Mercer Law Review

Volume 32
Number 2 *Special Lead Articles Edition*

Article 8

3-1981

The Threat or the Announcement of Plant Closure?

H. Thomas Arthur

COMMENTS

The Threat or the Announcement of Plant Closure?

The limits on an employer's free speech rights during a union representation campaign were established by the Supreme Court in *NLRB v. Gissel Packing Co.*[1] But the proper interpretation of *Gissel* first requires an understanding of the limitations on employers' property rights set out by the Court in *Textile Workers Union v. Darlington Manufacturing Co.*[2] A proper understanding of *Darlington* leads to the conclusion that the National Labor Relations Board (Board) and the circuit courts have been incorrectly applying the limits on an employer's first amendment right of free speech. The effect of the misapplication in the context of a unionization campaign is to deny employers the complete latitude of their free speech liberties as determined by the Supreme Court.

Part I of this comment analyzes the relationship of *Gissel* and *Darlington* to explain the criteria used in determining whether a statement made by an employer of his intention to close a plant is a threat—which is not protected speech—or an announcement—which is protected speech.[3] In Part II, selected circuit court cases that exemplify the current status of *Gissel* are discussed.

I. The Intersection of Gissel and Darlington

A. *Darlington: Limits on the Right of Partial Closure*

In *Darlington*, the Court's immediate concern was to establish limits on an employer's right to shut down a part of his business.[4] The controversy

1. 395 U.S. 575 (1969).
2. 380 U.S. 263 (1965).
3. National Labor Relations Act (NLRA) § 8(c), 29 U.S.C. § 158(c) (1976).
4. The Court did not discuss the origin of the employer's right to close his business; but that right is usually characterized as a property right. *See, e.g.*, NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 112 (1955).

began on September 6, 1959, when the Textile Workers Union won a representation election. On September 12, 1959, the board of directors decided to close the Darlington Manufacturing Company. This action was approved by the stockholders and the corporation was liquidated. The union charged that the employer had violated sections 8(a)(1),(3) and (5)[5] of the National Labor Relations Act (NLRA) by closing the plant and by refusing to bargain.

The Board found that the plant was closed because of antiunion animus by the president of the company in violation of section 8(a)(3). Further, the Board found "that Deering-Milliken and its affiliated corporations, including Darlington, constitute a single employer. . . . "[6] Since the single employer, Deering-Milliken, had not closed its entire operations, the Board concluded that the partial closing was an unfair labor practice and ordered back pay for all Darlington employees until they obtained substantially equivalent work or were put on preferential hiring lists at other Deering-Milliken mills.

On appeal to the fourth circuit, the Board's order was set aside. The court held that "[t]o go out of business in toto or to discontinue it in part permanently at any time . . . was Darlington's absolute prerogative."[7] The Supreme Court granted certiorari[8] to consider the important questions involved and held:

> So far as the Labor Relations Act is concerned, an employer has the absolute right to terminate his entire business for any reason he pleases, but [we] disagree with the Court of Appeals that such right includes the ability to close part of a business no matter what the reason.[9]

The limits on an employer's right to close part of his business were set out under a purpose and effect test. A partial closing is an unfair labor practice in violation of section 8(a)(3), if the employer's purpose was to discourage unionization at other parts of the business and if the employer could realistically foresee that the effect of the closing would be to discourage union activity.[10] The Court remanded the case to the NLRB for further proceedings in accordance with these limits.[11]

---

5. 29 U.S.C. §§ 158(a)(1),(3),(5) (1976).

6. 139 N.L.R.B. 241, 258, 51 L.R.R.M. 1278, 1286, *enforcement denied*, 325 F.2d 682 (4th Cir. 1963), *vacated*, 380 U.S. 263 (1965).

7. 325 F.2d 682, 685, *vacated*, 380 U.S. 263 (1965).

8. 377 U.S. 903 (1964).

9. 380 U.S. at 268.

10. *Id.* at 274-76.

