EMPLOYER "FREE SPEECH" IN THE UNITED STATES AND CANADA

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In view of the responsive nature of his relationship with his employer, and of his natural desire to want to appear to identify himself with the interests of his employer, an employee is obviously peculiarly vulnerable to influences, obvious or devious, which may operate to impair or destroy the free exercise of his rights under the [Labor Relations] Act.

—*Ontario Labour Relations Board*[1]

Labour legislation in the United States and in every Canadian jurisdiction recognizes the right of employees to select trade unions as their agents for the purposes of collective bargaining, and imposes a corresponding duty upon employers to refrain from interfering with or coercing their employees in the exercise of this right. It will be the purpose of this article to compare the extent to which American and Canadian courts and labour relations boards have, in enforcing the employer's statutory duty, placed limitations on what he may say to his employees during the course of a representation election campaign.[2] In an attempt at reasonable clarity, it is proposed first to outline the growth of the tangled mass of American law on this subject. When that has been done, it will be possible to look at the relatively small number of Canadian cases.

AMERICAN LAW

Although there are many reasons why the American law of employer free speech should be so much more copious and confused than the Canadian, four points deserve particular mention.

1. The United States is a much larger, much more industrialized country, and has had thirty years' experience with its present system of labour legislation; while parallel legislation in most Canadian provinces is no more than twenty years old.

2. Changes of administration in Washington in 1953 and 1961 resulted in sudden changes in the personnel and viewpoint of the National Labor Relations Board (N.L.R.B.). During the Eisenhower years, the Board took a noticeably more pro-employer approach to many aspects of labour relations.[3]

3. Decisions of the N.L.R.B. are subject to review by the ten federal Circuit Courts of Appeal, depending upon the geographical area of origin of each particular case. The various Circuits have often taken very

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1 *Piggott Motors (1961) Ltd.*, (1962), 63 C.L.L.C. 1125, 1130.

2 The term "employer free speech" will be used to denote this issue for the reason only that no better name is available. In Wirtz's words,

> "Everyone is in favor of 'speech', especially 'free speech', and there is no question about an employer's right to it. But this phrase blurs and conceals the very real issue of how far an employer should, as a policy question, be permitted to exert certain economic power he may have, or, even more precisely, to exert that economic power through the medium of speech. There is no better reason for identifying this problem as one of 'employer free speech' than there would be for calling it the problem of 'employer pressure tactics', or of 'employee freedom to vote'. It is all of these things, but it is no one of them": Wirtz, *The New National Labor Relations Board; Herein of 'Employer Persuasion'* (1954), 49 Northwestern U.L. Rev. 596.

The issue of employer free speech is, in reality, only a part of the much larger problem as to the tactics which should be available to either side in representation campaigns.

3 See Wirtz, *ibid.*

different approaches to the problem of employer free speech. In Canada, fortunately, there would appear to be no case in which the courts have reviewed any labour relations board decision on this problem. All the reported Canadian cases are Board cases, nearly all of them in the Ontario Labour Relations Board.

4. The First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech . . . ." Although the N.L.R.B. has been remarkably dexterous in resisting the application of this provision to employer statements made during representation election campaigns, the courts have been somewhat more inclined to give effect to it.

The growth of United States law on employer free speech began with the Wagner Act of 1935[4]—North America's first comprehensive collective bargaining statute and the model for most of Canada's labour legislation of the 1940's. The heart of the Wagner Act, section 7, guaranteed to employees "the right to self-organization, to form, join, or assist labour organizations, to bargain collectively through representatives of their own choosing . . . ." By section 8(a) (1), it was made an unfair labour practice for an employer to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in section 7.

The N.L.R.B. (set up by the Wagner Act to administer its provisions) during its early years interpreted these clauses very strictly against employers. The Board tended to hold that every statement made by an employer to his employees prior to a representation vote which expressed the employer's dislike for unions, or his preference as between competing unions, would have some coercive effect upon the employees, and was therefore an unfair labour practice under section 8(a) (1). The idea behind the Board's insistence upon employer neutrality during the 1935-41 period was eloquently expressed by Judge Learned Hand in these oft-quoted passages from a judgment upholding a Board order compelling an employer to cease and desist from presenting to an employee the employer's bitter opinion of unions:

> No doubt an employer is as free as anyone else in general to broadcast any argument he chooses against trade-unions; but it does not follow that he may do so to all audiences. The privilege of 'free speech', like other privileges, is not absolute; it has its seasons. . . . Language may serve to enlighten a hearer, though it also betrays the speaker's feelings and desires; but the light it sheds will be in some degree clouded, if the hearer is in his power . . . . Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate 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. What to an outsider will be no more than the vigorous presentation of a conviction, to an employee may be the manifestation of a determination which it is not safe to thwart. The Board must decide how far the second aspect obliterates the first.[5]

Not all of the Circuit Courts, however, shared Judge Hand's sympathy for the Board's policy of enforcing employer neutrality. For example, in *N.L.R.B.* v. *Ford Motor Co.*[6] the Sixth Circuit quashed a Board order which held some of Henry Ford's "Fordisms," communicated

4 Officially called the National Labor Relations Act, 49 Stat. 449, 29 U.S.C. §151.
5 *N.L.R.B.* v. *Federbush Co.* (1941), 121 Fed. (2d) 954, 957 (2nd cir.). The employer's objections to the Board's order were based on the First Amendment to the Constitution. Portions of these passages were quoted by the Ontario Labor Relations Board in *Hayes Steel Products Ltd.* (1964), O.L.R.B. April Monthly Report 30, 32.
6 (1940), 114 Fed. (2d) 905 (6th cir.).

to employees during a United Automobile Workers organizing campaign, to be unfair labour practices. Among the impugned remarks were the following:

> This group [the U.A.W.] is asking us to sit still while it sells our men the jobs that have always been free . . . .
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> When our men ask about unions . . . , I say to them: 'First, figure out for yourself what you are going to get out of it. If you go into a union, they have *got* you, but what have *you got*?'[7]

The court, in quashing the Board's order, said,

> Nowhere in the National Labor Relations Act is there sanction for an invasion of the liberties guaranteed to all citizens by the First Amendment . . . . If the concept that an employer's opinion of labor organizations and organizers must, because of the authority of master over servant, nearly always prove coercive, ever had validity, it is difficult now to say . . . that the concept is still a sound one. The servant no longer has occasion to fear the master's frown of authority or threats of discrimination for union activities, express or implied.[8]

When the question of employer free speech reached the U.S. Supreme Court, in the *Virginia Electric and Power* case,[9] the court took an attitude neither as liberal as that of Judge Hand in *Federbush* nor as benighted as that of the Sixth Circuit in the *Ford Motor* case. The company, which had a long record of anti-unionism, tried to resist an organizing drive by posting bulletins urging employees to bargain individually with the company and by encouraging "loyal" employees to form an "independent" union. The Board found these practices illegal, and ordered them stopped.[10] The Fourth Circuit disagreed,[11] but the Supreme Court, in sending the matter back to the Board for rehearing, laid down what was to become known as the "totality of conduct" doctrine:

> If the total activities of an employer restrain or coerce his employees in their free choice, then those employees are entitled to the protection of the Act. And in determining whether a course of conduct amounts to restraint or coercion, pressure exerted vocally by the employer can no more be disregarded than pressure exerted in other ways. For 'Slight suggestions as to the employer's choice between unions may have telling effect among men who know the consequences of incurring that employer's strong displeasure.'[12]

The *Virginia Electric* decision made the Circuit Courts somewhat chary of supporting the Board's policy. Even Judge Hand, who had spoken so eloquently in 1941 against allowing wide latitude to employer speech, felt his wings clipped by *Virginia Electric*. In the *American Tube Bending* case[13] two years later, that learned judge, speaking for the Second Circuit, held that he was bound to reverse a Board order enjoining the employer from using anti-union letters and speeches. The communications involved, he said, were

> substantially the same [as those in *Virginia Electric*] in their general tenor and purport . . . . The most that can be gathered from them was an argument, temperate in form, that a union would be against the employees' interests as well as the employer's, and that the continued prosperity of the company depended on going on as they had been. It seems to us extremely undesirable, particularly in so highly charged a subject matter, to draw fine-spun distinctions between two situations so closely alike . . . .[14]

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7 *Id.* at 913, n. 1.
8 *Id.* at 914.
9 *N.L.R.B. v. Virginia Electric and Power Co.* (1941), 314 U.S. 469, 62 S. Ct. 344, 86 L. Ed. 348.
10 (1940), 20 N.L.R.B. 911.
11 (1940), 115 Fed. (2d) 414 (4th cir.).
12 314 U.S. 469, 477.
13 (1941), 134 Fed. (2d) 993 (2nd cir.); *cert.* den., 320 U.S. 768, 64 S. Ct. 84, 88 L. Ed. 459.
14 134 Fed. (2d) 993, 995.

However, the N.L.R.B. has never allowed its policies to be influenced unduly by what the courts have said about them. The Board did not take long to mould the "totality of conduct" doctrine from the *Virigina Electric* case into the "captive audience" doctrine, which promised to be a most effective tool for the defusing of potent anti-union remarks. This doctrine was enunciated in the *Clark Bros.* case[15] in 1946. The employer shut down the plant's operations one hour before the voting was to begin, ordered all the employees to assemble, and delivered an anti-union address over the plant's public address system. The Board held such conduct to be a violation of section 8(a)(1) of the Act, regardless of whether the words of the speech themselves were protected by the First Amendment.

