RECENT DEVELOPMENTS

LABOR LAW: THREAT OF REPRISAL PRESUMED FROM EMPLOYER PLANT REMOVAL STATEMENTS

NLRB v. Yokell indicates that section 8 (c), the free speech provision of the National Labor Relations Act, will not protect the employer who speaks to employees of plant removal during an organizational campaign unless he carries the burden of proving that no threat of reprisal could reasonably be inferred from his statement. Yokell, copartner in the Crescent Art Linen Company, met with the employees to discuss unionization, working conditions, and employee complaints shortly after the Retail, Wholesale and Department Store Union launched an organizational drive at the company. At or immediately following the meeting, he mentioned that the company's lease, which was to expire in ten months, had not yet been renewed, and that it was possible that the plant might be moved. The trial examiner found this to be an implied threat of reprisal for union activity.3 The National Labor Relations Board, and thereafter the Court of Appeals for the Second Circuit, affirmed, concluding that the statement was unprotected by section 8 (c), which had been asserted by Yokell as a defense to a section 8 (a) (1) unfair labor practice charge.

The degree to which the statutory right of employees to organize and bargain collectively may properly encroach upon the free speech guaranty of the first amendment remains unclear, despite much litigation of the point since the passage of the Wagner Act in 1935. From its inception, the NLRB was quick to condemn anti-union statements made to employees by an employer or his representative, recognizing the potential for coercive impact which employer speech may have upon economically dependent employees. Unfair labor

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1 387 F.2d 751 (2d Cir. 1967).
6 Rockford Mitten & Hosiery Co., 16 N.L.R.B. 501, 505-07 (1939); Ford Motor Co.,
practice charges arising from such statements were often sustained by the courts with little consideration of the constitutional problem presented. In 1941, however, the Supreme Court, in *NLRB v. Virginia Electric & Power Company,* construing the NLRA to avoid constitutional conflict, held that speech violates the Act only when coercive on its face or when, in light of other circumstances, a coercive effect may be inferred. The Taft-Hartley Act incorporated the Supreme Court's standard into the fabric of the NLRA. Today, no expression of views, argument, or opinion may evidence or constitute an unfair labor practice unless, when tested objectively, its reasonably foreseeable effect is to threaten employees with reprisal or force, or to influence their opinion with promise of benefit.

In applying this standard to an employer's statement found by the NLRB to contain a threat of reprisal, appellate courts have examined the contested statement itself, and when not patently coercive, the totality of circumstances surrounding its publication.


8 314 U.S. 469, 477 (1941).


10 National Labor Relations Act § 8(c), 29 U.S.C. § 158(c) (1964); see, e.g., NLRB v. Colub, 388 F.2d 921 (2d Cir. 1967); NLRB v. TRW-Semiconductors, Inc., 385 F.2d 753, 759-60 (9th Cir. 1967); Southwire Co. v. NLRB, 385 F.2d 235 (5th Cir. 1967); Wausau Steel Corp. v. NLRB, 377 F.2d 369, 372 (7th Cir. 1967); NLRB v. Kingsford, 313 F.2d 825, 829 (6th Cir. 1963); Time-O-Matic, Inc. v. NLRB, 284 F.2d 96, 99 (7th Cir. 1960); cf. Jas H. Matthews & Co. v. NLRB, 354 F.2d 432, 441 (8th Cir.), cert. denied, 384 U.S. 1002 (1966) (objective test to determine if employer's no-solicitation rule violated employee rights); Edward Fields, Inc. v. NLRB, 325 F.2d 754, 759 (2d Cir. 1963) (similar test in employer interrogation cases).