11. *Id.* at 268. Subsequent to the company's victory in the appellate courts, the Board found that Darlington Mfg. Co.'s purpose was to chill unionization and that this effect was realistically foreseeable. Statements made by the head of the company, both before and after the plant closing, supported the new findings of unfair labor practices. The company

In a footnote in *Darlington,* the Court made a distinction between an employer threatening to close down an operating plant and an employer announcing a firm decision to close down in the event of unionization.[12] The only purpose of a threat would be to coerce employees' choice in an election; on the other hand, an announcement of a predetermined decision to close would communicate a matter of fact to employees. The Court recognized that there would be a temptation for employers to formalize a decision to close in the event of unionization and then announce the decision in the hope that the impact of the announcement would be to defeat the unionization effort. The Court saw no way to avoid this maneuver by employers; however, the Court thought that this would be an insignificant problem because employers would be reluctant to close a profitable operation.

B. Gissel: Limits on the Right to Communicate a Closure

In *Gissel,*[13] the Court dealt with the issue of free speech that had been anticipated in *Darlington.* The issue of whether communications from an employer to his employees are protected by the first amendment and section 8(c) of the NLRA,[14] regardless of their impact on a fair election, was raised by the Sinclair Company. The Court stated that "[section] 8(c) implements the First Amendment"[15] but with the proviso that an employer's expression may not contain "threat of reprisal or force or promise of benefit in violation of § 8(a)(1),"[16] which prohibits interference, re-

---

argued that the use of the statements was improper because they were protected speech under section 8(c) of the NLRA. This objection was rejected by the Board and its findings were upheld by the fourth circuit. Darlington Mfg. Co. v. NLRB, 397 F.2d 760 (4th Cir. 1968), *cert. denied,* 393 U.S. 1023 (1969).

12. 380 U.S. at 274 n.20.

13. NLRB v. Gissel Packing Co. was a consolidation of four unfair labor practices cases: NLRB v. Gissel Packing Co., 398 F.2d 336 (4th Cir. 1968); NLRB v. Heck's Inc., 398 F.2d 337 (4th Cir. 1968); General Steel Prods., Inc. v. NLRB, 398 F.2d 339 (4th Cir. 1968); and NLRB v. Sinclair Co., 397 F.2d 157 (1st Cir. 1968). There was a conflict between the First and the Fourth Circuit Courts of Appeals on issues involving union authorization cards and the appropriateness of a bargaining order as a remedy. The Court held that union authorization cards were not inherently unreliable and that if unfair labor practices by the employer made it unlikely that a free election could be held, then an order to bargain was an appropriate remedy for violations of sections 8(a)(1),(3),(5). The Court approved the Board's use of the bargaining order when there was a "tendency to undermine majority strength and impede the election process." 395 U.S. at 614. The goal to be achieved was "effectuating ascertainable employee free choice." *Id.* The Court added emphasis to the Board's position that this did not establish a *"per se* rule that the commission of any unfair labor practice will automatically result in a § 8(a)(5) violation and the issuance of an order to bargain." *Id.*

14. 29 U.S.C. § 158(c) (1976).

15. 395 U.S. at 617.

16. *Id.*

straint or coercion of employees in the exercise of their right to self-organization. The Court refused to find these limitations contrary to the first amendment and refused to establish an absolute right of free speech for an employer in a union representation campaign. "An employer's rights cannot outweigh the equal rights of the employees to associate freely. . . . [A]nd any balancing of those rights must take into account the economic dependence of the employees. . . . "[17]

The Supreme Court delivered a precise statement of the extent of employer's free speech rights with respect to the closing of a plant:

> He [the employer] may even make a prediction as to the precise effects he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control *or to convey a management decision already arrived at to close the plant in case of unionization.*[18]

The Court noted "that a reviewing court must recognize the Board's competence in the first instance to judge the impact of utterances made in the context of the employer-employee relationship. . . . "[19] This is explicitly required by section 10(e) of the NLRA.[20] Since the line separating a protected from an unprotected statement is extremely sensitive to the environment in which the statement is made, the fact finder must deal with both the intent and the expectations of the parties as a single unit. This makes it difficult for the appellate courts to review the Board's determinations of threat or announcement.