> [T]he employees were required to listen to these speeches because the respondent [company] 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 . . . .
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> 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, 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.[16]

The Second Circuit, although it upheld the Board's order,[17] did not give its wholehearted approval to the "captive audience" doctrine:

> An employer has an interest in presenting his views on labor relations to his employees. We should hesitate to hold that he may not do this on company time and pay, provided a similar opportunity to address them were accorded representatives of the union.[18]

By 1947, two years of severe labour strife had combined with the increased strength of unions and the growing articulateness of anti-labour organizations to turn American public opinion markedly against unions. The most tangible result was the Taft-Hartley Act,[19] which effected many amendments to the National Labor Relations Act. The amendment which concerns us was the new section 8(c):

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

Although it has never been even passably clear just what this subsection means, a glance at its legislative history[20] indicates that

> hostility to 'captive audience' was a principal motive prompting its adoption This was sufficiently apparent to the Board that it was, in the beginning, reluctant to flout the legislative purpose. Accordingly, the Board admitted that the *Clark* doctrine was abrogated by Section 8(c);[21] moreover, it extended this

15 (1946), 70 N.L.R.B. 802.
16 *Id.* at 804-05.
17 *N.L.R.B.* v. *Clark Bros. Co.* (1947), 163 Fed. (2d) 373 (2nd cir.).
18 *Id.* at 376.
19 Officially entitled the Labor Management Relations Act. (1947), 61 Stat. 136, 29 U.S.C. §141.
20 Senate Report No. 105, 80th Congress, 1st Session, pp. 23-24.
21 "[T]he language of Section 8(c) of the amended Act, and its legislative history, made it clear that the doctrine of the *Clark Bros.* case no longer exists as a basis for finding unfair labor practices in circumstances such as this record discloses. Even assuming, therefore, . . . that the respondent required its employees to attend and listen to the speeches, we conclude that it did not thereby violate the Act": *Babcock and Wilox Co.* (1948), 77 N.L.R.B. 577, 578.

admission even to employers who denied unions an equal opportunity to avail themselves of the advantages of company time and premises. With due deference to the legislative record, the Board adhered to this position until October, 1951, a period of four years.[22]

But did the Board of 1948 really sit back and let Congress dictate its policies for four years? It most certainly did not. Almost immediately after the passing of the Taft-Hartley Act, it set about, with a disregard for legislative intent which even Viscount Haldane could hardly have equalled, to pull the teeth of section 8(c).

The Board did this in the *General Shoe* case,[23] which, as we shall see, is still cited as a leading authority. The applicant union had lost a representation election; and, on the basis of the company's pre-election campaign activities, it applied for an order that the company cease and desist from such activities, and for a further order that the election be set aside and a new one held. The Board held, firstly, that it could not order the company to desist from its compaign activities, since such activities were protected by section 8(c):

> It is true that for two months before the election . . . the respondent engaged in a course of conduct consisting of publication, through its supervisors, in letters, in pamphlets, in leaflets, and in speeches, of vigorously disparaging statements concerning the Union, which undeniably were calculated to influence the rank-and-file employees in their choice of a bargaining representative. However, these statements contained no threat of reprisal or promise of benefit and appear to be only such expressions of opinion as are excluded from our consideration as an unfair labor practice by reason of section 8(c) of the amended Act.[24]

So much, then, for the union's allegation that the company's propaganda activities constituted an unfair labour practice—section 8(c), the Board held, prevented non-threatening propaganda from being held an unfair labour practice, and therefore from grounding a cease-and-desist order.

However, the Board was not finished yet. The union had also asked that the election be set aside. This, said the Board, was a "separate question," with regard to which the only applicable section of the Act was section 7, which guaranteed to employees the right to free choice of a bargaining representative.[25] The employer's campaign propaganda had jeopardized the likelihood of the employees' making a truly free choice; so the election would be set aside. Congress, said the Board in a footnote,

> only applied the new Section 8(c) to unfair labor practice cases. Matters which are not available to prove a violation of law, and therefore to impose a penalty upon a respondent, may still be pertinent, if extreme enough, in determining whether an election satisfies the Board's own administrative standards.[26]

What were the Board's "administrative standards" with regard to

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22 Bell, *The Coercive Character of Employer Speech: Context and Setting* (1955), 43 Georgetown L.J. 405, 418.
23 (1948), 77 N.L.R.B. 124.
24 *Id.* at 125.
25 *Id.* at 126.
26 *Id.* at 127, n. 10. The two dissenting members of the Board strongly protested, to no avail, against the majority's patent evasion of s. 8(c) (at p. 131): "It is paradoxical, to say the least, that now, after Congress has so strongly rejected the Board's prior construction of the Act in its relation to the Constitutional guarantee of free speech, that this Board should construe privileged expressions of opinion as creating an atmosphere which prevents employees from freely expressing their choice of representatives in a Board-conducted election. If the expression or dissemination of views, arguments, or opinion by an employer is to be afforded the full freedom which the amended Act envisages, it follows that the Board cannot justify setting aside elections merely because the employer avails himself of the protection which the statute specifically provides."

elections? They were not made explicit, but whatever they were, they were high.

> In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees. It is our duty to establish those conditions; it is also our duty to determine whether they have been fulfilled. When, in the rare extreme case, the standard drops too low, because of our fault or that of others, the requisite laboratory conditions are not present and the experiment must be conducted over again. That is the situation here.[27]

Not content with having removed cases involving the setting aside of elections from the purview of section 8(c), the Board went on in the well-known *Bonwit Teller* case[28] to resuscitate the Clark Bros. "captive audience" doctrine in an altered form. Here we encounter one of the least easily understood facets of the Board's jurisprudence—its treatment of "no-solicitation" rules. These are employer-created rules designed to prevent union organizers from soliciting support for the union on the company's premises, as well as to prevent all other types of canvassers from having a free rein.

A no-solicitation rule can be "broad" or "narrow." It is broad if it denies access to all employees at all times during which they may be on the employer's premises, whether they are on or off duty. It is narrow if it applies only during an employee's on-duty hours, but not at other times during which he may be on the premises. Generally speaking, a narrow no-solicitation rule is "lawful," and will be permitted by the Board, unless it is applied in a "discriminatory" manner—*i.e.*, unless it is applied more stringently against union canvassers than against other types of canvassers, or more stringently against one union than against another.[29] A broad no-solicitation rule will generally be considered "unlawful" unless it is "privileged"—*i.e.*, unless the nature of the employer's business is such that solicitation of employees during their off-duty time on the employer's premises will tend to disrupt the business.[30] Department stores are held to have the privilege of imposing board no-solicitation rules, on the basis that solicitation of employees, whether on or off duty, in the selling areas of a department store "may unduly interrupt or disturb the customer-salesperson relationship with a detrimental effect upon the employer's business."[31]

The management of Bonwit Teller, a large New York department

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27 *Id.* at 127. The "rare extreme case" is no longer rare, if it ever was. According to Bok, during a six-month period in 1964 the Board set aside 173 representation elections as a result of matters arising during the campaign, and 105 of the 173 cases involved "threats": Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act* (1964), 78 Harv. L. Rev. 38, 60, n. 50.

28 (1951), 96 N.L.R.B. 608, enforcement den. (1952), 197 Fed. (2d) 640.

29 *N.L.R.B.* v. *Gale Products, Division of Outboard Marine Corp.* (1964), 337 Fed. (2d) 390 (7th cir.).

30 "Rules prohibiting solicitation by employees on their own time in working areas can be upheld only on a showing that special circumstances make the rule necessary to maintain production or discipline . . . . We have long passed the point where the bundle of property rights can be used arbitrarily or capriciously to restrict a worker's freedom of association or expression": *N.L.R.B.* v. *United Aircraft Corp.* (1963), 324 Fed. (2d) 128 (2nd cir.), *cert.* den. (1964), 376 U.S. 951, 84 S. Ct. 969, 11 L. Ed. 2d 971. No-solicitation rules will not be allowed where a plant is so situated that union organizers are unlikely to have access to the employees at any place other than on the employer's premises: *N.L.R.B.* v. *Stowe Spining Co.* (1949), 336 U.S. 226, 69 S. Ct. 541, 93 L. Ed. 638. See, generally, *N.L.R.B.* v. *Babcock and Wilcox Co.* (1956), 351 U.S. 105, 76 S. Ct. 679, 100 L. Ed. 975; *N.L.R.B.* v. *United Steelworkers and Nutone Inc.* (1958), 357 U.S. 357, 78 S. Ct. 1268, 2 L. Ed. 2d 1383.

