Labor Law—Freedom of Speech—Employer's Statement of Open-Shop Policy or Issuance of Anti-union Literature as Unfair Labor Practice—[Federal].—The decisions of two circuit courts of appeals have raised several questions with respect to the National Labor Relations Act:[1] (1) Does the act prohibit non-coercive statements of opinion by an employer intended to influence his employees in respect to unionization activities? (2) Under what circumstances will a statement which on its face is non-coercive be regarded as coercive? (3) Does prohibition of such statements violate the employer's right to freedom of speech?

In one case an employer, almost immediately after a unionization drive was begun, enclosed in each pay envelope a statement of open-shop policy. Shortly thereafter, plant operations were decreased, employees active in the organizational movement were discharged, and a company union was fostered. The National Labor Relations Board found that under the surrounding circumstances, the declaration of policy, "designed to discourage organizational efforts," was an unfair labor practice under Section 8(1)[2] of the National Labor Relations Act.[3] On petition by the board to the Circuit Court of Appeals for the Third Circuit for a decree enforcing its cease and desist order, *held*, that there was substantial evidence to sustain the board's findings. Decree of enforcement granted. *NLRB v. Elkland Leather Co.*[4] In the other case, an employer distributed to his employees literature which criticized and argued against unions. In addition, employees engaged in organizational activities were discharged, and physical force was used to prevent pro-union literature from being distributed. The NLRB found that, in view of all the circumstances, the company literature was coercive, and ordered that its dissemination cease.[5] On petition for enforcement to the Circuit Court of Appeals for the Sixth Circuit, *held*, that, since the literature was not coercive on its face, its distribution was not an unfair labor practice, and that to prohibit the distribution would invade the employer's right to freedom of speech. Decree of enforcement denied as to prohibiting distribution of literature. *NLRB v. Ford Motor Co.*[6]

From the language and Congressional background of the National Labor Relations Act, it appears that the act was not intended to prevent non-coercive statements of opinion by an employer in respect to unions, even though such statements are designed to persuade or influence his employees in their unionization. During the hearings by the Senate Committee on Education and Labor, Chairman Walsh stated: "I do not think there is anything in this bill to prevent an employer when his employees .... are about to organize, from posting a notice, or writing each an individual letter, or personally stating to each that he thinks their best interest is to form a company union,

[1] 49 Stat. 449 (1935), 29 U.S.C.A. § 151 et seq. (Supp. 1939).

[2] "It shall be an unfair labor practice for an employer—(1) To interfere with, restrain, or coerce employees in the exercise of the rights .... ['to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection']." 49 Stat. 452 (1935), 29 U.S.C.A. § 158 (Supp. 1939).

[3] Elkland Leather Co., 8 N.L.R.B. 519 (1938).

[4] 114 F. (2d) 221 (C.C.A. 3d 1940), cert. den. 61 S. Ct. 170 (1940).

[5] Ford Motor Co., 14 N.L.R.B. 346 (1939).

[6] 114 F. (2d) 905 (C.C.A. 6th 1940).

that [he] is violently opposed to so-and-so who is attempting to organize a union."[7] The reports of the Congressional committees[8] which considered the bill indicate a similar understanding of Section 8(1), which was formulated in keeping with a Supreme Court interpretation of a provision in the Railway Labor Act prohibiting employers from exercising "interference, influence, or coercion" in the employees' selection of representatives.[9] The Court stated that the word "influence" was not to be understood as "interdicting the normal relations and innocent communications which are a part of all friendly intercourse, albeit between employer and employee."[9a] That the National Labor Relations Act does not include the term "influence" in defining unfair labor practices, indicates that Congress did not intend to preclude the employer from influencing his employees by argumentation.[10]

An employer's statement of opinion which on its face appears non-coercive may, however, reasonably be regarded by an employee as coercive in view of all relevant circumstances,[11] including the economic dependence of the employee on the employ-

[7] Hearings before the Senate Committee on Education and Labor on S. 1958, 74th Cong., 1st Sess., at 305 (1935). This statement was made in response to a witness' assertion that the proposed bill tied the employer's hands in his relations with his employees.

[8] H. Rep. 1147, 74th Cong., 1st Sess. (1935); S. Rep. 573, 74th Cong., 1st Sess. (1935).

[9] The Railway Labor Act, § 2, third subdivision, provided: "Representatives . . . . shall be designated by the respective parties . . . . without interference, influence, or coercion exercised by either party over the self-organization or designation of representatives by the other." 44 Stat. 577, 588 (1926), amended 48 Stat. 1186 (1934), 45 U.S.C.A. § 152 (Supp. 1939).

[9a] Texas & N.O.R.Co. v. Brotherhood of Railway & Steamship Clerks, 281 U.S. 548, 568 (1930).

