may indeed make seemingly trivial intimations of preference for another union powerful assistance for it." It has been held that the very existence of a labor organization which the employees suppose to be favored by the employer deprives them of the full freedom of choice which the Act demands. *Westinghouse Electric & Mfg. Co* v. *N L. R B*, 112 F. (2d) 657 (C C A 2) aff'd 312 U. S 660, *N L R B* v. *Waterman Steamship Corporation*, 309 U S 206; *N. L. R. B.* v. *Southern Bell Telephone and Telegraph Company*, 319 U S 50

[20] *N L R B* v. *Virginia Electric & Power Co*, 314 U S 469, 477, *Thomas* v *Collins*, 323 U S 516

[21] *N L R B* v *New Era Die Co*. 118 F (2d) 500, 505 (C. C. A. 3); *N. L R. B* v. *M E Blatt Co*, 143 F (2d) 268, 274 (C C A 3), cert den 323 U S. 774

[22] *N. L. R. B.* v. *Virginia Electric & Power Co., supra; Thomas* v. *Collins, supra.* Mr. Justice Douglas in his concurring opinion in the *Thomas* case (in which Mr. Justice Black and Mr. Justice Murphy joined) said:

> No one may be required to obtain a license in order to speak But once he 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.

presumed) on employees which is the point of inquiry. Further, whether the words or conduct of an employer constitute interference, restraint, or coercion within the meaning of the Act must be judged not as an abstract proposition, but realistically in the light of the economic relationship between the employer and his employees. It need hardly be stressed that their economic dependence renders employees unduly responsive to the suggestions of their employer, whose good will is so necessary, and gives to the employer's statements, whether or not ostensibly couched as argument or advice, an immediate and compelling effect that they would not possess if they were addressed to economic equals. "What to an outsider will be no more than the vigorous presentation of a conviction, to an employee may be a manifestation of a determination which it is not safe to thwart." [23] And, therefore, under certain circumstances, even "slight suggestions as to the employer's choice between unions may have a telling effect upon men who know the consequences of incurring that employer's strong displeasure." [24]

That is not to say that any show of bias or departure from neutrality is sufficient to amount to coercion. Much depends on the surrounding circumstances. Where the circumstances disclose that the statements made by the employer are designed not merely to persuade to action but form part of a course of conduct which is deliberately calculated to and has the effect of restraining or coercing employees in their free choice, then "pressure exerted vocally by the employer may no more be disregarded than pressure exerted in other ways" [25] And in determining whether a course of conduct attains the stature of restraint or coercion, the manner and degree (measured both in terms of quality and quantity) in which the employer departs from neutrality and manifests his opposition to a union are relevant considerations. Thus, standing alone and in the absence of other evidence, the presentation of an argument, temperate in form and containing no intimations of reprisal, such as appeared in the *American Tube Bending* case, may not support an inference of coercion sufficient to outweigh the employer's right of free expression.[26] But the situation is quite different where, as here, it is clear that the employer's purpose is not merely to express its views, but rather to engage in an organized, intensive, and aggressive campaign forming part of a general "course of conduct . . . aimed at achieving objectives forbidden by the Act." [27] For, to employees, conscious of the necessity of maintaining

[23] *N. L. R. B.* v. *Federbush Co., Inc.*, 121 F. (2d) 954, 957 (C. C. A. 2). See also *N. L. R. B.* v. *Griswold Mfg. Co.*, 106 F. (2d) 713, 722 (C. C. A. 3); *N. L. R. B.* v. *Falk Corp.*, 102 F. (2d) 383, 389, (C. C. A. 7), aff'd 308 U. S. 453; *N. L. R. B.* v. *M. E. Blatt Co.*, 143 F. (2d) 268, 273 (C. C. A. 3); *N. L. R. B.* v. *Link-Belt Company*, 311 U. S. 584, 600

[24] *N. L. R. B.* v. *Virginia Electric & Power Co., supra*, quoting with approval *International Association of Machinists* v. *N. L. R. B., supra.*

[25] *N. L. R. B.* v. *Virginia Electric & Power Co., supra.*

[26] *N. L. R. B.* v. *American Tube Bending Co.*, 134 F. (2d) 993 (C. C. A. 2), cert. den. 320 U. S. 768. Cf *N. L. R. B.* v. *M. E. Blatt Co., supra.*

