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Section 8(c) of the National Labor Relations Act: Giving It Meaning

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Section 8(c)[1] of the National Labor Relations Act[2] provides that an employer's communication with its employees "shall not constitute or be evidence of an unfair labor practice" as long as the communications do not contain threats of reprisals, threats of force, or promises of benefits.[3] In a long series of cases,[4] the National Labor Relations Board has undermined the express language of Section 8(c) and the intent of Congress, both in the substantive content of its decisions and in the manner in which it has rendered those decisions.[5]

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1. 29 U.S.C. § 158(c) (1976).

2. The present National Labor Relations Act, 29 U.S.C. §§ 151-169 (1976), had its beginning with the National Labor Relations (Wagner) Act, Pub. L. No. 198, 49 Stat. 449 (1935). The 1935 Act was amended by the Labor Management Relations (Taft-Hartley) Act, 1947, Pub. L. No. 101, 61 Stat. 136. The Act was further amended by the Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959, Pub. L. No. 86-257, 73 Stat. 519. A final amendment was the Act of July 26, 1974, Pub. L. No. 93-360, 88 Stat. 395. All subsequent references will be to "the Act" unless otherwise specified.

3. 29 U.S.C. § 158(c) (1976).

4. *See, e.g.*, General Dynamics Corp., 250 N.L.R.B. No. 96, 104 L.R.R.M. 1438 (1980); Marcus I. Lawrence Memorial Hosp., 249 N.L.R.B. No. 90, 104 L.R.R.M. 1290 (1980); Terminal Taxi Co., 229 N.L.R.B. 643, 95 L.R.R.M. 1124 (1977); W.A. Krueger Co., 224 N.L.R.B. 1066, 93 L.R.R.M. 1129 (1976); Media Mailers, Inc., 191 N.L.R.B. 251, 77 L.R.R.M. 1393 (1971); Cotton Producers Ass'n., 188 N.L.R.B. 772, 76 L.R.R.M. 1411 (1971).

5. *See generally* Aaron, *Employer Free Speech: The Search for Policy*, in PUBLIC POLICY AND COLLECTIVE BARGAINING 28 (Shister, Aaron & Summers, eds. 1962); Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 HARV. L. REV. 38 (1964); Koretz, *Employer Interference with Union Organization Versus Employer Free Speech*, 29 GEO. WASH. L. REV. 399 (1960); Comment, *Labor Law Reform: The Regulation of Free Speech and Equal Access in NLRB Representation Elections*, 127 U. PA. L. REV. 755, 756-73 (1979).

The substantive law developed by the Board in cases construing section 8(c) restricts employer speech in the very area which section 8(c) was designed to protect. By misapplying the "total context" doctrine, the Board has effectively restrained employers from telling employees objective facts about unions and labor relations. The purpose of section 8(c) is to free an employer to relate facts favorable to its position, but the Board's restraint of factual communication emasculates this statute.[6] In setting this policy, the Board and some courts have followed no discernable, consistent rules delineating the boundaries of employer speech. As a result, employers are bewildered, and the open discourse favored by section 8(c) is inhibited.

The following discussion will analyze this bedraggled amendment in the context of alleged coercive or threatening employer speech. The article will focus on the "total context" approach which the Board utilizes to determine whether an unfair labor practice has occurred or a representation election should be set aside.

I. LEGISLATIVE HISTORY OF SECTION 8(C)

Congress enacted section 8(c) in 1947 to allow employers full freedom of speech commensurate with that which unions enjoyed under the Wagner Act.[7] It was designed to prohibit the Board from categorizing privileged, employer free speech as coercive because the employer had committed an unrelated unfair labor practice.[8] Congress thus hoped to afford greater protection to employer free speech,[9] a necessity in light of earlier Board decisions severely limiting the employer's freedom of speech.[10] Indeed, the House of Representatives contemplated an amendment which restricted the Board's involvement on employer free speech issues more than the present version: "[A] statement may not be used against the person making it unless it, *standing alone*, is unfair within the express terms of sections 7 and 8 of the amended act."[11] In spite of section 8(c),

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6. *But see* King, *Pre-Election Conduct-Expanding Employer Rights and Some New and Renewed Perspectives*, 2 INDUS. REL. L.J. 185 (1977).