11 See, e.g., Texas Indus., Inc. v. NLRB, 336 F.2d 128, 131 (5th Cir. 1964) (phrasing of speech examined).

Occasionally, opinions dealing with section 8 (c) questions have been written in conclusory terms, labeling the employer’s speech a “threat,” and thus condemned, or merely “prophecy,” “prediction,” or “opinion,” within the ambit of section 8 (c) protection.\(^\text{13}\) A growing number of courts, however, are detailing their analyses, examining the manner in which,\(^\text{14}\) when,\(^\text{15}\) and by whom the statement was made;\(^\text{16}\) the geographic location of the plant, the type of industry, and other indicia of the employees’ level of sophistication in labor relations;\(^\text{17}\) and the ability of the employer to control the event which he presages,\(^\text{18}\) to determine the coercive potential of the contested communication. This latter factor, control, has played a significant role in evaluating statements made during an organizational campaign which threaten the core elements of job security, wages, and continuing employment.\(^\text{19}\) Statements indicating that reduction of employment, a shutdown, or plant removal would fol-

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\(^{13}\) E.g., Jervis Corp. v. NLRB, 387 F.2d 107 (6th Cir. 1967) (threat); NLRB v. Transport Clearings, Inc., 311 F.2d 519, 523 (5th Cir. 1962) (prophecy); cf. NLRB v. Golub Corp., 388 F.2d 921, 928 (2d Cir. 1967) (Hays, J., dissenting) (prediction); NLRB v. Union Pacific Stages, Inc., 99 F.2d 153, 178-79 (9th Cir. 1939) (opinion).

\(^{14}\) See, e.g., NLRB v. Mallory Plastics Co., 355 F.2d 509, 512 (7th Cir. 1966) (conversational communication held to be no threat); NLRB v. Laars Eng’rs, Inc., 332 F.2d 664, 666-67 (9th Cir.), cert. denied, 379 U.S. 930 (1964) (letter was not a threat); NLRB v. Abrasive Salvage Co., 285 F.2d 552, 554 (7th Cir. 1961) (interrogation held to be threat).

\(^{15}\) See, e.g., NLRB v. American Casting Serv., Inc., 365 F.2d 168, 173 (7th Cir. 1966) (speech to assembled employees was threat); NLRB v. Collins & Aikman Corp., 338 F.2d 743, 748 (5th Cir. 1964) (civic club newspaper advertisement not a threat); NLRB v. Cousins Associates, 283 F.2d 242 (2d Cir. 1960) (individual interrogation by employer, over coffee, away from shop, held threat); NLRB v. Rockwell Mfg. Co., 271 F.2d 109, 118 (3d Cir. 1959) (conversational communication while riding home with employee no threat); NLRB v. Syracuse Color Press, Inc., 209 F.2d 596, 599 (2d Cir. 1954) (compulsory interrogation in company offices held to be coercive).

\(^{16}\) See, e.g., NLRB v. Mallory Plastics Co., 355 F.2d 509, 512 (7th Cir. 1966) (immediate supervisors on friendly relations with employees held no threat); NLRB v. Clearfield Cheese Co., 322 F.2d 89, 93 n.2 (3d Cir. 1963) (threat from one of co-owners); Schwob Mfg. Co. v. NLRB, 297 F.2d 864, 869 (5th Cir. 1962) (no threat from supervisor with little authority to control employees); NLRB v. Morris Fishman & Sons, 278 F.2d 792, 796 (5th Cir. 1960) (foreman’s statements were threat); Sax v. NLRB, 171 F.2d 769, 771 (7th Cir. 1948) (supervisory employee with no anti-union record, no threat).

\(^{17}\) See, e.g., NLRB v. Herman Wilson Lumber Co., 355 F.2d 426, 432 (8th Cir. 1966) (Larson, J., dissenting) (factors for NLRB’s specialized experience); NLRB v. Collins & Aikman Corp., 338 F.2d 743, 748 (5th Cir. 1964) (sophistication among factors to be considered).

\(^{18}\) E.g., Southwire Co. v. NLRB, 383 F.2d 235 (5th Cir. 1967).

low unionization have been uniformly condemned by reviewing courts\(^\text{20}\) except when, in good faith and upon some reasonable basis, the employer has explained that economic factors will necessitate the change.\(^\text{21}\) Until NLRB v. Yokell, the threat of reprisal conditioned on unionization, where found in these cases, had been express, or could be readily implied from other anti-union conduct of the employer.\(^\text{22}\) The campaign in Yokell, however, was not characterized by employer threats of reprisal, but with promise of benefit, and the contested statement was made during or after an informal meeting at which both employer and employees aired their problems.\(^\text{23}\)