[27] See *N. L. R. B.* v. *Virginia Electric & Power Co., supra*, at 479; *Matter of Tomlinson of High Point, Inc.*, 58 N. L. R. B. 982; *Matter of Agar Packing & Provision Corporation*, 58 N. L. R. B. 738; cf. *J. L. Brandeis & Sons*, 53 N. L. R. B. 352, rev'd 142 F. (2d) 977 (C. C. A. 8). The following court decisions indicate the validity of this proposition: *Schweitzer* v. *N. L. R. B.*, 144 F. (2d) 520 (App. D. C.) "We do not hold this [the employer's right to comment] justifies an organized campaign or a protracted distribution of propaganda" *Reliance Mfg. Co.* v. *N. L. R. B.*, 125 F. (2d) 311 (C. C. A. 7) "While management may have a right under some circumstances to express its opinion as to a union or its preference between unions, such right certainly does not extend to the point where it becomes a participant in a contest to which it is not a party." *International Association of Machinists* v. *N. L. R. B., supra*, at 78. "The freedom of activity permitted one group and the close surveillence given another may be more powerful support for the

their employer's good will, an employer's aggressive participation in a campaign against a union, particularly where, as here, it reflects an uncompromising attitude of hostility toward one union and favor for the other, more than a "vigorous presentation of a conviction," becomes "a manifestation of a determination which it is not safe to thwart."

In the instant case, the form, content, volume, and concentration of the respondent's campaign propaganda, which was directed not only to the employees but to their families and the community as well, make it clear that the respondent's campaign was designed to go beyond mere persuasion and to achieve a restraining and coercive effect upon its employees' free expression of their organizational will. It is true that the respondent carefully avoided any explicit threats, largely by the device of placing the onus upon the CIO for any consequences that might follow their employees' selection of that organization. But the respondent achieved substantially the same effect in playing on its employees' fears of job insecurity by making it appear that the advent of the CIO would almost inevitably lead to disruption of harmonious management—labor relations, to resultant strikes and loss of production, business, and jobs, and to an impairment of the respondent's competitive position in the market.[28] The impact of this type of propaganda must be assessed, as it is here, in the setting of the locale in which it was presented:—a relatively small community, with limited job opportunities, in which the respondent was the chief employer of labor, and a community which had already witnessed the virtual shut-down of the shops of a leading employer as a result of labor trouble. Moreover, the respondent did more than exploit its influential employer position to support and assist the Association by its statements disparaging and discrediting the CIO, and the purposes, motives, and campaign promises of that organization; by its emphasis and distortion of the negative aspects of CIO membership such as employee liability for dues and assessments; and by its assurances that employees could expect from CIO representation no benefits or advantages which they did not already possess or would not otherwise obtain from the respondent. The expression of these views, considered in the setting of the respondent's undisguised offensive against the CIO, and coupled with the respondent's repeated emphasis that the CIO was antagonistic to its interests, as well as with its intimations that American workers of sound sense could not support the CIO, were such as could not but serve to inspire in employees the fear that their open identification with the Union which the respondent opposed would cause the respondent to regard them as disloyal and unfit, would incur the respondent's "strong displeasure," and would impair their potentialities for advancement and security in the plant.

That the respondent's propaganda had its intended coercive effect is apparent from the credited testimony, reported above, of employee witnesses on that point. Although it is not necessary to establish by direct evidence that the respondent's campaign had an actual coercive effect, the presence of this proof nevertheless confirms and fortifies the conclusion, which the record here justifies even independently thereof, that the respondent's campaign did in fact restrain and coerce the respondent's employees in their exercise of the right of self-organization.

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former than *campaign utterances*" (Emphasis supplied) See also *N L R. B.* v. *Trojan Powder Co*, 135 F (2d) 337 (C. C A 3), cert den 320 U S 768, where the court upheld the Board's cease and desist order based largely upon a "barrage" of letters to the employees, which the court found contained no explicit threat.

[28] The Board has recently declared that an employer's fear of loss of business resulting from the unionization of his employees, although genuine, does not justify him in warning his employees that the security of their employment would be impaired by their continued support of the union. *See Matter of A. J. Showalter Company*, 64 N. L. R. B. 573.

The coercive character and effect of the respondent's campaign statements, as well as the respondent's conduct as a whole, were not neutralized by the statements interspersed in some of its literature and in the speeches that employees were free to vote as they chose and that there would be no discrimination These statements were fused with and colored by the general mass of the respondent's statements, the predominant tenor of which was to reflect the respondent's determined opposition to the CIO.[29] The vehemence of the respondent's opposition to "outside unions," as evidenced particularly by *The Facts and the Record*, and the intensity, volume, and timing of the respondent's campaign were such as to render suspect in the eyes of the employees the sincerity of the respondent's assertions that it would refrain from discrimination.[30] Nor did the fact that the balloting at the election was secret obliterate the restraining effect of the respondent's campaign; for the right of the employees, without fear of retaliation, to expose themselves in an open campaign for the Union of their choice was as important to the success of their candidate and to their own exercise of the right of self-organization as was their right to vote a free ballot.