31 *Marshall Field and Co.* v. *N.L.R.B.* (1952), 200 Fed. (2d) 357, 380 (7th cir.).

store maintained a very broad no-solicitation rule which effectively denied union organizers access to its employees in the store. A few days before the representation election, the company's president assembled the store's employees and delivered an anti-union talk. The union asked the company for an opportunity to address the employees under similar conditions, but its request was refused. The union lost the election, and the Board, in setting it aside, held that

> For an employer, in the face of such a [no-solicitation] rule, to utilize its premises for the purpose of encouraging its employees to reject the Union, and then to deny the Union's request to present its case to the employees under the same circumstances, is an abuse of that privilege which, we believe, the statute does not intend us to license.
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> There is, in addition, an even more fundamental consideration—wholly apart from the Respondent's disparate use of the no-solicitation rule—which justifies the result we reach. We believe that the right of employees, guaranteed by Section 7 of the Act, freely to select or reject representation by a labor organization necessarily encompasses the right to hear both sides of the story under circumstances which reasonably approximate equality.[32]

The Board had, therefore, replaced the "captive audience" doctrine with the requirement of "equal opportunity." This new device, said the Board, was "in accord with the decision of the Court of Appeals for the Second Circuit in the *Clark Bros.* case."[33]

The courts did not treat the *Bonwit Teller* ruling too kindly. It was restricted quite closely to its facts by the Second Circuit.[34] "Nevertheless," says Aaron,

> it seems likely that the Board would probably have persisted in its view unless specifically overruled by a majority of the circuit courts or by the Supreme Court. There is more than one way to change a policy, however, and what Congress and the judiciary had failed to do was accomplished with comparative ease by a change in administration.[35]

Almost as soon as the Eisenhower administration's appointees became the majority of the Board in 1953, that tribunal's policies in general, including its attitude towards employer free speech, took a sharp turn in the employer's favour. The Eisenhower Board "restored broad license to employers who choose to oppose, in various ways, union organizing activities."[36]

The *Bonwit Teller* rule was an early casualty. On the same day in December 1953, the Board decided both the *Livingston Shirt*[37] and *Peerless Plywood*[38] cases. *Livingston Shirt* dealt with an unfair labour practice charge, *Peerless Plywood* with an application to set aside an election, and both expressly rejected *Bonwit Teller* as being "the discredited *Clark Bros.* doctrine in scant disguise."[39]

In *Livingston Shirt,* the unfair labour practice charge was based on the employer's actions in assembling his employees on his premises during working hours, delivering an uncoercive anti-union speech, and refusing the union's request for an opportunity to reply under similar conditions. In dismissing the union's complaint, the Board rejuvenated section 8(c):

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32 (1951), 96 N.L.R. 608, 612.
33 *Id.* at 613. This was strictly correct. See *ante,* p. 14.
34 *N.L.R.B.* v. *American Tube Bending Co.* (1953), 205 Fed. (2d) 45 (2nd cir.), per Judge Learned Hand.
35 Aaron, *Employer Free Speech: The Search for a Policy,* in Shister, Aaron and Summers, *Public Policy and Collective Bargaining* 39 (1962).
36 Wirtz, *ante,* n. 1, at 594.
37 (1953), 107 N.L.R.B. 400.
38 (1953), 107 N.L.R.B. 427.
39 (1953), 107 N.L.R.B. 400, 407.

> A basic principle directly affecting any consideration of this question is that Section 8(c) of the Act specifically prohibits us from finding that an uncoercive speech, *whenever* delivered by the employer, constitutes an unfair labor practice. Therefore, any attempt to rationalize a proscription against an employer who makes a privileged speech must necessarily be rested on the theory that the employer's vice is not in making the speech but in denying the union an opportunity to reply on company premises. But to say that conduct which is privileged gives rise to an obligation on the part of the employer to accord an equal opportunity for the union to reply under like circumstances, on pain of being found guilty of unlawful conduct, seems to us an untenable basis for a finding of unfair labor practices . . . . [A]n employer's premises are the natural forum for him just as the union hall is the inviolable forum for the union to assemble and address employees . . . .[40] [Italics added].

In *Peerless Plywood,* the union sought to have an election set aside on the ground that the employer had assembled and addressed his employees on the evening before the election. The speech was uncoercive, but the union relied on the fact that it had no opportunity to reply. The Board admitted that its *Livingston Shirt* decision, being on an unfair labour practice charge, was not directly applicable, and recognized

> that last-minute speeches by either employers or unions delivered to massed assemblies of employees on company time have an unwholesome and unsettling effect and tend to interfere with that sober and thoughtful choice which a free election is designed to reflect. We believe that the real vice is in the last-minute character of the speech . . . .[41]

The *Bonwit Teller* rule, said the Board, would only aggravate such a situation by giving the entire advantage to the party having the last word. Accordingly, the Board in *Peerless Plywood* found it necessary to enunciate an entirely new rule to govern all campaign speeches:

> This rule shall be that employers and unions alike will be prohibited from making election speeches on company time to massed audiences of employees within 24 hours before the scheduled time for conducting an election. Violation of this rule will cause the election to be set aside whenever valid objections are filed.[42]

The Board therefore abolished the *Bonwit Teller* "equal opportunity" rule entirely in unfair labour practice cases, and transformed it into the "24-hour rule" in cases of impugned elections. In *Livingston Shirt,* the Board congratulated itself on the new rule laid down in *Peerless Plywood:*

> It is beyond question a much more limited and, in our view, a more reasonable and practicable qualification on absolute freedom of speech than *Bonwit Teller.*[43]

However, Aaron, among others,[44] is less than congratulatory in his opinion of these two cases. *Livingston Shirt,* he argues,

> is no more than a disingenuous rationalization of a policy permitting employers to exploit economic power under the guise of exercising their right of free speech. The point is not that the union and the employer have the same right to deny each other permission to address employees in their respective 'forums'; rather, it is that the employer has the power, derived from the employment relation, to compel employees to listen, and that the union has not. It cannot make employees come to the union hall to hear a pre-election exhortation, even assuming the unlikely fact that there is often such a meeting place conveniently at hand.[45]

Nor does Aaron treat the 24-hour rule in *Peerless Plywood* any more kindly. It

> is also based on a 'principle' which is offensive to the spirit of freedom that it purports to serve. The Board's opinion in that case is the authentic voice of Big

40 *Id.* at 405-06.
41 (1953), 107 N.L.R.B. 427, 429.
42 *Ibid.*
43 (1953), 107 N.L.R.B. 400, 408.
44 See, e.g., Wirtz, *ante,* n. 1, at 605-06.
45 Aaron, *ante,* n. 35, at 51.

> Brother, dispassionate, paternal, and arbitrary. Employees must be protected from 'unwholesome' and 'unsettling' effects which interfere with a 'sober and thoughtful choice.' The assumption that appeals which are 'unwholesome and unsettling' if made 23 hours prior to an election somehow are shorn of their baneful influence if made 25 hours in advance is arrant nonsense; the suggestion that the Board is responsible for insuring that the election represents a 'sober and thoughtful choice', if taken seriously, has chilling implications.[46]

In addition to the *Livingston Shirt* and *Peerless Plywood* principles, which eased earlier restrictions as to the *time* and *place* of employer speech, the Eisenhower Board also evolved a rule of perhaps even greater importance which gave employers wide latitude as to the *substance* of their anti-union statements. This rule was set out in *Chicopee Manufacturing Co.*,[47] the "bête noire" of the Eisenhower Board's critics.[48] Two of the company's supervisors had told individual employees that if the union won the imminent election, the plant "would" or "could" be moved. The Board, in refusing the union's application to set aside the election, said:

> We view these statements, under the circumstances, as nothing more than predictions of the possible impact of wage demands upon the Employer's business. A prophecy that unionization might ultimately lead to loss of employment is not coercive where there is no threat that the Employer will use its economic power to make its prophecy come true.[49]

This sort of interpretation also permitted an employer to make statements as to his "legal position"—that is, he was allowed to express to his employees his intention to resist to the limits of the law any demands which the union might make, and he was allowed to "predict" that if the union won the election he would contest its right to bargain in the courts[50] and would thereby delay any improvements in terms and conditions of employment for a period of months or years. Bok, who is less contemptuous of the Eisenhower Board's policies than are most writers, says of the "threat-prediction" distinction:

> In principle, the policy was sound enough, for when the employer simply pointed out the adverse consequences which might lawfully result from unionization he provided the employees with information which was clearly pertinent to the decision they were called upon to make. In practice, however, the policy gave hostile employers great leeway to indulge in dire predictions in order to dissuade the employees from supporting the union. After reading the Board's decisions, one could hardly avoid wondering whether all the employers who warned of litigation were really intending to contest the Board's rulings and whether every employer who spoke of having to move his plant for economic reasons was actually sincere in making such predictions.[51]

It takes little inventiveness to imagine many different sorts of employer "predictions" which are really nothing but carefully worded threats to the effect that the predicted consequences will in fact occur in the event of a union victory.[52] Cox, writing in 1960, stated the problem succinctly:

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46 *Id.* at 51-52.
47 (1953), 107 N.L.R.B. 106.
48 *Koretz, Employer Interference with Union Organization versus Employer Free Speech*, 29 Geo. Wash. L. Rev. 399, 413.
49 (1953), 107 N.L.R.B. 160, 107.
50 *Esquire, Inc.* (1954), 107 N.L.R.B. 1238.
51 Bok, *ante*, n. 27, at 75.
52 See, for example, *Avildsen Tools and Machines, Inc.* (1955), 112 N.L.R.B. 1021, where the Board held the following query, made in a letter from the company to its employees, to be an unlawful threat: "What proof can you give us that the U.A.W. would not cause [the company's chairman] to become disgusted and close up the Chicago plant . . .?" At the same time, however, the Board held that similar, related items, including a graphic handbill referring to four unionized competitors' plants which had shut down, were merely "economic predictions" protected by s. 8(c). See also the cases cited by Koretz, *ante*, n. 48, at 413-15.

> The lower value which the N.L.R.B. now puts on freedom of association and the notion that an employer has a legitimate interest in defeating a union have led to increasing the latitude allowed employers in the name of free speech to the point where a clever lawyer can readily show an employer how to threaten and coerce his employees without fear of N.L.R.B. proceedings.[53]

This unsatisfactory state of affairs did not continue for long after the passing of the Eisenhower years. The new "Kennedy Board", motivated, perhaps, by "a sympathetic understanding of collective bargaining problems,"[54] expressly overruled much of the Board's past-1953 jurisprudence on the content of employer speech and brought the *General Shoe* case back into prominence.