Recognizing the constitutional stature of the question before it, the Yokell court essayed a balance between the first amendment principles which it noted underlie section 8 (c) and potential subrogation of other rights guaranteed by the Act. The court observed that the statement had been made far in advance of the lease expiration, in the context of an organizational campaign, without adequate explanation of the timing of disclosure.\(^\text{24}\) Further, no “economic cause-and-effect relationship” between relocation of the plant and its unionization was readily apparent; and the employer’s ability to control the occurrence of the event was clear. Thus, the court concluded, the statement could justifiably be treated as an implied threat of reprisal, “likely to instill fear in the employees that dire

\(^{20}\) E.g., NLRB v. Louisiana Mfg. Co., 374 F.2d 696 (8th Cir. 1967); NLRB v. American Casting Serv., Inc., 365 F.2d 168 (7th Cir. 1966); NLRB v. Associated Naval Architects, 355 F.2d 788 (4th Cir. 1966); NLRB v. D’Armigene, Inc., 353 F.2d 406 (2d Cir. 1965); Irving Air Chute Co. v. NLRB, 350 F.2d 176 (2d Cir. 1965); Surpreman Mfg. Co. v. NLRB, 341 F.2d 756 (6th Cir. 1965); NLRB v. Plant City Steel Corp., 331 F.2d 511 (5th Cir. 1964); NLRB v. Realist, Inc., 328 F.2d 840 (7th Cir.), cert. denied, 377 U.S. 994 (1964); A.P. Green Fire Brick Co. v. NLRB, 326 F.2d 910 (8th Cir. 1964); NLRB v. Herman Bros. Pet Supply, 325 F.2d 68 (6th Cir. 1963); Marshfield Steel Co., v. NLRB, 324 F.2d 533 (8th Cir. 1963); NLRB v. Clearfield Cheese Co., 322 F.2d 89 (8th Cir. 1963); NLRB v. Abrasive Salvage Co., 285 F.2d 552 (7th Cir. 1961); International Union of Electrical Workers v. NLRB, 289 F.2d 757 (D.C. Cir. 1960); NLRB v. Somerset Classics, Inc., 193 F.2d 613 (2d Cir.), cert. denied, 344 U.S. 816 (1952).

\(^{21}\) See, e.g., NLRB v. River Togs, Inc., 382 F.2d 198, 201 (2d Cir. 1967) (unionization might produce wage decreases); NLRB v. Brownwood Mfg. Co., 369 F.2d 136, 138 (5th Cir. 1966); Texas Indus., Inc. v. NLRB, 356 F.2d 128, 131 (5th Cir. 1964); NLRB v. Transport Clearings, Inc., 311 F.2d 519, 523 (5th Cir. 1962); Union Carbide Corp. v. NLRB, 310 F.2d 844, 845 (6th Cir. 1962).

\(^{22}\) See cases cited note 20 supra.

\(^{23}\) 387 F.2d at 754, 756.

\(^{24}\) Id. at 756.
steps of retaliation would result from an authorization of the Union as their bargaining representative.\textsuperscript{25}

Yokell, in effect, presumes that plant relocation statements made in the context of an organizational campaign are intended as threats of reprisal, placing the burden on the employer to prove either that the economic effects of unionization will require the change, or that explanation accompanying the statement negated any coercive effect. Read strictly, Yokell suggests that even when legitimate reasons for relocation, unconnected with the possibility of unionization, do exist, an employer will be restricted from expressing them to employees during the course of an organizational campaign. This presumption and restriction can readily be extended to employer statements concerning potential derogation of other core aspects of employment security. Employees' strong psychological desire for such security, when coupled with the employer's ability to control employment, would appear to justify strict limitations on employer speech in an organizational context. Nevertheless, if it is reasonable to believe that unionization will in fact force an adjustment in employment conditions, this information should be conveyed to employees. If a union is still desired, the accompanying consequences will at least have been knowingly accepted.\textsuperscript{26} As Yokell clearly indicates, however, an employer who has a valid reason for initiating plant relocation or other major employment changes wisely will avoid mention of it until representation proceedings are complete, unless he is prepared to assure employees, to their satisfaction and that of the Board, that the outcome of the campaign will have no effect on the change he foresees or proposes.

\textsuperscript{25}Id.

\textsuperscript{26}Cf. Bok, \textit{supra} note 5, at 76-77.