But the finding of interference, restraint, and coercion made in this case need not and does not rest alone upon what the respondent *said* in its literature and speeches; nor is it necessarily dependent upon the finding of restraint and coercion made with respect to the statements standing alone. It is based as well upon what the respondent *did* in conjunction with what it *said* and as part of its total course of conduct; upon the use made by the respondent of its economic power over its employees in its general effort to influence and interfere with their free action. And clearly, what the respondent *did*, as distinguished from what it *said* was not protected by its constitutional privilege of free speech, even if it be assumed that the utterances, standing alone, were non-coercive. What the respondent *did* will now be considered.

As elsewhere found herein, the respondent during the period in question had a plant rule (the validity of which will be hereinafter considered) under which, as the rule was interpreted and applied, the CIO was barred from using company time or property to solicit members, to distribute its campaign literature, or otherwise to engage in its union activities. On the other hand, and notwithstanding the rule, the respondent, by making speeches and by distributing copies of one of these speeches during working hours, utilized the same time and property, which it denied to the CIO, to conduct, in part, its campaign against the CIO and on behalf of the Association. Moreover, the respondent took advantage of its economic control over its employees to compel its employees, who could not with impunity disregard the direction of their employer during working time, to assemble and to give heed to its campaign arguments, consisting in effect of anti-CIO solicitation. It implemented its managerial authority by paying

[29] This is illustrated by the testimony of one employee witness, Sam Alaimo, who, asked to explain his testimony that Clark "did not mean it" when Clark said there would be no discrimination, testified:

> Why do I say he don't mean it? Last word he say, "You don't need outside union" When he got through speak, put the words all together That is what he mean

See *N. L. R. B.* v *Federbush, supra:* "Words are not pebbles in alien juxtaposition, they have only a communal existence, and not only does the meaning of each impenetrate the other, but all in their aggregate take their purport from the setting in which they are used, of which the relation between the speaker and the hearer is perhaps the most important part"

[30] In *N L. R B.* v *Virginia Electric & Power Co., supra,* the Supreme Court recognized that the purport of utterances setting "forth the right of the employees to do as they please without fear of retaliation by the Company" may "be altered by imponderable subtleties at work." These subtleties are present here. See *Matter of Agar Packing & Provision Corporation, supra.*

its employees for the time spent by them in listening to these arguments. It made use of a channel of communication, closed to the CIO and one where the free competition of ideas envisaged by the First Amendment could not operate, to campaign in opposition to the CIO and in support of the Association, without affording the CIO an equal means to reach the employees to counter this campaign. In short, the respondent disparately utilized not only its time and property but its economic power and its control over its employees and their jobs as well for the purpose of assisting, promoting, and supporting the Association in its election contest with the CIO, thereby affording the Association a substantial tactical advantage.[31]

By compelling its employees to assemble on company time and property to listen to its campaign speeches, the respondent did more than make an improper use of its economic power over its employees to interfere with their free choice of a bargaining agent. It also directly infringed upon a right of its employees, as basic as the employer's right of free speech itself. The employees' right of self-organization is a "fundamental right," [32] which is not only part of the right of free speech but of free assembly as well.[33] The prohibition by Congress against interference by employers with the selection of employee representatives was based upon a recognition of that right, the safeguard of which, protected by the First Amendment from governmental infringement, in its application to employee self-organizational activities was made operative by the Act upon employers as well.[34] Just as the right of free speech includes the right to refrain from speaking [35] so also does the right of free assembly carry with it the right to refrain from assembling. It can scarcely be doubted, for example, that a governmental decree requiring all citizens in a community to assemble at a political rally would represent an abridgement of their right of free assembly protected by the First Amendment. The corollary right of employees to assemble freely (or to refuse to assemble) for self-organizational purposes having by statutory recognition and implementation likewise been safeguarded from employer interference, the action of the respondent in forcing its employees to assemble and to give heed to its campaign speeches was no less an abridgement of their right of free assembly. It is no answer to say that the employees were then on company time and under company control True, under their contract of hire, the employees subjected themselves to the control of the respondent during working hours, certainly with respect to all incidents of the master-servant relationship, and possibly also with respect to such matters as fund raising drives, which although not direct incidents of that relationship are nevertheless not protected from employer interference by statutory implementation of the fundamental right. But the employees' right to self-organization is not an incident of the employment relationship which the respondent could control, for Congress has specifically prohibited an employer's interference with that right. Having in conjunction with its addresses to the captive audience of its employees infringed upon employee rights of