C. Relationship of Gissel to Darlington

In *Gissel,* the Court cited *Darlington* to emphasize the legitimacy of an employer's announcement that a decision to close the plant in the event of unionization has already been made.[21] This citation is an important factor in understanding the limits on employers' first amendment rights. The Court must have intended to limit this protection to communications that announce a predetermined, conditional intention to close only if the closing itself would be legitimate under the *Darlington* test. Therefore, in order for an employer's statement of an intention to close in the event of unionization to be protected under the predetermined decision prong of

---

17. *Id.*

18. *Id.* at 618 (emphasis added).

19. *Id.* at 620.

20. 29 U.S.C. § 160(e) (1976): "The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive."

21. 395 U.S. at 618.

the *Gissel* test, it must be determined that if the closing itself had occurred as a result of the union victory, the closing would have been permissible under *Darlington.*

In *Darlington,* the Court structured the test to allow antiunion animus as a permissible motive for a partial closing. The only antiunion animus which is prohibited is that which is directed at other parts of the organization. An employer may close a part of his operations without economic justification as long as there is no intent to chill union activity in other areas of the organization or as long as the chilling effect is not realistically foreseeable. The *Darlington* limits on the right to close are incorporated into the *Gissel* determination of the limits and extent of an employer's rights of expression. An employer has a protected right to communicate an intention to close down in the event of unionization even though there is no economic basis for the shut-down.

In applying the test, the first step is to examine the two criteria found in *Gissel.* First, if the employer has carefully worded a statement based on objective economic facts, then the statement would be protected. Second, if the statement communicates a decision that has already been made to close the operation in the event of unionization, then the second step must be taken. This step is to apply the two criteria of *Darlington* to determine if the closing itself would be permissible. If the closing would be permissible under *Darlington,* then the statement is protected under *Gissel.*

A basic theme that runs through both *Darlington* and *Gissel* is the balancing of employers' rights against employees' rights of free association. The economic dependency of employees on their employers formed the foundation for limitations on the employers' freedoms of speech.[22] The Court in *Darlington* denied employers the absolute right to close a part of a business arbitrarily in order to prevent employers from reaping economic benefit by chilling employees' rights of association elsewhere in the organization. Thus, an inferred policy goal may be articulated: an employer is permitted to announce an intention to close permanently in the event of unionization without any objective basis to support his decision only under circumstances in which he will not exploit the economic dependency of employees elsewhere in his organization.

The limitations on an employer's free speech rights do not reach so far as to exclude antiunion animus and purpose to chill unionization in the part of the organization in which the union is seeking representation. This is the possibility that the Supreme Court recognized in *Darlington* and strengthened in *Gissel.* The Board and the circuit courts have failed to recognize the extent of the rights of employers in this circumstance.

---

22. *Id.* at 617.

II. The Current Application

Recent (1979 and 1980) cases exemplify the status of the treatment that the NLRB and the circuit courts give to communications that express an intention to close. The suggested test for protected speech was not applied in any of these cases. However, had that test been applied, the Board and the courts of appeals would have reached the same result in five of the following cases. These five cases are discussed in Subpart A. On the other hand, the Board would have reached an opposite resolution of the "threat" issue in two of the following cases. These cases are discussed in Subpart B.

A. Threats of Closure

In *Huron Copysette, Inc. v. NLRB*,[23] the speech analyzed was made by a foreman who told an employee that the General Manager would shut down the plant if the union won representation.[24] No economic facts were asserted to warrant the prediction and there was no suggestion by the parties that a decision to close had in fact been made by anyone with the authority to make such a decision. The Board and the court concluded that the statement was a threat because of the antiunion animus which was evident in the environment of the campaign and the lack of economic facts to support the statement. Had the suggested test been applied, the statements would have been deemed to be threats because no previously made decision to close had been made. These statements by the foreman were, therefore, clearly threats under both parts of the test in *Gissel*.

An employer attempted to use *Darlington* to protect its discharge of non-shareholder employees in *NLRB v. Fort Vancouver Plywood Co.*[25] The company was a worker-owned enterprise that employed non-shareholding as well as shareholding workers. The non-shareholding employees were told that if unionization occurred, they would be discharged. After the union victory, the company discharged all non-shareholding employees. The court found these statements to be an unfair labor practice: "[t]hreats of plant closure are also coercive unless, unlike the case here, they are phrased as economic predictions based on objective facts beyond the employer's control."[26] In this case, the company's argument that the discharge of all of the non-shareholding employees was protected by *Dar-*

23. 615 F.2d 712 (6th Cir. 1980).