7. K. HUHN, P. JANUS & R. WILLIAMS, NLRB REGULATION OF ELECTION CONDUCT 56 (Labor Relations and Public Policy Series, Rep. No. 8 1974) (hereinafter cited as REP. No. 8).

8. *See* S. REP. No. 105, 80th Cong., 1st Sess. 23 (1947); H. R. REP. No. 510, 80th Cong., 1st Sess. 45 (1947); Comment, *Labor Law Reform: The Regulation of Free Speech and Equal Access in NLRB Representation Elections*, 127 U. PA. L. REV. 755, 761 (1979).

9. IV NLRB ANN. REPTS. 49-50 (1948).

10. *See* cases cited at note 4 *supra*; *See also* C. MORRIS, THE DEVELOPING LABOR LAW 72 (1971).

11. H.R. REP. No. 245, 80th Cong., 1st Sess. 33 (1947), *reprinted in* I NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 324 (1948) (emphasis added).

the Board and some courts have felt compelled to monitor continually employer speech. This has resulted in many strained interpretations of employer's remarks.

II. WHAT WENT WRONG?

The starting point of the Board's attenuation of section 8(c) was the doctrine of "total context" enunciated by the Supreme Court in *NLRB v. Gissel Packing Co.*[12] In this case, the Court held that "[a]ny assessment of the precise scope of employer expression . . . must be made in the context of its labor relations setting."[13] In *Gissel,* however, there were other unfair labor practices involved[14] in addition to the employer's free speech. These employer actions by themselves formed the basis for the Court issuing a bargaining order. In other words, the employer's speech, viewed alone, may not have been a sufficient basis to find an unfair labor practice or overturn an election. Nonetheless, the Board has seized upon this total context approach to attack employer free speech which, standing alone, is perfectly innocuous and well within the employer's right under section 8(c). Yet, under the total context test, the Board finds that same speech objectionable.

Hedstrom Co.[15] illustrates the problem. In *Hedstrom Co.,* the president of the company made an election-eve speech in which he referred to the "unhappy experience" of his former employees in another state, from which, as all the present employees knew, the company had moved its plant to avoid unionization. The Board reasoned that by making this reference, the president had impliedly threatened to close the plant if the union won the election. However, only after the Board viewed the speech within the total context of the employer's conduct, which included other unfair labor practices—interrogations, threats of reprisals, soliciting grievances, and creating an impression of surveillance—did it conclude that the employer's speech violated Section 8(a)(1).[16] In the context of this case, the finding with respect to the employer's speech was immaterial. It served no useful purpose to find the speech violative of the Act.

Unfortunately, many courts have adopted the Board's reliance on the

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12. 395 U.S. 575 (1969).

13. *Id.* at 617.

14. During the course of the campaign, the employer threatened the employees with reprisals, interrogated and offered benefits to employees and, in several instances, discharged employees for engaging in union activity. *Id.* at 580 n.1.

15. 223 N.L.R.B. 1409, 92 L.R.R.M. 1297 (1976), *modified on other grounds,* 558 F.2d 1137 (3d Cir. 1977).

16. 29 U.S.C. § 158(a)(1) (1976), which provides that "[i]t shall be an unfair labor practice for an employer - (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 157 of this title . . . . "

"total context" approach to employer free speech. In *NLRB v. Interstate Engineering,*[17] the Board petitioned to enforce its order issued after its determination that an employer had committed unfair labor practices involving allegedly coercive conduct. The company officers sent a series of letters to the employees during the organizing campaign advising them that if the union won the election, the company would "bargain from scratch."[18] The employer argued that Section 8(c) protected this speech, that these letters simply informed the employees of the economic reality of unionization and the lawful position the company would take both in bargaining and in the event of strike, and that the company letters simply responded to union literature stating that, with unionization, the company "would have to 'bargain-up' from the existing scale of wages, fringe benefits and working conditions. . . . "[19] The court disagreed with this position, applied the "total context" test, and found that the employers had committed an unfair labor practice.