[31] See *Matter of Thompson Products, Inc.*, 60 N L R B. 885 An employer's disparate treatment of competing labor organizations in an election campaign has frequently been held by the Board to constitute discriminatory and improper assistance and interference by the employer with the exercise by the employees of their free choice of bargaining representatives, See *Matter of Joshua Hendy Iron Works*, 53 N L R B. 1411; *Matter of Crosley Corporation*, 60 N L R B 623

[32] *N L R B* v *Jones & Laughlin Steel Corp*, 301 U. S. 1, 33

[33] *Thomas* v. *Collins, supra*

[34] See *N L R. B* v *Jones & Laughlin, supra,* at pp 33–34; *Hague* v *CIO,* 307 U S. 496, 510

[35] *Board of Education* v *Barnette,* 319 U. S. 624, 634, 645.

equal stature with its own right of free speech, the respondent cannot now shield itself behind its constitutional privilege and claim immunity for its conduct.

But even if it be considered that the mere conflict of competing rights on the same level does not necessarily warrant the abridgement of the right of him who precipitates the clash, but requires, rather, the balancing and accommodation of the competing rights, one to the other, the result reached is the same. On this assumption it is necessary, in accordance with recognized principles, to determine what in fact will be the prejudice to employees in allowing the employer to address them on the subject of employee organization during working hours and what will be the employees' benefit and the employer's prejudice in disallowing it. Obviously, if an employer is permitted to address compulsory employee audiences on the subject of employee organization it would give rise to grave danger of irreparable damage to employees. For the employer alone has assured access to all the employees, and exponents of a contrary view (including employees who may not exercise their own right of free speech on this subject during working hours), having no equal means of matching the employer's advantage in this respect, are thus precluded from competing on equal terms with him in the presentation of facts and argument. And this is particularly true where, as here, the employees are addressed during working hours on the day of the election and no fair opportunity is afforded others to counter the employer's statements. On the other hand, the disallowance of such addresses during working hours entails relatively harmless prejudice to the employer's exercise of his right of free speech, for he still may avail himself during non-working hours of the avenues of communication open to employees and labor organizations. For these reasons, it is found that the interest of the employees to be free from employer compulsion under the circumstances here considered outweigh the respondent's interest in its right of free speech.

There remain for consideration the allegations of the complaint relating to the respondent's prohibition of union solicitation on the employees' own time and relating to the respondent's surveillance of union activities, both to be considered in connection with the respondent's total course of conduct.

The respondent's rule, known as Shop Rule 6, although making no specific reference to union solicitation, is broad enough on its face to cover such solicitation, even on the employees' own time, and the record establishes that it was in fact so interpreted and applied by the respondent. Moreover, the record shows, and it is found, that the rule was discriminatorily applied by the respondent. While enforcing this no-solicitation rule against the CIO by prohibiting distribution of a CIO leaflet during non-working time, the respondent engaged in anti-CIO solicitation during working hours and on company property by distributing copies of O'Connor's speech;[36] further, except during the period immediately preceding the election, the respondent permitted the Association to distribute its "Bulletin" on company property. Nothing in the rule or in the record indicates that, at least insofar as it applied to union solicitation activities on the employees' own time, the rule was either necessary or reasonably calculated to insure plant discipline or efficiency. It is found that the respondent's no-solicitation rule is violative of the Act insofar as it prohibits union solicitation by employees on company property during non-working hours[37] This unlawful prohibition in the rule is a recognized impediment to self organization and, aside from its discriminatory application, handicapped the CIO

[36] See *Matter of Tomlinson of High Point, supra.*

[37] *Matter of Republic Aviation Corporation*, 51 N L. R. B. 1186, enf'd 324 U. S. 793 (16 L. R. R. 300).

which was trying to gain a foothold in the plant more than it did the Association, the established and recognized bargaining agent. Thus, the very existence of this rule as interpreted and applied had the necessary effect of impeding the employees in the exercise of their right to transfer their allegiance from the Association. The restraint was not cured in this case by the qualification, "unless proper authorization is received"; on the contrary, so qualified, the rule exercised a still greater restraining influence due to the natural reluctance of employees to disclose to their employer their interest in a union. It is noted that the rule contains no prohibition directed specifically to "distribution" of literature, although "solicitation" was apparently interpreted by the respondent to include "distribution." The undersigned finds it unnecessary in this case to determine whether or not the respondent could validly promulgate a rule prohibiting such distribution on company property covering even the employees' own time; it is obvious that in any event it would be required under the Act to apply such a rule on a non-discriminatory basis.