In *Dal-Tex Optical*,[55] the employer made paternalistic speeches emphasizing how well off his employees were in comparison with employees of unionized competitors, and warning them not to rock the boat. The tone of the Board's judgment shows the extent to which its thinking had changed with regard to the "threat-prediction" distinction:

> Even a cursory reading of those portions of the speeches of the Employer's president demonstrates that they were couched in language calculated to convey to employees the danger and futility of their designating the Union. After listing some of the existing benefits, he queried whether they wanted 'to gamble all of those things', stated that if required to bargain he would do so on 'a cold-blooded business basis' so that the employees 'may come out with a lot less than you have now', and emphasized his own control over wages. This was a clear cut, readily understandable threat that the Employer would bargain 'from scratch' as though no economic benefits had been given, and the employees would suffer economic loss and reprisal.[56]

That the *General Shoe* requirement of "laboratory conditions" for the conduct of representation elections was back in favour was made clear by the Board's statement of the policy it intended to follow:

> [W]e shall look to the economic realities of the employer-employee relationship and shall set aside an election where we find that the employer's conduct has resulted in substantial interference with the election, regardless of the form in which the statement was made.[57]

Statements by the employer that he intends to use legal action as a delaying tactic have also fallen from grace. In *Lord Baltimore Press*,[58] the employer sent a letter to its employees with the message that (in the Board's words)

> (1) The Employer might be forced out of the offset business, thus eliminating the jobs of these employees; (2) the Petitioner's [the union's] demands would be so unreasonable that the Employer would have to resist and Petitioner would have to call a strike; (3) the Employer would in no event bargain with Petitioner because it deemed the unit inappropriate.[59]

In setting aside the subsequent election upon the union's application, the Board held that, whether or not the employer was technically right about the bargaining unit's appropriateness,

> we can only view this kind of statement of legal position as a threat to use the delaying processes of the law to the fullest extent possible in order to thwart the policies of the Act we enforce. Such conduct, combined with the fear of economic loss that must follow from the Employer's predictions of its reaction to the Petitioner's unknown demands must be held to have destroyed the laboratory

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53 Cox, *Law and the National Labor Policy* 41-42 (1960).
54 Stern, *The Kennedy Labor Policy: A Favorable View* (1964), 3 Industrial Relations 21, 23.
55 (1962), 137 N.L.R.B. 1782.
56 *Id.* at 1785.
57 *Id.* at 1787.
58 (1963), 142 N.L.R.B. 328.
59 *Ibid.*

> conditions we seek to maintain and, consequently, to have prevented the employees' 'free choice'.[60]

Although the *Dal-Tex* and *Lord Baltimore Press* cases indicated the Board's virtual abandonment of the "threat-prediction" distinction, the courts in very recent cases have shown much less willingness to give it up. In *Texas Industries Inc.* v. *N.L.R.B.*,[61] the employer's letter to its employees said that a strike was the union's only means of enforcing its demands, and that "When you strike, you will lose your wages and possibly your job. The Company is free to hire someone to take your place." The letter continued:

> You know that under union methods we would not have been able to operate with continuous employment for you during the past year. Good pay cheques depend upon continuous full time employment.[62]

The Fifth Circuit, never noted for a liberal approach to labour matters, held that neither of these two patently intimidatory passages constituted an unfair labour practice:

> It is well settled that under § 8(c) the employer must be regarded as a rightful contestant for his employees' loyalty in a union election. This section permits an employer to state his legal rights under the Act and to predict that dire economic consequences will follow from a union victory.[63]

An issue which has arisen recently is that of employer speech which is *inflammatory* rather than threatening. The most significant inflammatory propaganda is that which plays upon racial feelings, and two 1962 cases unfortunately show that the Board's policy on such propaganda is likely to please no one.[64]

In *Sewell Manufacturing*,[65] a case which arose in Georgia, the employer mailed to its employees a newspaper picture of the white leader of a union other than the one involved in the case dancing with an unidentified Negro woman.[66] Below the picture was a story headed "Race Mixing Is an Issue as Vickers Workers Ballot." The employer sent other letters containing similar material to its employees, and distributed copies of a racist monthly called "Militant Truth" which constantly attacked unions. The union lost the election, and the Board ordered it set aside because of the absence of the "laboratory conditions" required by the *General Shoe* doctrine. The Board held that

> appeals to racial prejudice on matters unrelated to the election issues or to the union's activities . . . inject an element which is obstructive of the very purpose of an election. They create conditions which make impossible a sober, informed exercise of the franchise. The Board does not intend to tolerate as "election propaganda" appeals or arguments which can have no purpose except to inflame the racial feelings of voters in the election.[67]

However, the Board then went into some very murky water:

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60 *Id.* at 329. See Grodin, *The Kennedy Labor Board* (1964), 3 Industrial Relations 33, 38-40.
61 (1964), 336 Fed. (2d) 128 (5th cir.).
62 *Id.* at 130.
63 *Ibid.* See, also, *J. S. Dillon and Sons Stores Co., Inc.* v. *N.L.R.B.* (1964), 338 Fed. (2d) 395 (10th cir.), where the court decided that employer remarks could not be held to be threats unless the words used were *expressly* threatening. The over-all context of the remarks was dismissed as totally irrelevant.
64 For a detailed account of the development of this policy, See, *Employee Choice and Some Problems of Race and Remedies in Representation Campaigns* (1963), 72 Yale L.J. 1243.
65 (1962), 138 N.L.R.B. 66.
66 "The lady in question was a Nigerian delegate to the International Labor Organization and the picture was taken at an I.L.O. conference in Geneva." Bok, *ante*, n. 27, at 68, n. 68.
67 (1962), 138 N.L.R.B. 66, 71.

> This is not to say that a relevant campaign statement is to be condemned because it may have racial overtones . . . .
>
> So long . . . as a party limits itself to *truthfully* setting forth another party's position on matters of racial interest and does not deliberately seek to overstress and exacerbate racial feelings by irrelevant, inflammatory appeals, we shall not set aside an election on this ground.[68]

Having thus drawn some sort of distinction between acceptable and unacceptable racist propaganda, the Board went on to apply this distinction in its very next case: *Allen Morrison Sign Co.*[69] In that case, part of the employer's letter to its employees mentioned the A.F.L.-C.I.O.'s opposition to segregation, and continued:

> Our purpose in pointing these matters out to you is not to tell you how you ought to feel on integration and segregation, but to let you know how the unions, including the Textile Union, have tried to force it down the throats of the people living in the South.[70]

These statements, said the Board, were

> temperate in tone and advised the employees as to certain facts concerning union expenditure to help eliminate segregation . . . . We are not able to say that the Employer in this case resorted to inflammatory propaganda on matters in no way related to the choice before the voters, and we therefore decline to set the election aside.[71]

The immediate reaction of one who despises any form of racist propaganda is to dismiss as pure sophistry any such attempt to set some of that propaganda apart as being tolerably "temperate" and "factual." But Bok's criticism, although savouring of despair, is worth considering.

> [T]here is reason to doubt whether much can be gained by discouraging inflammatory appeals . . . . If workers in a Southern town are subjected to a dispassionate account of attempts by unions to encourage integration will they be any more rational in evaluating this information? In discussing the speech among themselves, will they not quickly supply the emotional overtones which the employer has carefully culled from his remarks? . . .
>
> Even if [intemperate] appeals were demonstrably more effective, it does not follow that their suppression would do much to further the objectives of the act . . . . Given the difficulty of making a rational choice in the typical representation election, employees who can be kept off balance by appeals of this sort are surely unlikely candidates to make their way dispassionately through the welter of assertions, rumours, and conflicting claims which they must consider in reaching a decision. Hence, it is difficult to make out any substantial reason for limiting the employer other than the distaste which one may hold for tactics of this kind.[72]

The Board has gone beyond racist appeals to hold other types of inflammatory propaganda to be violative of the required "laboratory conditions," and therefore to be grounds for setting aside elections. Viciously anti-union motion pictures, specially produced for use in representation campaigns, have been foremost among these other types of propaganda.[73]

Continuing further yet, the Board has sought, again on the basis of the *General Shoe* doctrine, to invalidate elections on the grounds of pure and simple misstatement of fact, even in the absence of inflammatory overtones. The boundaries of this application of *General Shoe* were set

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68 *Id.* at 71-72. The Board did, however, make it clear (at p. 72) that "the burden will be on the party making use of a racial message to establish that it was truthful and germane . . . ."

69 (1962), 138 N.L.R.B. 73.

70 *Id.* at 74.

71 *Id.* at 75.

72 Bok, *ante*, n. 27, at 71-73.

73 *Plochman and Harrison—Cherry Lane Foods, Inc.* (1962), 140 N.L.R.B. 130; *Storkline Corp.* (1963), 142 N.L.R.B. 875.

out in *United States Gypsum,*[74] where an election was set aside because of the employer's use, on the day preceding the election, of deliberate misrepresentations concerning the union's performance as bargaining agent at one of the employer's other plants. The Board said:

> Absent threats or other elements of intimidation, the Board will not undertake to police or censor the propaganda material used by the participants in a Board election, and leaves it to the opposing party to correct, and to the employees themselves to evaluate, such utterances. However, when one of the parties deliberately misstates material facts which are within its special knowledge, under circumstances that the other party or parties cannot learn about them in time to point out the misstatements, and the employees themselves lack the independent knowledge to make possible a proper evaluation of the misstatements, the Board will find that the bounds of legitimate campaign propaganda have been exceeded and will set aside an election.[75]

It can safely be said, therefore, that the Board (though not the courts) has for virtually all purposes departed from the ill-conceived "threat-prediction" test which prevailed during the Eisenhower years, and is now exercising much tighter control over the *content* of employer speech. But what about the rules, dating back to 1953,[76] which laid down quite mild restrictions as to the *time* and *place* of employer speech?