> The letters, each standing alone, may well have been protected by the employer's rights of free speech. We cannot, however, consider the letters in isolation, as the respondent would have us do. In its brief, as in its oral argument, the respondent chose to ignore the voluminous evidence concerning intolerably coercive conduct on its part. Remarks uttered or written during campaigns of employee organization "may or may not be coercive, depending on the context in which they are uttered. . . . In order to derive the true import of these remarks, it is necessary to view the context in which they are made." . . . The letters must be related to the whole body of egregious and unfair tactics that the respondent chose to employ.[20]

Once again, finding the letters coercive added nothing to the case.

In the cases such as *Gissel,* there were other activities which in themselves justified setting aside the election or imposing a bargaining obligation. But, as mentioned previously, the Board has extended the "total context" doctrine to reach truthful expressions in the context of an elec-

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17. 583 F.2d 1087 (9th Cir. 1978).

18. *Id.* at 1088 n.1. The Board and the Court emphasized one letter sent to the Company Vice President which stated:

> If we ever get organized - we are required to bargain with that organization. Some people make the mistake that bargaining starts with what you have and goes from there. This is absolutely wrong - it is a give-and-take proposition. Everyone should understand early in the game that the law permits a Company to bargain from scratch - from a blank piece of paper. When an A-T-O Company is organized, it is our policy to do just that. *Id.*

19. Interstate Eng'r, 230 N.L.R.B. 1, 13, 96 L.R.R.M. 1135 (1977).

20. 583 F.2d at 1088. *See also* NLRB v. Mangurian's, Inc., 566 F.2d 463 (5th Cir. 1978); R. J. Lallier Trucking v. NLRB, 558 F.2d 1322 (8th Cir. 1977); NLRB v. Four Winds Indus., 530 F.2d 75 (9th Cir. 1976).

tion campaign in which there are no improper activities. This is the Board's error. Certainly the situation involving only issues of free speech, absent any other unfair labor practice claim, or objection to an election result are rare. Nevertheless, in situations involving only employer speech, the "total context" test has been applied, and the Board has narrowly interpreted the employer's right of free speech. By virtue of its holdings, the Board not only penalizes employers and individuals for having spoken the truth, but it also impedes free expressions of the truth by creating apprehension that free speech can set aside an election or form the basis for an unfair labor practice. A few examples will illustrate the problem.

In *Marcus I. Lawrence Memorial Hospital*,[21] the union alleged that, prior to an election, the hospital had violated section 8(a)(1) of the Act by implicitly threatening employees with the loss of their jobs. The Board focused on a series of meetings held by the hospital's management several days prior to the election. The reports of what was said during the meetings varied considerably, but essentially the management representatives stated that union hospitals had restrictive job assignments, that unionization of the hospital would have a "detrimental effect" on patient care, and that several hospitals had closed for financial reasons after unionization. Based on this sketchy testimony, the Board concluded that the hospital had engaged in unfair labor practices within the meaning of section 8(a)(1) of the Act both by making implicit threats and by "creating the spectre of financial disaster" if the union won the election:

> Thus it appears that the physicians' assertions that unionized hospitals failed to deliver the same quality medical care as nonunion hospitals coupled with their observation that Respondent was the source of livelihood for all concerned, was designed to express the message that unionization carried the terrible risk of financial failure. That spectre was followed by a discussion of financial possibilities, including bankruptcy or simply the failure to maintain a reasonable level of business. Those two things can be translated easily to an implication of financial collapse . . . or something less, both of which would result in at least partial, if not total loss of employment.
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> . . . .
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> The sum of the above conversations simply is that [the hospital management], while carefully attempting to avoid straightforward threats to close the Hospital nonetheless subtly, through the use of analogy and hypothesis, fashioned the spectre of financial illness in the event of unionization and implied that the illness would eventually be measured in terms of the employees' jobs . . . [s]uch a "prediction," absent any