The allegation of surveillance, added by amendment at the hearing, is based on Moody's testimony, more fully adverted to above, that the respondent kept itself informed on the CIO campaign by (a) reports from supervisors, statements of employees, inquiries made about the plant, and statements of employees heard in the plant, and (b) Moody's conduct in visiting bars frequented by employees on a "couple" of occasions for the express purpose of overhearing conversations bearing on the campaign. With respect to the first aspect of Moody's testimony, concerning the information secured by the respondent in and about the plant, the undersigned is not persuaded on the record as it stands that there is sufficient to sustain the allegation of surveillance. Although this aspect of Moody's testimony tends to indicate a lack of proper recognition on the respondent's part that union organization and activities are primarily matters of employee and not employer concern, the record does not clearly establish that the reporting supervisors obtained their information improperly, that the statements made by the employees were encouraged by the respondent,[38] that the inquiries made were directed to employees, or that the statements of employees overheard in the plant were such as would not normally have been overheard by the respondent's management employees without any attempt at surveillance. However, with respect to the second aspect of Moody's testimony, concerning his visits to the bars, the undersigned finds, particularly in view of Moody's express admission as to the purpose of his visits, that Moody's conduct constituted surveillance by the respondent of union activities and of the union activities of its employees. This finding is not affected by the fact that Moody also testified that his object was not to find out what employees were interested in the union but rather to learn what was being said in the campaign. It is obvious that campaign statements of employees cannot be divorced from organizational activities and that what employees say under such circumstances will reflect their attitude toward and even membership in a union. The respondent's defense that there is no showing that any of the employees had any knowledge that Moody overheard any of their conversations, or that any employees were discriminated against as a result thereof, is clearly without merit.[39] Moody's conduct was nonetheless an interference with the employees' rights to self organization.

Upon the record viewed as a whole, the undersigned is convinced and finds that the acts and statements of the respondent outlined above, including the respondent's campaign of literature, advertisements, and speeches, which opposed the CIO and assisted, promoted, and contributed support to the Association;

[38] Cf. *Matter of S H Camp and Company*, 60 N. L. R. B 263.

[39] *N. L. R. B.* v. *Grower Shipper Vegetable Ass'n*, 122 F. (2d) 368 (C. C. A. 9); *Bethlehem Steel Co.* v. *N. L. R. B.*, 74 App. D. C. 52, 120 F. (2d) 641.

the respondent's disparate use in conjunction with that campaign of its time and property and of its economic power over its employees to give the Association a tactical advantage over the CIO in the election contest; the respondent's action in compelling its employees to assemble at its plant during working hours and to listen to speeches delivered by its officers on the subject of their selection of a bargaining agent; the respondent's use of a no-solicitation rule which prohibited union activities during non-working hours and which, moreover, was discriminatorily applied; the respondent's surveillance of the union activities of its employees; and the totality of these activities, constituted a course of conduct which the respondent intended should, and which in fact did, interfere with, restrain, and coerce its employees in the exercise of the rights guaranteed in Section 7 of the Act. It is further concluded and found that since the respondent's campaign statements were an integral part of the respondent's total course of conduct, which interfered with, restrained, and coerced the employees in the exercise of such rights, the statements were not privileged under the Constitution.

### IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the respondent set forth in Section III, above, occurring in connection with the operations of the respondent described in Section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

### V. THE REMEDY

Since it has been found that the respondent has engaged in unfair labor practices, it will be recommended that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. It having been found that the respondent's rule known as Shop Rule 6, insofar as it prohibits union solicitation by employees during their non-working hours, is violative of the Act, it will be recommended that the respondent be ordered to rescind immediately the rule to that extent.

Upon the basis of the foregoing findings of fact and upon the entire record in the case the undersigned makes the following:

### CONCLUSIONS OF LAW

1. United Automobile, Aircraft and Agricultural Implement Workers of America, C. I. O., is a labor organization within the meaning of Section 2 (5) of the Act.

2. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, the respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (1) of the Act.

3. The aforesaid unfair labor practices are unfair labor practices affecting commerce, within the meaning of Section 2 (6) and (7) of the Act.

## RECOMMENDATIONS

Upon the basis of the above findings of fact and conclusions of law, the undersigned recommends that the respondent, Clark Bros. Co. Inc., Olean, New York, and its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Engaging, in conjunction with any election contest held to designate bargaining representatives for its employees, in any campaign for the purpose

of interfering with, restraining, or coercing its employees in the exercise of their right to select representatives of their own choosing.