24. The foreman also told employees that if the union came into the plant, working conditions would become rigid and harsh. This implies an expectation of a continued operation of the plant and could have been used by the Board or the court to conclude that the expressed intent to close was a sham.

25. 604 F.2d 596 (9th Cir. 1979), *cert. denied*, 100 S. Ct. 1275 (1980).

26. *Id.* at 599 n.1.

lington was rejected because the plant continued in operation. A full application of the test for protected speech would have used the failure of the discharge to pass the *Darlington* test as the basis for concluding that the statement was unprotected on the predetermined decision prong of the *Gissel* test as well as the lack of objective economic facts to find a threat.

In *NLRB v. Chatfield-Anderson Co.*,[27] the court found that the employer had threatened to close one of his two plants in the event of unionization. In addition to the threat of closure, the company had threatened economic reprisals if the union won the representation election and promised benefits if the union were to lose. The threat of reprisals other than a closure establish that no firm decision to close had in fact been made. The conclusion that the statements were unfair labor practices could have been reached under either alternative of the *Gissel* test. However, the ninth circuit did not base its decision on that reasoning; rather, the court stated that "[t]he company's representations were not legitimate opinions on the consequences of unionization which had some reasonable basis in fact, but were threats of retaliation. . . . "[28]

The ninth circuit almost reached both alternatives of the *Gissel* criteria for unprotected communication of an intention to close in *NLRB v. Lantz*.[29] Statements by Lantz about his intention to close "show a clear-cut anti-union animus which, *when coupled with . . . testimony of continued operation on a non-union basis,* establishes verbal threats not protected by the free speech provisions of § 8(c), and in violation of § 8(a)(1) of the Act."[30] Unfortunately, the court based its finding of an unprotected threat solely on the lack of economic facts to support a predicted closing.

In *Nebraska Bulk Transport, Inc. v. NLRB*,[31] a letter from the employer to employees contained statements about economic expectations of the employer and the indication that a decision to close in the event of unionization had already been made. The court took the predetermined decision as an indication of antiunion animus and on that basis found that there was a threat to close. The court assumed that antiunion animus of the employer could not be a valid basis for reaching a decision to close. Since this was a complete closure that was predicted, the *Darlington* protection of unionization in other parts of an organization would have no limiting effect on the *Gissel* test in this case. The court should have simply noted that the company had continued in operation after the

27. 606 F.2d 266 (9th Cir. 1979).
28. *Id.* at 268.
29. 607 F.2d 290 (9th Cir. 1979).
30. *Id.* at 298 (emphasis added).
31. 608 F.2d 311 (8th Cir. 1979).

union had won representation and concluded that no firm decision to close had in fact been made. The court reached the correct conclusion; however, it did so on an erroneous understanding of the limits on employer's rights of free speech.

B. *Announcements of Closure*

In *Electrical Products Division of Midland-Ross Corp. v. NLRB*,[32] the company owned and operated two plants. One plant was unionized; the other was not. Before the unionization campaign was initiated at the non-union plant, the corporation began a financial study of the continued economic viability of the union plant. The Board found that the employer's announcement of the decision to close the union plant, although based on acceptable economic grounds and valid business reasons, was timed so that it had a threatening effect on the union campaign. The employer's communication of the decision to close the union plant was the basis for one charge of an unfair labor practice.[33] The court supported its conclusion that the announcement was an unfair labor practice by stating that "[t]he particular danger to be avoided is predictions not based on objective facts that tend to undermine the employees' ability to make a free choice."[34] The court's decision indicates that any statement made by an employer that would undermine the employees' ability to make a free choice would be a threat unless based on objective economic fact. This approach ignores the predetermined decision part of the *Gissel* criteria. The decision to close the union plant was itself an objective fact at the time it was announced. In a dissenting opinion in *Midland-Ross*, Judge Weis stated:

> Underlying the Board's approach is a patronizing attitude toward the workers' ability to make an intelligent decision. The Board evidently doubts that the employees are mature adults who are entitled to relevant and truthful information useful in making a considered choice. To "protect" them the agency apparently would spoon-feed only those matters that it deems safe for them to learn.[35]

The availability of "relevant and truthful" information is exactly what the second part of the *Gissel* test is designed to protect. The majority's assertion that the timing of the announcement had a chilling purpose belittles the valid grounds for the decision to close. The finding of an unpro-

---

32. 617 F.2d 977 (3d Cir. 1980). This case is presently being appealed to the U.S. Supreme Court.