21. 249 N.L.R.B. No. 90, 104 L.R.R.M. 1290 (1980).

objective facts to support it violates the Section 8(a)(1).[22]

Assuming that the hospital's agents were transmitting true, objective facts to employees, it is submitted that the Board's decision is erroneous. The Board considered the statements by management to be designed to imply "financial illness in the event of unionization." Of course, they did. But if the facts as explained were true, then financial illness *did* befall those hospitals because of unionization.

If there were other causes of the referenced hospital's demise, then the Board's action would have been proper because the statements of the employer would not have been *true,* objective statements of fact. This is a test that all parties can understand. To hold otherwise is to belie the intention of Congress in passing section 8(c). Any time employees are told true, unfavorable facts about a union the Board could find those statements designed to imply "financial illness" or other detrimental effects of unionization. All unfavorable publicity would fall into this category, but if those are the facts, the voter is entitled to know them even if those facts would tend to persuade the voter to vote against the union.

Lacking concrete guidelines, the Board has frequently interpreted employer speech in an unrealistic, narrow fashion. Some courts have admonished the Board for such action. The sequence of events in *General Telephone Directory Co.*[23] is illustrative. In that case, the company had announced prior to the union activity that the employees would receive a pay increase in January, 1976. In response to inquiries about the scheduled raise during the course of the union organizational campaign, however, various managers of the employer told employees that negotiations would "start with a blank piece of paper"[24] if the union was voted in. On another occasion, a sales manager told employees that if the union "gets in," the previously scheduled raises were no longer "automatic."[25] The Administrative Law Judge (ALJ) and the Board felt that these statements were clearly coercive and threatening and amounted to an unfair labor practice.

On appeal, the Ninth Circuit Court of Appeals[26] denied enforcement, reasoning that "the communications were not only innocuous in light of the circumstances, but well within the employer's 'protected speech' under § 8(c) of the Act."[27] Even though the employer's statements were vague, the court concluded this did not warrant a necessary inference of

22. 249 N.L.R.B. at 11 (slip op.).
23. 233 N.L.R.B. 422, 96 L.R.R.M. 1549 (1977).
24. *Id.*
25. *Id.*, 96 L.R.R.M. at 1550.
26. NLRB v. General Tel. Directory Co., 602 F.2d 912 (9th Cir. 1979).
27. *Id.* at 916.

threat or retaliation. Moreover, the court admonished the Board for their narrow interpretation of the free speech provision.

> There is nothing in the record before us to reveal prior antiunion animus, or motive of subversive, coercive, or retaliatory intent in the company's relations, via verbal communication, with employees . . . .
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> . . . .
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> We find nothing in the record to indicate that any of the company's representatives intended more than to infer that the advent of unionization could possibly alter the economic circumstances and possibilities at the time. An alteration, as such, cannot be said to be solely one of the management nature, as it is an obvious corollary in labor law that an employee's economic circumstances vary in direct proportion to the existence and amount of union influence. For the respondent company to be "slapped on the wrist" by the Board for statements with no illegal motive and with a substantial basis in fact (that being the common knowledge of union-management relations and their effect on economic conditions with a company), *we find the Board drawing inferences of a narrow and unrealistic nature in today's business/labor society.*[28]

The Board was also rebuked for limiting employer free speech in *Florida Steel Corp. v. NLRB.*[29] Responding to objections filed by the union, the Board set aside an election which the union lost by an overwhelming vote. The Board found that the company had violated sections 8(a)(3)[30] and 8(a)(4)[31] of the Act when it discharged a union organizer rather than assign him to another position. The Board also found that the company violated section 8(a)(1) of the Act both by distributing a letter to employees advising them of their right to obtain legal counsel before talking to a Board agent and by telling employees of the company's willingness to assist employees in obtaining such counsel.[32] The Board approved the findings of the ALJ, who concluded:

> Respondent violated § 8(a)(1) of the Act by its April 20, 1976 letter to employees advising them of their right to obtain legal counsel before talking to a Board agent, and of Respondent's willingness to assist employees in obtaining such counsel. *In light of all the circumstances,*

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28. *Id.* at 919 (emphasis added).
29. 587 F.2d 735 (5th Cir. 1979).
30. 29 U.S.C. § 158(a)(3) (1976).
31. 29 U.S.C. § 158(a)(4) (1976).
32. The pertinent part of the letter provided:

> In addition, if a National Labor Relations Board agent should drop in on you, you may ask for an opportunity to obtain legal counsel before you talk to him.
>
> If you should want some legal counsel, or just help in handling any of the situations described above, all you need to do is let your supervisor know. He will put you in touch with someone who can help you. 587 F.2d at 750.

> *including Respondent's pattern of unlawful conduct, as shown in this and previous cases,* the letter seems a patent attempt to obstruct the investigations of the Board by discouraging employees from supplying information to Board agents.[33]

On appeal, the court found that the employer had just cause to discharge the employee, and that anti-union animus was not the motivating reason for the dismissal. The court reprimanded the Board for its unrealistic interpretation of the employer speech:

> Obviously, the ALJ and the Board interpreted the letter as being coercive and compulsory and a restraint on the employees of their rights, as guaranteed by § 7 of the Act. . . . We do not agree. . . . We interpret the letter and hold that there is nothing on the face of the letter that requires or compels the employees to do anything. There is no coercion, threat of reprisal, or force in the letter. . . . There was no proof that any employee was actually coerced or compelled to do anything.
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> The holding of the Board . . . *is nothing but pure speculation and imagination on the part of the Board, as there is nothing in the record that supports or even tends to support such a holding.*[34]

The court also held that the letter was protected free speech under the first amendment and section 8(c), since it was merely an accurate and objective statement of the law. Moreover, the court felt that the Board was punishing the company solely because of the company's long history of opposition to the union. According to the court, such a position by the Board is indefensible. The court concluded that the Board's role should be "akin to that of an impartial and neutral referee. . . . [T]he Board has no authority to punish a company because it is against a union."[35]

The Board's "total context" approach to free speech has produced equally subjective results in the election context. For instance, in *General Dynamics Corp.*,[36] the union filed objections to an election claiming that the employer's pre-election campaign literature, posters and speeches created an atmosphere of coercion, threatened employees with loss of benefits and created an impression that the collective bargaining process would be futile. The employer's campaign included the following tactics: a "Don't-Vote-For-A-Loser" poster, containing the union's victories and losses in prior organizing campaigns at the employer's plant; a handbill stating that certain plants where employees had been represented by the

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33. *Id.*

34. *Id.* at 751 (emphasis added).

35. *Id.* at 753. *See* NLRB v. McGahey, 233 F.2d 406 (5th Cir. 1956) "[A]ntiunion bias, strong convictions against unions or opposition to the underlying philosophy of the Labor Management Relations Act is not itself an unfair labor practice. In a free democracy, it is the citizen, not the Government, who fixes his own beliefs." *Id.* at 409.

36. 250 N.L.R.B. No. 96, 104 L.R.R.M. 1438 (1980).

union had closed; and campaign speeches which emphasized specific instances of violence, strikes, loss of business, jobs and benefits during union organizing campaigns and after the elections.[37] The Board considered the "total context" of the employer's conduct and, setting aside the election, concluded that the employer exceeded the bounds of permissible campaign speech:

> In the instant case, from the very outset of its campaign, the Employer repeatedly emphasized unemployment and plant closings . . . . The Employer's assurances that it would bargain in good faith and that strikes and plant closure were not anticipated [at this plant] do not insulate the Employer from responsibility for the coercive effect of its campaign considered as a whole.[38]