(b) In any other manner interfering with, restraining or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist United Automobile, Aircraft and Agricultural Implement Workers of America, C. I. O., or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection as guaranteed in Section 7 of the Act.

2. Take the following affirmative action, which the undersigned finds will effectuate the policies of the Act:

(a) Rescind immediately Shop Rule 6 insofar as it prohibits union solicitation on the employees' own time;

(b) Mail to each of its employees a copy of the notice attached hereto, marked "Appendix C";

(c) Post at its plant at Olean, New York, copies of the notice attached hereto, marked "Appendix C." Copies of said notice, to be furnished by the Regional Director of the Third Region, shall, after being duly signed by the respondent's representative, be posted by the respondent immediately upon receipt thereof, and maintained by it for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the respondent to insure that said notices are not altered, defaced, or covered by any other material;

(d) Notify the Regional Director for the Third Region in writing within ten (10) days from the date of the receipt of this Intermediate Report what steps the respondent has taken to comply herewith.

It is further recommended that unless on or before ten (10) days from the receipt of this Intermediate Report, the respondent notifies said Regional Director in writing that it will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring the respondent to take the action aforesaid.

As provided in Section 33 of Article II of the Rules and Regulations of the National Labor Relations Board, Series 3, as amended, effective July 12, 1944, any party or counsel for the Board may within fifteen (15) days from the date of the entry of the order transferring the case to the Board, pursuant to Section 32 of Article II of said Rules and Regulations, file with the Board, Rochambeau Building, Washington 25, D C, an original and four copies of a statement in writing setting forth such exceptions to the Intermediate Report or to any other part of the record or proceeding (including rulings upon all motions or objections) as is relied upon, together with the original and four copies of a brief in support thereof. Immediately upon the filing of such statement of exceptions and/or brief, the party or counsel for the Board filing the same shall serve a copy thereof upon each of the other parties and shall file a copy with the Regional Director. As further provided in said Section 33, should any party desire permission to argue orally before the Board, request therefor must be made in writing within ten (10) days from the date of the order transferring the case to the Board.

ARTHUR LEFF,
*Trial Examiner.*

Dated November 15, 1945

## APPENDIX A

*Fellow Employees of Clark Bros.:*

This meeting has been called in response to requests of a number of employees asking that the Company make a statement regarding Thursday's election. I'm

glad to have the opportunity to talk to you. I should like to just stand here and tell you all the thoughts that are going through my mind But our lawyer tells us that we should not do that; that the National Labor Relations Act limits us in what we can say to you. So it has been necessary to write it all out to read to you so that afterwards no one could claim that I had said something different.

In order that you may review what I have said and check any points in question, an exact copy of this talk will be sent to your home address through the mails.

The main thing our lawyer objected to was that I might try to make you vote one way or another. I told him that we just didn't operate that way and that the employees knew it. We feel and we always have, that whether you folks belong or don't belong to a church or a lodge or a union is just—plain none of our business.

I do feel though, that, regardless of what anybody says, we've gotten along so well together through all these troublesome years that I don't want you to get some outsider in between us, unless after hearing everything I can honestly and fairly tell you, you still feel that's necessary.

As you know, the National Labor Relations Board has directed that a run-off election be held in the plant on February 8, 1945, to determine whether or not you wish to make a change in your collective bargaining agent. In other words, you as an employee of the Company, will have an opportunity to cast a vote either in favor of, or against, the philosophy, policies and relationships under which we have been working together for many years.

Because such an election is to be held, this talk is to briefly review the history of the campaigns conducted and the attacks waged by professional organizers in the interest of International Unions and to explain to you our beliefs in the matter. You may then vote as you please.

PRESENT CAMPAIGN FOLLOWS PATTERN

The present drive no doubt causes new employees both wonderment and uneasiness. Those of you who are relatively newcomers have no way of knowing whether or not all statements made are true or false, particularly when they concern individuals or departments other than you or your own, or when they attack people whom you have not had the opportunity to know and thus form your own first hand judgment.

Older employees with the company say the current drive follows a well worn groove They remember that since around 1941 there has been a constant stream of propaganda thrust upon employees at the gates. They have heard whispering campaigns before which have charged the company with unfair behavior toward its employees. They have heard stories before that Clark workers can only get what they deserve through representation by an outside organization.

The management of this company has striven with all of its energy and diligence to establish good labor relations and a genuine feeling of friendliness throughout the Clark plant. The management of the Company is in the hands of men who have, for the most part, come up from the ranks They have worked with you, and some of your fathers and grandfathers over the years in building this Company to its present position of trust and public confidence They have all spent practically their entire business lives with the Company. They have sought to pursue a policy of direct and decent dealings with all employees of the Company.