The *Peerless Plywood* rule, it would appear, remains in effect,[77] so that the Board will not allow either the employer or the union to address "massed audiences" of employees on company time within 24 hours of the balloting. The status of the *Livingston Shirt* rule, which held that an employer who addressed his employees on company time and premises need not accord to the union an opportunity to address the employees under similar conditions, is somewhat more doubtful. It would appear, however, that the rule will still be applied except in cases where the union's alternative opportunities to communicate with the employees are extremely inadequate.[78]

Because of the sensitivity of N.L.R.B. policies to changes of administration in Washington, it is difficult to discern any coherent Board policy on employer free speech and impossible to predict how the Board will handle this issue in the future. However, the Board has, since the end of the Eisenhower regime, shown itself willing to scrutinize the content of employer speech very closely; and, on the basis of the *General Shoe* doctrine, to set aside impugned elections whenever such speech is likely to have had any substantial coercive, inflammatory, or misleading effect upon the employees involved. Neither section 8(c) of the Taft-Hartley Act nor the First Amendment to the Constitution has been allowed by the Board to interfere with its policies to any appreciable extent.[79]

Bok, in his careful study of the entire problem of the regulation of

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74 (1961), 130 N.L.R.B. 901.

75 *Id.* at 904. Exactly the same rule has been applied to misrepresentations by unions: *Hollywood Ceramics Co.* (1962), 140 N.L.R.B. 221.

76 *Livingston Shirt Corp.* (1953), 107 N.L.R.B. 400; *Peerless Plywood Co.* (1953), 107 N.L.R.B. 427.

77 *X-Ray Manufacturing Corp.* (1963), 143 N.L.R.B. 247, 248; Kleeb, *Employer Rights and Thier Limitations During Union Organizational Campaigns* (1964), 15 Lab. L.J. 327.

78 *May Department Stores Co.* (1962), 136 N.L.R.B. 797, enforcement den. (1963), 316 Fed. (2d) 797, where the majority of the Board held that the *Bonwit Teller* decision (1951), 96 N.L.R.B. 608, was still "legally sound." See Bok, *ante,* n. 27, at 96-99.

79 If the courts continue to withhold their support, however—as in the *Dillon Stores* case, *ante,* n. 63, and the *Texas Industries* case, ante, n. 61—the Board will eventually be forced to back down. How far it might have to retreat is an open question.

representation election campaigns, finds this detailed regulation of the substance of employer speech to be largely futile:

> When employees are unable to form a reasoned judgment on the effects of a union, given the complexity of the issues and the limited information at their disposal, no legal rule can lead them to a rational conclusion. If certain influences are suppressed by law, the voters will often respond by simply relying on other factors that are no more rational. As a result, if it is correct to assume that the issues in representation elections have become increasingly complex, one must be skeptical about the degree to which legal rules can actually bring about more reasoned decisions by the electorate.[80]

Even if the law were able to bring the election returns more closely into accord with the wishes of the "rational" voters, Bok continues, the majority's desires would not likely be furthered, because "most empirical studies would have us believe" that "rational" voters are only a small minority of almost any electorate.[81]

The Board would be much better advised, Bok argues, to allow wide latitude to both sides as to the *content* of their election statements; but to implement new rules, similar in spirit to those in *Livingston Shirt* and *Peerless Plywood,* to ensure that neither side has vastly superior *opportunities* to communicate its arguments to the employees:

> What is the nature of fairness in the context of a representation election? In essence, it is a question of equality . . . . [I]f the election is to be fair, neither side should have disproportionate power to exert pressures that will sway the outcome of the election on grounds unrelated to the merits of its position.[82]

This reasoning leads Bok to suggest as a possible solution that in all elections involving a certain minimum number of employees,

> the employer could not deliver a speech to his employees during working hours within the last seven days of the campaign unless he permitted the union to do likewise, nor could he allow his supervisors to solicit during this period without relaxing his ban on solicitation by the employees.[83]

Assuring the union such an ample opportunity to reply would, Bok concludes, provide "strong justification for relaxing the restrictive rules presently imposed upon the substantive content of the employer's speech."[84]

Aaron, an exceptionally perceptive writer, feels, on the other hand, that the *Livingston Shirt* and *Peerless Plywood* rules are highly unsatisfactory;[85] but admits that it is easier to criticize them "than to propose others that are demonstrably more equitable and workable."[86] The ideal but unattainable solution, he submits,

> would insure that the union and the employer have exactly the same access to all employees through exactly the same communication media. Alternatively, it seems better to move in the opposite direction and to emancipate the captive audience altogether by returning to the principle enunciated in the *Clark Bros.* case. This would preserve against employer and union the individual employee's right not to listen and would separate the employer's exercise of free speech from his economic power to compel his employees to listen.[87]

This suggestion appears to go more directly to the heart of the problem than Bok's, in that it would, by removing the employer's right to speak to "captive audiences" of his employees, neutralize the most effective

80 Bok, *ante,* n. 27, at 52.
81 *Id.,* n. 34.
82 *Id.* at 54.
83 *Id.* at 102.
84 *Id.* at 103.
85 Aaron, *ante,* n. 35, at 51-52.
86 *Id.* at 52
87 *Id.* at 52-53.

weapon given to him by his position of ecomomic superiority.[88] Unlike Bok, Aaron does not feel that more effective regulation of the time and place of employer speech will in itself render unnecessary most of the existing controls with regard to the *content* of such speech. Aaron admits that it is "infinitely more troublesome"[89] to develop workable rules as to *what* an employer may or may not say, but he clearly recognizes that such rules are a necessary complement to "captive audience" or "equal opportunity" rules in order to ensure that employees have authentic freedom from employer influence in their choice of a bargaining agent.[90]

In conclusion, the N.L.R.B. now appears to be deeply committed to the building of an ever more complex structure of rules to control employer speech in representation elections. The future shape of this structure is far from clear, however, as the Board has had to surmount numerous obstacles to get as far as it has, and it may well face further setbacks in the courts or in Congress if it proceeds with full vigour.

CANADIAN LAW

From the stormy sea of the American law on employer free speech, one can glide with considerable relief into the little lagoons of the Canadian law. The National Labor Relations Act, as applied by the N.L.R.B., dominates American labour law. Because jurisdiction over labour relations in Canada is largely but not wholly provincial, any examination of almost any aspect of Canadian labour law must take account of the existence of ten provincial statutes and one federal statute, interpreted by eleven different Boards. Insofar as provisions with regard to employer free speech are concerned, there is little uniformity among the jurisdictions. Each Act has one or more general provisions, equivalent in effect to a combination of parts of sections 7, 8 (a) (1), and 8 (a) (3) of the National Labor Relations Act, designed to prevent the coercion of employees in the exercise of their right of organization.[91] Representative of these general provisions is section 4 (4) of the federal *Industrial Relations and Disputes Investigation Act*:[92]

> No employer and no person acting on behalf of an employer shall seek by intimidation, by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or any other penalty, or by any means to compel an employee to refrain from becoming or to cease to be a member or officer or representative of a trade union . . . .

Six provinces[93] and the Dominion have no further provisions dealing

88 Revival of the "captive audience" doctrine would also put the Board back on the course from which it was diverted, firstly by the Taft-Hartley Act and later by the advent of the Eisenhower administration.

89 Aaron, *ante*, n. 35, at 53.

90 *Id.* at 53-55.

91 Industrial Relations and Disputes Investigation Act, R.S.C. 1952, c. 152, s. 4(4); Alberta Labour Act, R.S.A. 1955, c. 167, s. 80(1); British Columbia Labour Relations Act, R.S.B.C. 1960, c. 205, ss. 4(2)(c), 6; Manitoba Labour Relations Act, R.S.M. 1954, c. 132, s. 4(3); New Brunswick Labour Relations Act, R.S.N.B. 1952, c. 124, s. 3(3); Newfoundland Labour Relations Act, R.S.N. 1952, c. 258, s. 4(3); Nova Scotia Trade Union Act, R.S.N.S. 1954, c. 295, s. 4(3); Ontario Labour Relations Act, R.S.O. 1960, c. 202, ss. 48, 52; Prince Edward Island Industrial Relations Act, (P.E.I.) 1962, c. 18, s. 4(3); Quebec Labour Code, (Que.) 1964, c. 45, s. 12; Saskatchewan Trade Union Act, R.S.S. 1953, c. 259, ss. 8(1)(e), 8(1)(g).

92 R.S.C. 1952, c. 152, s. 4(4). The New Brunswick, Newfoundland, Nova Scotia, and Prince Edward Island provisions, cited in n. 91, *ante*, are virtually identical to s. 4(4) of the Dominion Act. The provisions in the other provincial Acts, though often very different in wording and in scope, are basically quite similar.