Similarly, in *Turner Shoe Co.*,[39] the employer distributed a campaign leaflet entitled "The Death of a Shoe Factory" and a leaflet which described plant closings where employees had been represented by the organizing union.[40] In a campaign speech delivered to the employees two days before the election, the employer stated that unionization could mean strikes, plant closure and loss of jobs. In closing, he asserted that "if we are not careful, a disaster could hit and we could lose it all."[41] The Board reasoned that the employer's "overall campaign" was coercive, and overemphasized job security, although none of the employer's campaign material or statements attributed strikes, plant closings or job loss to unionization:

> [E]mployees, who are particularly sensitive to rumors of plant closing, take such hints as coercive threats rather than honest forecasts . . . Communications which hover on the edge of the permissible and the unpermissible are objectionable as "[i]t is only simple justice that a person who seeks advantage from his elected use of the murky waters of double entendre should be held accountable therefor at the level of his audience rather than that of sophisticated tribunals, law professors, scholars of the niceties of labor law, or 'grammarians'![42]

The Board also found that the employer's campaign speech interfered

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37. 250 N.L.R.B. No. 96, 104 L.R.R.M. at 1439.
38. 250 N.L.R.B. No. 96, 104 L.R.R.M. at 1441.
39. 249 N.L.R.B. No. 20, 104 L.R.R.M. 1336 (1980).
40. 249 N.L.R.B. No. 20, 104 L.R.R.M. at 1337.
41. *Id.*
42. 249 N.L.R.B. No. 20, 104 L.R.R.M. at 1338. *See also* Honeywell, Inc., 225 N.L.R.B. 617, 92 L.R.R.M. 1426 (1976) (employer interfered with representation election when it told employees that it expected to recall laid-off employees to meet customer demands resulting from new marketing approaches, but that "all this effort could be wasted if we can't continue to work effectively as a team," and that it therefore felt that "the interference of a labor union would only hinder our chances of further recovery.")

with a representation election in *W. A. Krueger Co.*[43] In this case, the employer sent a letter and gave four speeches to the employees in the weeks preceding the election. In those communications, the employer conveyed his "extreme disappoint[ment]" with employees who had signed authorization cards, explained that the employer would strongly, but lawfully, resist the union's campaign with "a lot of time and money," compared the union to "cancer" and an "internal disaster," informed the employees that a shut down as a consequence of having a union was a real possibility, and expressed concern that the "disruptive influence" of a union could make it difficult for the company to be strong to survive.[44] The Board concluded that the overall effect of the employer's campaign created an atmosphere of "fear and futility," which amounted to a "thinly veiled threat" and "exceeded the bounds of permissible campaign propaganda."

> It is true that this propaganda contains no express unqualified rejection of the collective-bargaining principle. *Yet it is also true that some of its statements came perilously close to doing so* and, when coupled with the Employer's preoccupation with strikes, shutdowns, plant relocation, violence, job losses, and economic deprivation, could reasonably create in the minds of these employees the impression that theirs was a choice between no union or striking.[45]

The problems with the Board's approach are evident. First, there are no precise definitions of what is and is not permissible pre-election speech by the employer. Rather than following a consistent policy which treats anything that is objectively true as permissible, the Board has pursued a highly subjective and perplexing case-by-case approach. As a result, even employers with the best intentions are uncertain about the contours of permissible campaign speech.

Second, since employer speech under the current nebulous Board policy is virtually always subject to challenge, the effectiveness of the election process is diminished.

> The utility of elections lies in final, definitive and unchallenged results; elections become useless when the results are challenged, uncertain and rejected. Elections are intended to establish and stabilize representation, not have it unsettled and in dispute.[46]

Not surprisingly, as the Board becomes increasingly involved in the election process in its role as censor of employer speech, the entire process

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43. 224 N.L.R.B. 1066, 93 L.R.R.M. 1129 (1976).
44. *Id.* at 1066-67, 93 L.R.R.M. at 1129-30.
45. *Id.* at 1070, 93 L.R.R.M. at 1132.
46. Samoff, *NLRB Elections: Uncertainty and Certainty*, 117 U. PA. L. REV. 228 (1968).

suffers. The Board must devote agency time and resources handling section 8(c) issues, and it seems reasonable to suggest that, in the absence of clear guidelines, the challenges and objections to employer campaign speech will continue.