We have attempted to provide a positive organization policy that provides opportunity, advancement, recognition, appreciation and security And today we have a clean shop where we all can work reasonable hours, in pleasant sur-

roundings, and at rates of pay as high or higher than in any plant in this area. These are facts. We do recognize that every man in the Clark organization has hopes and ambitions of his own. We want our supervisory organization to meet the wishes and desires of the people who are associated with the Company, not as members of masses but as human individuals.

As the result of this healthy relationship, Clark employees have learned to get along together and settle their differences with management through "within the plant employee representation", organized and controlled by the employees only. Without the control of professionals the principle has worked well and the Company and its business have grown The wages and working conditions of individuals have grown proportionately with the Company The Army-Navy "E" flag with stars for countless achievements flies proudly over our plant. The Company's war production record stands as a shining light against the background of endless strikes and work stoppages that have occurred in other plants where outside organizers have been in charge.

Compare the employee-management cooperation that has made this record possible to the war record of the organization which now seeks to take over the Clark plant. It is stretching the truth pretty far to say that an organization which, throughout this war period has had tens of thousands of men idle all over America on strike, may claim that they can take the leadership of the Clark plant and do a better war production job.

Attempts have been made over a long period of time to convince you that you should turn your affairs over to outsiders If you wish to do so it is your right and privilege. The Clark management will respect your decision but the management of this Company believes we can best promote and establish good working conditions by working closely and directly with you through your own independent organization with whom we have had many dealings and contracts in the past. In laying all our cards on the table, neither of us can stand alone. We cannot get along without each other. How prosperous and how successful we are together depends upon our mutual confidence and ability Think well before you turn to outside leadership.

WHY DO WE OPPOSE OUTSIDE UNIONS?

There is honest question in the minds of some employees as to why we oppose outside unions The fact is that we have sought no quarrel with outside unions. The question should be "why have outside unions carried on campaigns of falsehoods respecting the Clark management and its treatment of the individual?" If you have read all the hand bills over a period of time you have undoubtedly noted charges and statements which, if believed, could have no other effect than to completely destroy confidence within the organization. Ask yourself, in the light of what you know about the Company, if it isn't sheer self-serving malicious propaganda when the outside organizers in their hand bills and bulletins imply that

"Favoritism rules at Clarks.
That the entire official family is dishonest.
That workmen who speak well of the Company are stooges and stool pigeons."

In their desperate attempt to find something to criticize, these outsiders have started the battle cry "down with the merit system." Why do they resort to this when the adoption of this plan has put added money in the pockets of Clark employees after all other effort to obtain outright increases had failed?

IF CHARGES ARE TRUE, WHERE IS THE EVIDENCE?

According to all the propaganda which has been spread by the outside organizers, there is nothing good about Clark Bros., or its management. In all of the literature that has been distributed, never one word of commendation regarding the Company or its policies has been uttered. And never have they made one suggestion of how business could be increased, more jobs made, nor how to make present jobs more secure. We manufacture and sell specialties in the Oil Industry. We have no cost-plus contracts. If we expect to sell our products our prices have to be competitive. Labor is our chief cost. If we can't compete we lose business and you lose your jobs. If we can compete and make a fair profit that means more jobs. Those of you who have been with us for 18 to 20 years know how we've grown and continued to buy more and more equipment which in turn has meant more and more jobs. Now these are fundamental things and I don't care who tells you he can get more for you, there are certain limits and if we go beyond those we destroy our business and your jobs.

If, as the outside organizations claim, the Company is unfair, how then does it happen that the vast majority of workers who have left the Clark plant to work elsewhere have returned for their old jobs with the statement that "I prefer to work at Clark's rather than any other place I have ever been?" If conditions in the plant are as bad as they have been painted by outsiders how does it happen that with all of the changes in employment being made throughout the country, not 25 men have left Clark Bros employment of their own accord in the past year. This is a phenomenal record and it means something.

The success or lack of success of these attempts on the part of outside organizations has had close attention at the hands of officials, high in the ranks of outside organizations. They are willing to expend large sums of money in their attempts to organize Clark Bros. and they know that once successful, to them it will mean a steady flow of funds to their treasury every month.

ASK YOURSELF THESE QUESTIONS

Ask yourself if your status as it has been outlined to you in all sincerity by the Company is something that can be improved by paying this money to outsiders to act as your leaders. Ask yourself if it is sincere leadership interested in your personal welfare, or if it is self-seeking leadership that you desire. Ask yourself soberly why outsiders would become so vitally interested in your welfare. They started all of this personal interest in you before they had ever seen one of you.