93 Alberta, British Columbia, Newfoundland, Nova Scotia, Prince Edward Island, and Quebec.

in any way with representation election tactics. In these seven jurisdictions, only one reported case may be found bearing directly on the question of employer speech—the recent decision of the Canada Labour Relations Board in *Taggart Service Ltd.*[94] Local 91 of the Teamsters' Union had applied for certification for a multi-city, inter-provincial unit of the respondent company's truckers and related workers who had until then been represented by the Taggart Employees' Association. At a hearing held in April, 1964, evidence presented by the union established that 133 of the 233 employees in the appropriate unit were members in good standing of the union. However, petitions were also submitted, supported by oral evidence, to the effect that a substantial number of the employees in the unit were opposed to the union. As a result, the Board ordered a vote, which the union narrowly lost. Because of remarks made by the respondent's spokesmen to its assembled employees at its Ottawa, Toronto, and Montreal terminals on the two evenings prior to the vote, the union asked the Board to disregard the vote and to grant certification under section 9(2) of the I.R.D.I. Act.[95]

At the Toronto meetings, the respondent's president, Perkins, had made statements to the following effect (in the Board's words):

> In summary, after explaining the welfare and retirement benefits enjoyed by the employees under the existing agreement with the Taggart Employees Association, the employees were told by Perkins that these would be terminated if the Teamsters came in. Perkins explained that the Association contract did not provide for overtime rates of pay, that the company could not afford to pay overtime rates of pay and if the Teamsters came in the company would have to cut down on their hours of work below the 48-hour level and would have to hire more help to do so. The company would also have to consider piggyback operations. Perkins said he had had for some months a contract in his office from both railways asking the company to use piggyback and was sure that all he would have to do to put this into effect would be to call either railroad . . . .[96]

Similar remarks were made in Ottawa and Montreal, and testimony was adduced from employees that they clearly understood from the company's statements that support of the Teamsters might lead the company to pursue a course of action unfavourable to the employees.

The Board, after quoting s. 4(4) and other provisions of the I.R.D.I. Act, granted the union's request for immediate certification on the basis of the evidence of membership submitted prior to the vote. In disregarding the vote, the Board said:

> An employer may express his views and give facts in appropriate manner and circumstances on the issues involved in representation proceedings in so far as these directly affect him and has the right to make appropriate reply to propaganda directed against him in relation thereto. However he should bear in mind in so doing the force and weight which such expression of views may have upon the minds of his employees and which derive from the nature and extent of his authority as employer over his employees . . . . He should take care that such expressions of views do not constitute and may not reasonably be construed by his employees to be an attempt by means of intimidation, threats, or other means

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94 (1964) C.C.H. Can. L.L.R. par 16,015.

95 R.S.C. 1952, c. 152, s. 9(2), which provides:

> When pursuant to an application for certification under this Act by a trade union, the Board has determined that a unit of employees is appropriate for collective bargaining
>
> (a) if the Board is satisfied that the majority of the employees in the unit are members in good standing of the trade union, or
>
> (b) if, as a result of a vote of the employees in the unit, the Board is satisfied that a majority of them have selected the trade union to be a bargaining agent on their behalf,
>
> the Board may certify the trade union as a bargaining agent of the employees in the unit.

96 (1964) C.C.H. Can. L.L.R. par. 16,015 at p. 13,054.

> of coercion to interfere with their freedom to join a trade union of their choice or to otherwise select a bargaining agent of their own choice.[97]

In the light of their substance, timing and context, the Board continued, the respondent's statements

> constituted in the aggregate an improper attempt . . . to influence its employees by intimidation and threats against the selection of the [Teamsters] as their bargaining agent.[98]

Although the Board felt that it could not "weigh precisely the full extent to which these actions of the Respondent did contribute to the result of the vote,"[99] it was not prepared to accept the vote as indicating the employees' true wishes.

This judgment, embodying the same type of reasoning which characterizes current N.L.R.B. decisions and the more enlightened of the American court cases in this area, should be taken as a leading authority in at least those six provinces which lack any more explicit statutory guidance as to the limits of permissible election tactics. It might also be desirable, in light of the chaotic history of the American law on employer free speech, that those provinces enact clear, firm restrictions on what employers may say and on when and where they may say it.

The four remaining provinces[100] each make some statutory mention of representation election tactics. New Brunswick merely makes it an unfair labour practice for either side to attempt to influence the voter by intimidation, coercion or bribery.[101] In the absence of any reported decisions, the wording of this provision would lead to the conclusion that the right to employer free speech exists so long as such speech does not amount to intimidation, coercion or bribery. Strengthening the section might be in order, particularly the imposition of some limits as to the time and place of uncoercive speech. Saskatchewan, adhering more closely to the American National Labor Relations Act, also makes it an unfair labour practice for an employer "to interfere in the selection of a trade union as a representative of employees for the purpose of bargaining collectively."[102] Again, judicial or administrative interpretation is lacking, but this section is strong enough, if liberally construed, to allow the imposition of virtually any restriction on employer speech.

Manitoba appears to have the most forthright provision to be found in either Canada or the United States:

> Where the Board requires a vote of the employees in a unit to be taken under this section, no person shall make or put forth propaganda, or engage in electioneering or other activities, for the purpose of influencing the vote in support of, or against, any trade union that is an applicant for certification.[103]

This denies the right of free speech to *either* party, and appears to be the extreme form of the N.L.R.B's "laboratory conditions" requirement as set out in the *General Shoe* case.[104] Perhaps the very explicitness of this

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97 *Id.* at pp. 13,055-56.
98 *Id.* at p. 13,056.
99 *Ibid.*
100 Manitoba, New Brunswick, Ontario, and Saskatchewan.
101 New Brunswick Labour Relations Act, R.S.N.B. 1952, c. 124, s. 3(4), which provides: "No person shall seek to influence the manner in which an employee may vote, in any vote taken under this Act, by intimidation or coercion or by giving, or offering to give, money or any other valuable consideration."
102 Saskatchewan Trade Union Act, R.S.S. 1953, c. 259, s. 8 (1)(g).
103 Manitoba Labour Relations Act, R.S.M. 1954, c. 132, s. 9(4A), enacted by (Man.) 1957, c. 36, s. 8.
104 (1948), 77 N.L.R.B. 124. See *ante*, at pp. 15-16.

provision is responsible for the absence of any reported cases on it. There is an obvious danger that such a blunt prohibition against any form of electioneering may deprive employees of the information which they legitimately require to enable them to arrive at anything approaching a rational conclusion as to the merits of an aspiring bargaining agent.[105]

This leaves us with the one province which has both an express statutory provision for the protection of employer free speech and an appreciable amount of Board jurisprudence on the subject—Ontario. In the pre-1960 period, however, the Ontario Labour Relations Act stated no more with regard to representation election tactics than the federal Act now says. [106] During that time, the Ontario Labour Relations Board laid down the policy which it still consistently follows—the requirement that both employers and unions so conduct their election campaigns as not to create a situation in which the vote would be unlikely to disclose the true wishes of the employees.

A leading case in which the Board in effect brought the *General Shoe* doctrine into Ontario was *Underwood Manufacturing Co. Ltd.*[107] Shortly after the union's first organizational meeting, the company decided to reduce staff, and laid off, among others, eight employees who were active in the union. The union applied for certification without a vote, on the ground that the atmosphere created by the dismissal of its supporters would make it most unlikely that the remaining employees would express their true wishes in an election.[108]

The Board held, firstly, that there was no need for it to decide whether or not the eight union supporters had been dismissed for their union

105 See Bok, *ante*, n. 27, at 52, quoted *ante*, p. 24. Although there are no reported cases on s. 9(4A), there is a Manitoba decision on an important matter closely related to employer free speech—employer interrogation of his employees during the course of a representation campaign. In *Dent's English Bacon Co. Ltd.*, (1959), C.C.H. Can. L.L.R. 1955-59 Transfer Binder par. 16,136, fourteen of the seventeen employees in the bargaining unit took out membership in the union. Two of the fourteen later approached the plant superintendent, who was a personal friend of all of the employees, and indicated their desire to withdraw from the union. The superintendent thereupon visited the homes of almost all of the employees, accompanied by a commissioner for oaths, and, in an outwardly uncoercive way, asked each employee how he stood with regard to the union. When each employee stated his opposition to the union, the superintendent took a statutory declaration to that effect from the employee. The Manitoba Labour Board refused to give any weight to the statutory declarations, because, in its opinion, "statements solicited by an employer from individual employees suffer from the inherent dominant position of the employer in relation to the employee."

The American courts have generally taken a less strict attitude toward employer interrogation. They prefer a case-by-case approach, in which they examine the circumstances surrounding each instance of interrogation, in an attempt to ascertain whether the employees involved are likely to have been coerced: *N.L.R.B.* v. *Camco, Inc.* (1965), 340 Fed. (2d) 803 (5th cir.).

106 Labour Relations Act, R.S.O. 1950, c. 194, ss. 45, 47, 48.

107 (1952), C.C.H. Can. L.L.R. 1949-54 Transfer Binder par. 17,040. Although this case involved employer actions rather than statements, the principle which it enunciates is nonetheless directly relevant. As Board Members Archer and Harvey said in the *Hazell* case (1949), C.C.H. Can. L.L.R. 1949-54 Transfer Binder par. 17,007, at p. 13,010, "What is always to be determined is the wish of the employees, not of the employer. Conduct of an employer designed to obstruct or destroy the liberty of choice of employees in representation matters is therefore improper, regardless of the particular means adopted."

Another form of employer *action* which can have marked effect upon representation elections is the granting of improvements in terms and conditions of employment prior to the election. Although this matter is beyond the scope of this paper, it may be noted that there is an interesting contrast between the reasoning of the Ontario Labour Relations Board in *Scythes and Co. Ltd.* (1952), C.C.H. Can. L.L.R. 1949-54 Transfer Binder par. 17,018, and the reasoning of the United States Supreme Court in *N.L.R.B.* v. *Exchange Parts Co.* (1964), 375 U.S. 405, 84 S.Ct. 457, 11 L.Ed.2d 435. See Note, (1964), 18 Southwestern L.J. 533.