Third, the Board is engaging in pure conjecture in deciding that the employer's speech, viewed in the total context of the campaign, had a coercive impact on the employee. The benefits of Board supervision are even less certain.

> [T]he Board has never had any reliable basis for assuming that active government regulation of campaign speech and conduct can make the voting process any more rational or intelligent. The benefit to employees, employers, unions, and the public from prompt, final settlement of representation questions is clear and identifiable. But whether any countervailing benefit is gained from setting aside one election and ordering another in the hope that the second will be a freer or more rational process is, in most instances, a matter of pure conjecture.[47]

Indeed, the most empirical study of campaign speech and conduct concludes that most employees "are not coerced by threats of reprisal or promises of benefits into voting against union representation. . . . Employees who want union representation vote for the union despite threats or promises designed to cause them to do otherwise."[48]

Applying the Board's reasoning in a different context would result in a ban even on truthful *political* speeches since they have a tendency to guide the voter in one direction. But the very purpose of campaign speeches is to persuade. Candidates are reluctant to spell out their opponents' attributes, and in many instances, focus on their weaknesses. But if what they convey is true, can it be doubted that the voters have a right to know in order to make an informed decision? We assume in the political context that voters can ascertain the facts by having access to information from all sides of the political spectrum. The Board's treatment of free speech cases, in the labor context, conflicts with our national policy in general elections. We encourage the people to make and vote their own conclusions—in effect, to separate the wheat from the chaff.

The Board has failed to recognize the sophistication of the worker of the eighties. We entrust the majority of persons eligible to vote with the responsibility of discerning the nuances of foreign and economic policy,

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47. REPORT No. 8, *supra* note 7, at 440.

48. J. GETMAN, S. GOLDBERG, & J. HERMAN, UNION REPRESENTATION ELECTIONS: LAW AND REALITY 147 (1976). Although this study has been criticized as being marred by specific "conceptual and methodological flaws," it nevertheless represents the most authoritative study to date. *See* King, *Pre-Election Conduct - Expanding Employer Rights and Some Renewed Perspectives*, 2 INDUS. REL. L.J. 185, 206-216 (1977); Rosenfeld, Book Review, 2 INDUS. REL. L.J. 308, 318 (1977).

and of understanding inflation, recession, economic cycles, defense postures, alliances, the welfare system, laissez-faire, parity, energy conservation, ecology, criminal rehabilitation, and the hundreds of other subjects regularly discussed by candidates in elections throughout our country. How can it be said, therefore, that these same voters are unable to understand layoffs, strikes, replacements, and those labor subjects generally covered in employer speeches? Employees are more qualified to evaluate campaign speeches and literature in a representation election involving an environment with which they are familiar than they are in an ordinary civil election. They are "capable of taking the campaign boasts and bluffs of both parties with an appropriate grain of salt."[49]

The Board's paternalism in the context of employer free speech is simply unnecessary. Its approach as ultimate censor of employer campaign speech not only insults the intelligence of the employee but also runs contrary to the cherished principle that parties should be given substantial access to the voters so that those voters can make an intelligent, informed decision.

> One of the fundamental assumptions of a system calling for democratic elections is, after all, that voters exposed to a free flow of information, opinions, and ideas, from the competing sides can be trusted to make a rational choice for themselves, without the necessity of censorship.[50]

At least four concerns have been articulated to justify the Board's supervision of the employer free speech. First, employees are economically dependent on their employer, and consequently disinclined to take any action which would jeopardize their economic well being.[51] Second, the employer's right of free speech must be balanced against the employees' right to associate freely.[52] Third, the level of employee sophistication and understanding in organizational campaigns directly corresponds to the level of development of industrial relations in a particular plant or geographical area.[53] Finally, otherwise innocent language may vary in meaning depending on the circumstances and the time when it is used.[54]

To the extent that there is some validity to these concerns, the question becomes whether regulation of the employer's free speech is neces-

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49. REPORT No. 8, *supra* note 7, at 442.