[10] Senator Walsh stated that the Senate Committee had stricken the word "influence" from the bill in order to permit an employer to tell his employees that it would be to their best interests to form a company union, or that he was opposed to a particular union organizer. (Hearings before the Senate Committee on Education and Labor on S. 1958, 74th Cong., 1st Sess., at 305 (1935)). The fact that the employer presents the reasons for his conclusions would not make the statement coercive; in fact, it would remove any strain of coercion that might be regarded as being present in the bare expression of a conclusion.

During the course of the debates on the floor of the Senate, it is noteworthy that Senator Walsh stated: "An employee, like an employer, of course, has the right to discuss the merits of any organization. Indeed, Congress could not constitutionally pass a law abridging the freedom of speech. . . . . The bill now under consideration does not enter into those realms of free speech . . . ." 79 Cong. Rec. 7661 (1935).

[11] Continental Box Co. v. NLRB, 113 F. (2d) 93 (C.C.A. 5th 1940); Humble Oil and Refining Co. v. NLRB, 113 F. (2d) 85 (C.C.A. 5th 1940); Clover Fork Coal Co. v. NLRB, 97 F. (2d) 331 (C.C.A. 6th 1938). The board has adopted the reasonable test of determining whether a statement is coercive by examining it in the context of the surrounding circumstances and its relation to the entire factual background. Therefore the violation in these cases necessarily depends upon the finding of other unfair labor practices. See NLRB Ann. Rep. 59 (1939). But cf. Midland Steel Products Co. v. NLRB, 113 F. (2d) 800 (C.C.A. 6th 1940); NLRB v. Express Publishing Co., 111 F. (2d) 588 (C.C.A. 5th 1940); Rockford Mitten & Hosiery Co., 16 N.L.R.B. 501 (1939). It has been argued that even statements of opinion by an employer are unfair labor practices. Mariano, The Wagner Act 34–35 (1940); NLRB and Free Speech, 7 Int'l Jur. Ass'n Bull. 25, 35 (1938); E. S. Smith, address delivered July 22, 1938, before the American Communications Ass'n Convention, NLRB Release R-1082. A biased, but not unamusing writer has made the argument that: "Freedom of speech is possible only among those

er.[12] It is well settled that a patently coercive statement, such as one which contains a threat to move the plant if the employees unionize, is an unfair labor practice.[13] Since the act is designed to protect organizational activity, similar treatment should be accorded statements which in view of the employer's antagonistic actions may be regarded by a reasonable employee as coercive. The question whether the statements are constructively coercive is one of "fact," and in both cases under discussion, the expressions of open-shop policy or of dislike of, and argument against, unionization would appear coercive to an employee in the face of the discharge of union sympathizers, physical violence in stifling organizational efforts, and/or the slowing down of production.

The courts have been unanimous in stating that an attempt by the board to prohibit an employer from making statements not constructively coercive, although intended to influence his employees, would abridge the employer's right to freedom of speech.[14] But a patently coercive statement is not so privileged. It is with respect to statements that are coercive only when examined in the context of surrounding circumstances that the freedom of speech issue is in doubt. Is the employer's right forfeited when he engages in unfair labor practices which infect his speech? It has been argued that since under *Thornhill v. Alabama*[15] and *Carlson v. California*[16] the right of the employees to picket and to publicize a strike is guaranteed under the right to freedom of speech, the employer should have equal rights, including the privilege of publicizing his opinions as to unions and strikes. But the employer has never been denied this right; he has been required merely to exercise it subject to the same limitations which have been imposed upon labor. The *Thornhill* and *Carlson* cases both emphasized that peaceful picketing alone was protected under the freedom of speech concept. The New York Court of Appeals in *Busch Jewelry Co. v. United Retail Employees Union*[17] denied labor the right to picket peacefully in the future where the union had in the past failed to live up to its responsibility of peaceful conduct. An employer who has failed in his responsibility to

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who approximate each other in equality of position. When an employer addresses himself to his employees on the subject of unionism, orally or in writing, directly or through some mouthpiece, economic compulsion comes in through the door and freedom of speech flies out the window. Freedom of speech is a give-and-take proposition. But on the subject of unionism it is the employees who must do the taking. The action of corporate employers in propagandizing their workers against unions has no more relation to freedom than the present corporate economy has to the precepts of Adam Smith." Rosenfarb, The National Labor Policy and How It Works 79–80 (1940). For a critical evaluation of Rosenfarb's work, see Rice's review thereof in 8 Univ. Chi. L. Rev. 174 (1940).

[12] Virginia Ferry Corp. v. NLRB, 101 F. (2d) 103 (C.C.A. 4th 1939); cf. NLRB v. Falk Corp., 102 F. (2d) 383 (C.C.A. 7th 1939).

[13] NLRB v. Asheville Hosiery Co., 108 F. (2d) 288 (C.C.A. 4th 1939); Stockpole Carbon Co., 6 N.L.R.B. 171 (1938); Titan Metal Mfg. Co., 106 F. (2d) 254 (C.C.A. 3d 1939), cert. den. 308 U.S. 615 (1939); see Wisconsin Labor Relations Board v. Fred Rueping Leather Co., 228 Wis. 473, 279 N.W. 673, 683 (1938); Texas & N.O.R. Co. v. Brotherhood of Railway and Steamship Clerks, 281 U.S. 548 (1930).