108 Labour Relations Act, R.S.O. 1960, c. 202, s. 7(5):

> If the Board is satisfied that more than 50 per cent of the employees in the bargaining unit are members of the trade union and that the true wishes of the employees are not likely to be disclosed by a representation vote, the Board may certify the trade union as bargaining agent without taking a representation vote.

activities, as it had authority under section 7 (5) to certify without a vote even in the absence of an unfair labour practice. In the Board's words,

> [I]t is not necessary to the operation of [section 7(5)] that the respondent shall have committed an unfair labour practice in violation of some other section of the Act. In fact, the mere commission of an unfair labour practice would not justify the Board in finding that such commission, *per se*, precluded the expression of the true wishes of employees.[109]

The real issue, as the Board expressed it, was

> whether the particular circumstances of the individual case are such as to have a reasonable tendency towards a coercive effect on employees (even if not so intended) so as to create a likelihood of interfering with the free exercise of their rights.[110]

Applying this very flexible test to the facts at hand, the Board concluded:

> We believe that the layoff of these particular individuals at a time immediately following the formal launching of an organizing campaign and affecting persons who are certain to have been known to employees as active supporters of the applicant, and under circumstances where the principle of seniority was not as closely followed as it had been in previous layoffs, would, amongst a small group of employees such as here involved(approximately 150), be interpreted by the employees as meaning that the action was in some measure linked to their union activities. Employees, having come to such a conclusion, would of necessity be likely to submerge their desire to actively support the applicant. To this extent, it is unlikely that a representation vote would disclose the true wishes of the employees, and is a proper case for the Board to exercise its discretionary power under Section 7(5).[111]

However, that the Board would not take too strict an attitude toward election propaganda (at least where the propaganda was that of the union) was shown in the *Stauffer-Dobbie Manufacturing* case.[112]. The Board, at the instance of a number of employees in the bargaining unit, had ordered a vote on the issue of de-certification. The incumbent union narrowly won, and the intervening employer objected to the vote on the ground, *inter alia,* that the union had published material containing untrue statements and improper inferences in an attempt to influence the employees. In refusing to set aside the vote, the Board said:

> A new vote will generally be directed where the action complained of is coercive in nature or if ways and means of destroying the secrecy of the ballot or the confidence of the employees in the secrecy of the ballot are suggested or implied . . . . In the main, however, a considerable amount of leeway is permitted in electioneering. The Board does not undertake to police election campaigns or to consider the truth or falsity of campaign literature or speeches unless the ability of the employees to evaluate such literature or speeches is impaired, e.g., by the use of campaign trickery, to such an extent that the free desires of the employees cannot be determined in a secret vote.[113]

As to the standard of resistance to propaganda which was to be expected of an employee, the Board said, "One cannot pay too much attention to either the most gullible voter or the one of firm convictions."[114] The question was whether the "reasonable" voter was likely to be misled. The union's statements here, the Board held, were "obvious propaganda clearly recognizable as such by the employees,"[115] and could not be said to have interfered with the free expression of their wishes.

That whether or not the campaign propaganda has rendered the vote

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109 (1952), C.C.H. Can. L.L.R. 1949-54 Transfer Binder par. 17,040, at p. 13,068.
110 *Id.* at p. 13,069.
111 *Id.* at p. 13,070.
112 (1959), C.C.H. Can. L.L.R. 1955-59 Transfer Binder par. 16,147.
113 *Id.* at p. 12,275.
114 *Ibid.*
115 *Ibid.*

unlikely to reflect the employees' true wishes is indeed the essential criterion of the permissibility of employer speech in the eyes of the Ontario Labour Relations Board was confirmed in the *Savage Shoes* case,[116] the last reported decision on employer free speech before the coming into effect of the 1960 amendments. The company had assembled its employees, on company time, to hear a speech from the general superintendent. This speech, admitted by the union to have been uncoercive on its face, simply asked, in the Board's words, "that each employee give serious thought as to how they should vote and then pointed out some of the things that the company thought the employees should consider in making their decision."[117] The Board, in refusing the union's application to set aside the election on the grounds of the speech, held that:

> [I]f a speech is in question, regard must be had to the whole speech and the circumstances under which it was made. Keeping this rule in mind, in the present case there is nothing which, in our opinion, can be said to be coercive in the conduct of the respondent company, nor has anything occurred which could be said to have impaired the ability of the employees to evaluate the speech to such an extent that their free desires could not be determined in a secret vote.[118]

Board Member Archer strongly dissented in terms very reminiscent of the N.L.R.B.'s decision in *Clark Bros.* The employees in this case, he argued, were in reality a "captive audience" because the employer's "request" that they attend the speech actually amounted to an order.[119] The majority of the Board in no way denied that the employees did constitute a "captive audience," but were most careful to add the following:

> [T]his decision must not be construed as a 'carte blanche' to address so-called 'captive audiences'. In deciding whether propaganda or electioneering by an employer warrants the taking of a new representation vote, one of the factors which the Board might well consider is the assembling of employees during working hours when, because of the nature of the employer-employee relationship, it is unlikely that any employee would consider that he had a choice in the matter of attendance.[120]

Meanwhile, the Ontario Legislature's Select Committee on Labour Relations had, as a result of employer complaints, come out in favour of express statutory recognition of the right of employer free speech:

> It is the recommendation of this Committee that employers should be free to express their views on an equal basis with trade unions provided they do not use coercion, intimidation, threats, promises or undue influence.[121]

This recommendation resulted in important amendments being made in 1960 to what was then section 45 of the Labour Relations Act[122]—amendments by which the Legislature with one hand gave to unions protection against employer interference in their "selection" by employees, and with the other hand purported to take away much of what it had just given (and probably more) by inserting an employer free speech clause in almost the exact terms of the Committee's recommendation. The amended section, now section 48,[123] provides as follows (with the 1960 amendments in italics):

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116 (1960), 60 C.L.L.C. 888.
117 *Ibid.*
118 *Id.* at 889.
119 *Id.* at 890.
120 *Id.* at 889.
121 Report of the Select Committee on Labour Relations of the Ontario Legislature, 1958, p. 38.
122 R.S.O. 1950, c. 194, s. 45.
123 R.S.O. 1960, c. 202, s. 48.

> No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, *selection,* or administration of a trade union *or the representation of employees by a trade union* or contribute financial or other support to a trade union, *but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.*

It will be recalled that the insertion of the strikingly similar section 8(c) into the National Labor Relations Act in 1947 had little effect on N.L.R.B. policies, and that whatever effect it did have was short lived.[124] There have not been enough cases on employer free speech in Ontario since the section 48 amendments came into effect in October 1960 to justify any firm conclusions as to the attitude of the Ontario Labour Relations Board toward them;[125] but it is safe to say that the few relevant reported decisions of the Board since that date have been, if anything, less tolerant of employer campaign statements than were the earlier decisions.

In the *Sun Tube* case,[126] the company's personnel manager on several occasions assembled all the employees on company premises during working hours; and made remarks which, in the United States, would likely have been excused as "predictions" during the Eisenhower years,[127] but would probably he held to be threats now.[128] The remarks warned the employees

> that, if the union came in, they could lose their existing fringe benefits, that the respondent might have to close down its plant as it could not afford to pay higher wages, and that the respondent had never had and would never have a union in its plant.[129]

These statements, "made in the circumstances of this case, including the repeated convening of employees under 'captive audience' conditions," were held, on the authority of the *Underwood* case,[130] to justify certification of the union without a vote under section 7(5), in that the statements "would have a coercive effect on the employees and would make it unlikely that their true wishes would be disclosed by a representation vote."[131]

That the *General Shoe* doctrine is still as applicable in Ontario as it was at the time of the *Underwood* case, notwithstanding the employer free speech clause in section 48, is clear from the *Wolverine Tube* case.[132] The company president delivered an anti-union speech to his assembled employees on company time, emphasizing, among other things, his

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124 *Ante,* at pp. 14-17.

125 In *Chrysler Corp. of Canada,* (1960) O.L.R.B.. March Monthly Report 428, the Board said, at p. 429:

> Section 48 is couched in broad terms and it is impossible, and probably unwise, to attempt to spell out in detail what an employer may or may not do in compliance with the section. Each case will obviously turn on its own peculiar facts. Some of the factors that may have to be taken into account may be whether the views expressed to the employees were enunciated to each of them privately or to the employees in a group, whether the employees were in fact free to attend or not to attend to hear the expression of views, whether the views were expressed in reply to some statement of the union or consisted of comments made 'at large' as to the desirability of the employees joining a unit [*sic*] or any particular union, whether employees were urged or advised, either expressly or impliedly, to notify the Board of their opposition to the union, or whether the employees were asked about their sympathies in respect to the union or about their membership or non-membership.

126 (1962) O.L.R.B. April Monthly Report 28.

127 *Chicopee Manufacturing Co.* (1953), 107 N.L.R.B. 106; see *ante,* p. 19.

128 *Dal-Tex Optical Co.* (1962), 137 N.L.R.B. 1782; see *ante,* p. 20.

129 (1962) O.L.R.B. April Monthly Report 28.

130 (1952), C.C.H. Can. L.L.R. 1949-54 Transfer Binder par. 17,040.

131 (1962) O.L.R.B. April Monthly Report 28, 29.

132 (1963), 63 C.L.L.C. 1226 (O.L.R.B.).

accusation that the applicant union did not keep its promises, his feeling that it would not be in the employees' best interests to be represented by the union, and his preference for an "employees' committee" which was being formed. After the meeting, the company sent letters to each of the employees expressing its surprise at their continued interest in the union.