33. The other unfair labor practice was the refusal of the company to bargain with the union on the effects of the closing.

34. 617 F.2d at 984.

35. *Id.* at 990 (Weis, J., dissenting).

tected threat to close in this case does not meet the tests of *Gissel* and *Darlington*. There was an objective basis to close the plant that was already unionized and the decision that was announced was a predetermined decision to close.

The case that most clearly demonstrates the lack of application of *Gissel* and *Darlington* is *Bruce Duncan Co. v. NLRB*.[36] In *Duncan*, the administrative law judge (ALJ) had found three unfair labor practices: a threat made against an employee's family, a threat to close, and a partial closing.[37] The employer had stated that if the union won the election, the company had decided to close that part of the business. After the union victory, that part of the company's business was closed. The Board accepted the ALJ's finding that the two threats were unfair labor practices, but it set aside the finding of a violation by partial closure. The partial closure was found permissible under the *Darlington* rule. The Board's findings were upheld by the Fourth Circuit Court of Appeals. The court relied upon antiunion animus as the basis for that conclusion because it did not find valid economic grounds for the decision to close. The result in this case is strictly opposite to the result that would have been reached under the proper approach to the question of threat or free speech as determined by the Supreme Court in *Gissel* and *Darlington*.[38] The predicted partial closure was that a firm decision to close had already been made and the partial closure was permissible because there was no intent to chill union activity in other parts of the business.

The unfortunate result in *Duncan* serves to emphasize the wisdom of the limitations on employers' rights of free speech that were constructed by the Supreme Court in *Darlington* and *Gissel*. These limitations define the extent of the freedom as well as confine it. The holding in *Duncan* would shrink these freedoms to the point at which an employer who would have a right to close under *Darlington* would not have the right to communicate that decision to those who would be most affected by the closure.

III. Conclusion

The Supreme Court has set limitations on an employer's protected speech by balancing his first amendment rights against the organizational rights of employees. These limitations are found in *Gissel*. To communi-

36. 590 F.2d 1304 (4th Cir. 1979).

37. 233 N.L.R.B. 1243, 97 L.R.R.M. 1027 (1977), *enforced*, 590 F.2d 1304 (4th Cir. 1979).

38. It is startling that a case which so clearly misapplied the tests of *Gissel* and *Darlington* on the issue of protected statements of plant closure would come from the Fourth Circuit Court of Appeals. It was the fourth circuit that was overruled by the Supreme Court in both *Darlington* and *Gissel*.

cate an expectation that a plant will be closed in the event of unionization, an employer must offer a carefully phrased statement of his beliefs based on objective economic facts or he must communicate that the proper authority had already made the decision to close in the event of unionization.

The prior decision to close is, however, restricted by *Darlington*. The closing may not have as its purpose a chilling effect on unionization in other parts of an employer's operations and any chilling effect, in fact, must not have been realistically foreseeable.

The recent cases discussed in this paper indicate that the Board and the reviewing courts are not applying this standard. Instead, once antiunion animus is found, the only defense available to an employer is to prove objective economic facts to support his statements. In its desire to impose a laboratory environment on the unionization process, the Board, with the concurrence of the circuit courts, has neglected to notice that antiunion animus can be a legitimate motivation of employers in restricted circumstances.

All of the recent cases discussed demonstrate a failure to apply the proper test for unprotected threats. While only two of these cases would have been decided differently had the test been properly applied, these two cases prove that failure to approach the issue in the correct manner is more than a problem of academic neatness. Unless the complete test is applied, the first amendment rights of employers will continue to be violated.

H. THOMAS ARTHUR