[14] Midland Steel Products Co. v. NLRB, 113 F. (2d) 800 (C.C.A. 6th 1940); NLRB v. Express Publishing Co., 111 F. (2d) 588 (C.C.A. 5th 1940); Jefferson Electric Co. v. NLRB, 102 F. (2d) 949 (C.C.A. 7th 1939); NLRB v. Union Pacific Stages, 99 F. (2d) 153 (C.C.A. 9th 1938); cf. Continental Box Co. v. NLRB, 113 F. (2d) 93 (C.C.A. 5th 1940).

[15] 310 U.S. 88 (1940). [16] 310 U.S. 106 (1940).

[17] 281 N.Y. 150, 22 N.E. (2d) 320 (1939) noted in 7 Univ. Chi. L. Rev. 171 (1939); see Nann v. Raimist, 255 N.Y. 307, 174 N.E. 690 (1931).

refrain from unfair labor practices should not be heard to complain that his rights have been unfairly curtailed.

In the *Ford* case, the board's order directed the Ford Company to cease and desist from "disseminating among its employees statements or propaganda which disparages or criticizes labor organizations or which advises its employees not to form such organizations." Presumably the board assumed that if unfair labor practices existed in the recent past, any statement by an employer as to unions is coercive. The employer apparently is even prohibited from revealing in a non-coercive manner facts which, if known, would persuade the employees not to join a particular union. If this is the correct interpretation, the order would seem to violate the employer's right to freedom of speech. Once the court has enjoined the employer's unfair labor practices, there may be a broad area within which the employer can speak without reasonable employees feeling they are being coerced.[18]

Labor Law—Picketing and Strike Arising out of Breach of Contract Not to Deal with Companies Not in Good Standing with Union—[Washington].—A baking company executed a contract with a union under which it agreed to hire only members in good standing with the union, and agreed to certain hours of labor and wages. The contract contained the following clause: "There shall be no goods delivered to or sold at the plant for resale from trucks to persons not in good standing with local union No. 524." The baking company continued to sell half of its output of goods to Paddy Kake Sales Company, which was not in good standing with the union. Regarding these sales as a breach of contract, the union called a strike and refused to handle any of the baking company's goods going to Paddy Kake, and picketed the baking company's place of business. In a suit by the baking company for an injunction and damages, relief was granted by the trial court. Damages and an injunction were denied the defendant union on a cross complaint based on the contract. On appeal, *held*, the breach of contract constituted a basis for a labor dispute. Picketing did not constitute a secondary boycott. The denial of damages for the breach of contract was affirmed. *Marvel Baking Co. v. Teamsters' Union Local No. 524.*[1]

Under Washington statutes[2] a breach of contract may be the basis of a labor dispute. "Self-help"—peaceful picketing[3] and striking[4]—can be used where such action

[18] Cf. dissent of Judge Lehman in Busch Jewelry Co. v. United Retail Employee's Union, 281 N.Y. 150, 157, 22 N.E. (2d) 320, 322 (1939), noted in 7 Univ. Chi. L. Rev. 171, 174 (1939).

[1] 105 P. (2d) 46 (Wash. 1940).

[2] Wash. Rev. Stat. Ann. (Remington, Supp. 1940) § 7612–13 (the term "labor dispute" includes any controversy covering terms and conditions of employment and their maintenance).

[3] Wash. Rev. Stat. Ann. (Remington, Supp. 1940) § 7612–14 (e); Safeway Stores v. Retail Clerks' Union, 184 Wash. 322, 51 P. (2d) 372 (1935); United Electric Coal Co. v. Rice, 80 F. (2d) 1 (C.C.A. 7th 1936); Adams v. Building Service Employees' Union, 197 Wash. 242, 84 P. (2d) 1021 (1938); Fornili v. Auto Mechanics' Union, 200 Wash. 283, 93 P. (2d) 422 (1939); Yakima v. Gorham, 200 Wash. 564, 94 P. (2d) 180 (1939), noted in 7 Univ. Chi. L. Rev. 388 (1939); Kimbel v. Lumber & Saw Mill Workers' Union, 189 Wash. 416, 65 P. (2d) 1066 (1937) (reasonable distance of picketing allowed). See The Status of the Right to Picket in Washington, 5 Wash. L. Rev. 126 (1930); Status of Picketing in Washington, 15 Wash. L. Rev. 47 (1940), for history of picketing in Washington.

[4] Wash. Rev. Stat. Ann. (Remington, Supp. 1940) § 7612–4 (a) (no court shall issue an injunction or prohibit persons interested in a labor dispute from "ceasing or refusing to perform any work or to remain in any relation of employment").