The Board, in ordering immediate certification of the union under section 7(5), held that "the activities of the employer in this case must be found to pass far beyond the free-speech privilege contemplated and conferred by the concluding words of section 48 . . . ."[133] It is of considerable importance that the Board refused to confine itself to the express meaning of the employer's words, but was willing to look to the over-all context:

> It is obvious to us that when the remarks made by the employer at the pre-election meeting and in the printed documents which followed the meeting, are construed together, they reveal veiled but plainly unmistakable suggestions, sufficient to impress any employee of average intelligence and fortitude, that the continuance of present wages, working conditions, steady employment, and pension benefits will be threatened if the [union] is voted in . . . .[134]

The N.L.R.B., as we have seen,[135] has quite recently, in the *Sewell* case,[136] expressed its willingness to set elections aside if campaign propaganda, although not strictly constituting intimidation, is inflammatory in its nature and in its manner of expression. Two cases can be found which indicate that the Ontario Labour Relations Board will take a similar view of such propaganda. in *Joseph Gould & Sons*,[137] the intervener union circulated a letter, in Yiddish, alleging that a vote for the applicant union would be a vote for "a group of anti-Unionists, anti-Jews, Jew-haters, anti-semites and such like." [138] The Board, in setting aside the election, acknowledged that in representation campaigns, as in other types of election campaigns, the parties should be allowed wide latitude, but continued:

> This latitude cannot, however, be so wide as to subvert the entire purpose of the vote.
>
> The circular letter here referred to is cleverly calculated to divert the attention of voting employees from the main issue of selecting one of two rival unions as their bargaining agent, by the use of an appeal to racial and religious prejudices. It represents the use of a tool which thinking people in a free society must abhor and repudiate . . . .[139]

Similarly, in *Maple Leaf Milling*,[140] the applicant union put out leaflets in which allegations were made as to "the views and attitudes of one of the members of the Board in this matter." The Board, in ordering a new vote, said:

> While a considerable amount of leeway is permitted in electioneering, we regard as highly improper any attempt by a party to proceedings before this Board to influence voters by drawing inferences based on speculation as to what motivated a member of the Board in reaching his conclusion.[141]

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133 *Id.* at 1229.

134 *Id.* at 1230. This case is also valuable for its extensive discussion of the question of remedies—i.e., when will the Board order a new election rather than grant outright certification under s. 7(5)?

135 *Ante*, pp. 21-22.

136 (1962), 138 N.L.R.B. 66.

137 (1952), C.C.H. Can. L.L.R. 1949-54 Transfer Binder par 17,039.

138 *Id.* at p. 13,066.

139 *Id.* at p. 13,067.

140 (1953), C.C.H. Can. L.L.R. 1949-54 Transfer Binder par. 17,055.

141 *Ibid.*

An Ontario equivalent can be found for one of the most important of the limitations placed by the N.L.R.B. on the time and place of employer speech—the *Peerless Plywood rule.*[142] This rule, it will be recalled, applies in all representation election campaigns and provides that "employers and employees alike will be prohibited from making election speeches on company time to massed assemblies of employees within 24 hours before the scheduled time for conducting an election."[143] Although no such automatic rule has been established in Ontario, the Board's registrar has the power, under section 42(j) of the Board's Rules of Procedure, to "direct all interested persons to refrain and desist from propaganda and electioneering during the day or days the vote is taken and for seventy-two hours before the day on which the vote is commenced."[144]

The registrar generally does impose this 72-hour no-propaganda rule, and the Board has interpreted its meaning very strictly. In the *Stauffer-Dobbie* case,[145] the Board, while holding that a good deal of leeway was to be permitted to propaganda circulated prior to the period of silence, clearly distinguished the case of material circulated within that period:

> As the Board said in the *Rogers Majestic Case* (1948) D.L.S. 7-1382: 'The "no-propaganda" rule is an absolute prohibition.' The Board will not enquire into whether the electioneering or propaganda complained of did or did not influence the voters. A party guilty of infringing the rule will not be permitted to profit by its own wrongdoing and a new vote will be directed at the request of any innocent party to the proceedings.[146]

A good example of the strictness of the 72-hour rule is provided by the *Maple Leaf Veneer* case.[147] Some days before the prohibited period, the employer sent a letter to its employees referring to the threat posed to its business by Japanese competition. During the prohibited period, the employer posted a notice to the effect that it was about to lose its largest customer to Japanese or other competitors. The union, in applying to set aside the election, admitted that the notice was unobjectionable in itself, but argued that when it was read in conjunction with the earlier letter it became campaign propaganda. The Board agreed, and held that the posting of the notice during the 72-hour period warranted the calling of a new election.

The question of the interpretation of the 72-hour rule was thoroughly canvassed by the Board in the *Automatic Electric* case.[148] The head office of the intervener union, the International Union of Electrical Workers, published a fortnightly newspaper, the *I.U.E. News,* in Washington. Some of the respondent company's employees were on the paper's regular mailing list, and received copies during the no-propaganda period preceding the election which was to be held between the intervener and the applicant union, the United Electrical Workers. There was apparently a good deal of bad feeling between the two unions at all levels, and the issue of *I.U.E. News* received by the respondent's employees during the no-propaganda period, although it made no mention of the Automatic

142 *Ante,* p. 18.
143 (1953), 107 N.L.R.B. 425, 429.
144 Rev. Reg. Ont. 1960, Reg. 401, Rule 42(j).
145 (1959), C.C.H. Can. L.L.R. 1955-59 Transfer Binder par. 16,147.
146 *Id.* at p. 12,275.
147 (1961) O.L.R.B. May Monthly Report 58.
148 (1961), 62 C.L.L.C. 1006.

Electric election, carried several strongly-worded attacks on the applicant.[149]

The Board first held that the no-propaganda rule, while strict, should not be held to be "absolute." It was preferable, said the Board (referring to its decisions in the *Wilcolator* case[150] and the *Canadian Gypsum* case[151]), to hold that the rule imposed "a heavy onus on the parties to see that the rule is not infringed."[152] Even if election propaganda did appear during the 72-hour period, the Board felt that the onus could be discharged by proof that the party benefitting from the propaganda could not reasonably have anticipated that it would be seen by the employees during that period.

This onus was held not to have been discharged in the *Automatic Electric* case, and the election was set aside. According to the Board, representatives of the intervener should have realized that an issue of the newspaper would reach the employees during the no-propaganda period; and should also have realized, in light of the contents of previous issues, that it would likely contain material critical of the applicant. The intervener was therefore obliged

> at least to draw to the attention of the Board the fact that there would be an issue of the publication during this period. It would then have been up to the Board to decide what effect this publication should have on the Board's choice of a date for the vote.[153]

The 72-hour rule bears an interesting resemblance to Bok's suggestion that no employer be allowed to address his employees during working hours in the last seven days before the vote unless the union is also allowed to address them under comparable conditions.[154]. The Ontario rule is both more sweeping, in that it imposes a virtually complete ban on all forms of electioneering, and more flexible in that it does not apply automatically. It would seem to be an effective means of avoiding any undesirable effects that might result from last-minute speeches, but whether it need be so broad as to cut off *all* campaign communications is open to question. A complete prohibition of this sort may be easier for the Board to handle and easier for the parties to understand; but (as with the even broader prohibition in section 9(4A) of the Manitoba Labour Relations Act)[155] it may exclude a good deal of information which the employees would find useful in making their decision on union representation.

The Ontario Labour Relations Board has, it may be concluded, held consistently to its policy of requiring that representation elections reflect as closely as possible the true wishes of the employees involved. It

149 For example, the front-page banner headline read, "UE Bosses Show True Color—RED," the last word appearing in red ink: (1962), 62 C.L.L.C. 1006, 1007.
150 (1959) O.L.R.B. Oct. Monthly Report 245.
151 (1960) O.L.R.B. Jan. Monthly Report 349.
152 (1962), 62 C.L.L.C. 1006, 1009.
153 *Id.* at 1010. Board Member Archer, dissenting, said at pp. 1010-11:
> When one considers the numerous periodicals, newspapers, house organs, etc., that bombard the average trade unionist almost every day, one can readily see how difficult it becomes to enforce at '72-hour' rule if this type of literature is considered to be propaganda in contravention of the Rules. I believe that before propaganda should be considered objectionable, certain ingredients should be present: (i) that the propaganda be directed to the vote in question, or (ii) that it be distributed by someone connected with the campaign over whom the party has control.

However cogent these rules may appear, they would, if given effect to, be likely to undermine the basis of the 72-hour rule.
154 Bok, *ante*, n. 27, at 102; and see text of present article at p. 24.
155 *Ante*, n. 103; *ante*, pp. 27-28.

appears to have resisted attempts (legislative and otherwise) to foist the shibboleth of employer free speech upon it, and it has shown a clear understanding of the dangers inherent in allowing employers to use their economic power over their employees as a means of forestalling the establishment of collective bargaining. The wisdom of this policy is borne out by the fact that the American N.L.R.B., as currently constituted, has largely reverted to it after a period in the wilderness. It is encouraging to note that the Canada Labour Relations Board has also taken a stand in favour of ensuring that employees "have made their own choice" in representation elections;[156] and it is to be hoped that other provincial Boards, when confronted with this issue, will face it as firmly as it has been faced in Ontario.

156 *Taggart Service Ltd.*, (1964), C.C.H. Can. L.L.R. p. 13,051, 13,055; *ante*, pp. 26-27.