50. *Id.*

51. NLRB v. Gissel Packing Co., 395 U.S. at 580.

52. *Id. See* NLRB v. Intertherm, Inc. 596 F.2d 267 (8th Cir. 1979) "In reviewing a challenged [free speech] statement by an employer, we look to the *context* of its particular labor relations setting and balance the employer's right of expression against the equal right of employees to associate freely with a collective bargaining setting." *Id.* at 277.

53. Brown, *Free Speech in NLRB Representation Proceedings,* in 50 L.R.R.M. 72, 73 (1962).

54. *Id.*

sary to avoid the articulated evils. The Board's present policy disserves the employee since it presents a distorted picture of the union.[55] Moreover, if the employer's statements are true, and grounded on objective fact, then their tendency (if any) to upset the employee should be of little consequence. Employees are entitled to know the naked truth, regardless of how discomforting that truth may prove to be.[56] It is suggested that other protections, such as the *Peerless Plywood*[57] "twenty-four-hour-no-captive-speech" rule, which assures that a union has time to respond to the employer's speeches,[58] are clearly preferable to prohibiting the free flow of information.

III. Conclusion

The "total context" doctrine should be abandoned. As long as the truth of matters disseminated to voters can be objectively established, there should be no violations of the Act based upon those communications. In situations in which the employer's free speech involves subjective truths, (*e.g.*, all employees will be fired who sign authorization cards) which have a demonstrable coercive impact, the Board may justifiably find an unfair labor practice or order another election. But if the employer relates only true facts, which can be objectively substantiated, (*e.g.*, a plant went bankrupt after voting in Union X) the Board should remain neutral. "[T]he Board should temper its reflex to read 'implied' or 'veiled' threats into routine expressions of partisan opinion and to infer an adverse impact upon the voters' choice from such remarks."[59]

In cases in which the Board becomes involved in a dispute between management and union, it should appraise the employer free speech realistically. Vigorous campaigning is imbedded in our labor policy,[60] and section 8(c) was designed to encourage free and open discussion of election

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55. *See* Bok, *supra* note 5, at 77-79.

56. *See, e.g.*, NLRB v. Eastern Smelting & Refining Corp., 598 F.2d 666, 672 (1st Cir. 1979) ("Employer is not restricted to [presenting] pleasant facts."); *See also* Bok, *supra* note 5, at 79:

> [T]here may be genuine hazards in selecting a union which the employees should consider in reaching a rational conclusion. . . . [T]he employer should be permitted to stress these disadvantages so long as the consequences he mentions are ones which may actually and lawfully take place if the union is voted in.

57. Peerless Plywood Co., 107 N.L.R.B. 427, 33 L.R.R.M. 1151 (1953).

58. Other alternatives include defining more precisely what is permissible free speech or enhancing the opportunities to respond. *See* Report No. 8, *supra* note 7, at 441.

59. *Id.* at 442. *See* J. P. Stevens & Co. v. NLRB, 449 F.2d 595, 597 (4th Cir. 1971) ("It startles the conscience to deny an employer . . . the right to tell its employees the truth. . . . However unbefitting, verity can never amount to illegality.")

60. *See, e.g.*, Old Dominion Branch No. 496 v. Austin, 418 U.S. 264, 272-73 (1974); Linn v. United Plant Guard Workers Local 114, 383 U.S. 53, 62 (1966).

issues. Employers should be entitled to scrutinize union promises and to appraise employees of potential shortcomings of unionization. The employees are entitled to know the inherent disadvantages of unionization. Consequently, the increasingly restrictive Board approach to employer campaign speech is inappropriate.

Employer free speech should be afforded broad tolerance. The dangers inherent in prohibiting the free flow of information are well documented. Restricting the truth has seldom proven to be a satisfactory solution—it is certainly not the solution in the area of employer free speech.