When we review the organizing campaign which has been conducted in our plant and when we reflect upon the experience of other companies with these outside organizations, particularly with respect to their record of war time strikes and production stoppages, it is obvious that it would be extremely difficult to maintain the same harmonious relationship which now exists should an outside organization inject itself into ours.

Clark Bros. has an abiding faith in the good sense of the men and women who make up this Company. We believe the American workman has lots of intelligence and that it is no fault of his that he is sometimes short of information because we who are managers have not always given him the benefit of the facts in our possession.

I wish to stress in closing that at the forthcoming election you will be absolutely free to vote in accordance with your own desire That the election will be conducted by secret ballot and no one but yourself will know your vote. That the

election will be conducted in a fair and impartial manner. That there will be no retaliation or discrimination against employees because they favor any organization. The Company will abide by the result of the election.

By letters and other releases we have attempted to provide you with factual information which we are hopeful will assist you in your deliberations. There was much more that could have been said. There may be those who will question the right of the Company to discuss these matters with you so openly and frankly. You are a part of the organization and our own people. Frank and open discussions between associates is the American way and we rest the question with your good judgment.

Mr. Clark, President of the Company, will make a final statement to you tomorrow over this same speaker. I am sure that you will be very glad to hear from him personally.

APPENDIX B

Johnny O'Connor told me yesterday that I would make the Company's final statement about tomorrow's election. I too am going to read mine. It will be short and to the point. Just a while ago, Mr. Scheitinger of the U A. W.-C. I. O. took me to task in a radio address for the Company's interest in the election, and he directed to me a lot of questions over the radio, which, I, of course, had no opportunity to answer.

I do think however, I should point out to you that answers to practically all of the questions asked by Mr. Scheitinger are to be found in material which is already in your hands. Naturally, the Company is interested in any election that is for the purpose of selecting the people with whom the Company must deal, regarding your interests and our interests. It isn't at all necessary, but I deny that this interest is motivated by selfishness as some would try to have you believe.

I was asked to explain the difference between Clark Bros. rates in 1941 and those existing in the automobile factories in Detroit in 1941. I don't think the rates applying in the automobile manufacturing business have anything to do with rates in Clark Bros. at Olean. Neither do 1941 rates have anything to do with rates today, which, as we have pointed out a number of times, are controlled by the War Labor Board policy. In presenting his questions, Mr. Scheitinger did not ask me, to explain how it happens that his organization published a statement several days ago showing that the C. I. O. workers countrywide are now enjoying an average hourly rate of 80.7¢ per hour, whereas Clark workers are enjoying an average rate of 95¢ per hour. Does Mr Scheitinger wish this explained too? Does he wish me to explain that since 1941 Clark rates have gone up from an average of 64¢ an hour to 95¢ an hour, whereas rates in plants represented by C I. O. have increased only from 75¢ to 80.7¢ by his own admission.

I want to say that if you think you would be better off with an outside union and that you need them to protect your interest, then vote it in. Nobody in this plant, as long as I am running it, will be discriminated against because of the way be votes or the way he thinks.

This company has engaged in collective bargaining over a period of years with an organization made up of and controlled by the men in this plant. Working with this organization, we have been able to go a long way in improving conditions in the plant and increasing the advantages and benefits to workers. It has been done in an honorable and straight-forward way without the disturbing influences that have prevailed in many plants where outsiders held sway. You can't please all of the people all the time, we know. However you know a good job has been done here. Anything that has the possibility of disturbing the peaceful progress is a matter of deep concern to us.

I have been working for this company a long time, just as many of you have. My job depends on your performance, just as your job depends on my performance If we can't get along together without outside groups coming between us, my personal feeling is that we will not be making the most of our opportunity.

It so happens that being an officer of the Company, I have no vote, but I am going to tell you straight from the shoulder what my action would be if I did have one. I would not vote an outside union into the plant. I would not do it because there is no need of it. That is my honest opinion for whatever it is worth to you in making your final decision.

One other thing I would like to ask you to do, and that is for every man to go to the ballot box and vote his conviction, but above all vote.

## APPENDIX C

### NOTICE TO EMPLOYEES

Pursuant to the recommendations of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

> We will not engage, in conjunction with any election contest held to designate bargaining representatives for our employees, in any campaign for the purpose of interfering with, restraining, or coercing our employees in the exercise of their right to select bargaining representatives of their own choosing.
>
> We will not in any other manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist United Automobile, Aircraft and Agricultural Implement Workers of America, C. I. O, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. All our employees are free to become or remain members of this union, or any other labor organization.
>
> CLARK BROS. CO. INC.

Dated_____ By _____
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.