neglect of that duty. But where, as in the instant case, the duty is almost undischargeable, justice to the insured demands a more effective remedy. Literal compliance with the cooperation clause in the instant case would afford the insurer the opportunity of defending both the complaint and cross-complaint, in other words absolute control of the defenses of both parties to the litigation.[9] Under such circumstances it should be fairly easy for the insurer to demonstrate contributory negligence which would relieve the insurer of liability under both policies. To give such an unusual advantage by means of a form clause not intended to cover such a situation could hardly be conscionable. The solution of this problem so inherently fraught with inextricable conflict of interests demands that compliance with the cooperation clause be excused.

Labor Law—National Labor Relations Act—Employer's Speech during Working Hours as Unfair Labor Practice—[National Labor Relations Board].—The National Labor Relations Board had scheduled a run-off election[1] between an independent and a CIO union, to be held on the respondent's premises. The power in the plant was shut off and the employees were directed over the public address system and by foremen to convene on company time in the shipping room. There the president of the respondent company delivered an anti-CIO speech to them. The respondent had prohibited union solicitation and organizational activity at any time on company premises; but during the campaign it had enforced this rule only against the CIO. In addition, the respondent kept itself informed as to the progress of the campaign by reports from supervisors and through what an agent overheard at bars frequented by employees. On charges of unfair labor practices under Section 8(1) of the National Labor Relations Act,[2] *held*, the respondent violated the Act, (1) by promulgating the blanket no-solicitation rule, (2) by discriminating against the outside union in applying the rule, (3) by surveillance of pre-election activities, (4) by campaign state-

Co. v. Massachusetts Bonding & Ins. Co., 193 App. Div. 438, 184 N.Y. Supp. 243 (1920); Brassil v. Maryland Casualty Co., 210 N.Y. 235, 104 N.E. 622 (1914); Vance, Insurance, 917 (2nd ed., 1930).

[9] In the negligence litigation the plaintiff could file his complaint by attorneys of his own choice, and likewise the defendant could file his cross-complaint by his attorneys. But the cooperation clause would require that the defendant permit the insurer to defend the complaint and the plaintiff permit the insurer to defend the cross-complaint. In this manner the insurer would have complete control of the defense in the litigation.

[1] An election had been held on January 19, 1945, with the following result: Association, 448; CIO, 444; neither, 34. Since no choice on the ballot received the required majority of the votes cast it became necessary to conduct a run-off election with "neither" dropped from the ballot and the employees left to choose between the two unions. Respondent, after having refrained from participating in the first pre-election campaign, began on February 3, 1945, an intensive five-day campaign favoring the Association. The run-off election of February 8, 1945, resulted in a clear majority for the Association with the following tabulation: Association, 584; CIO, 394; challenged ballots, 14. It should be noted that even though 53 more employees voted in the second election, the CIO received 50 votes less than in the first one.

[2] 49 Stat. 449 (1935), 29 U.S.C.A. § 151 et seq. (1942).

ments which constituted "an integral and inseparable part of the respondent's coercive course of conduct," and (5) by making speeches on unionism to assembled employees during working hours, which constituted an independent unfair labor practice, even though "the speech itself may be privileged under the Constitution." *Matter of Clark Bros. Co., Inc.*[3]

The National Labor Relations Act provides that it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees" in the exercise of their right of self-organization guaranteed by the Act.[4] The Board in its early years interpreted these words to mean that the Act required strict neutrality on the part of the employer in regard to all union questions arising among employees on the ground that they alone had a legitimate interest in the selection or rejection of a bargaining agent.[5] Any expression of opinion unfavorable to unionism, made by an employer to his employees, even though it was unaccompanied by threat of reprisal, was held to be a violation of Section 8(1) of the Act.[6] In its attempt to force employers to maintain a neutral position, the Board found unfair labor practices where union organizers were described as "racketeers" or as persons interested solely in their own advancement, where unions were depicted as "rotten" and "corrupt" and its members as "communists and Reds and foreigners."[7]

While the Board's neutrality theory was attacked as denying employers their constitutional right to freedom of speech,[8] the Second Circuit Court of Appeals upheld the Board on the grounds that because of his employees' economic dependence, statements by an employer to them "have a force independent of persuasion."[9] In its first pronouncement on employer freedom of speech under the Act, the Supreme Court declared in 1941 that the statute did not prevent an employer from expressing his views on labor policies or problems, stating, however, that such expressions were not privileged where they were part of a coercive course of conduct.[10] Two years later, in *NLRB v. American Tube*

[3] 70 N.L.R.B. No. 60, 18 Lab. Rel. Rep. Man. 1360 (1946). A petition by the Board to have its order enforced was filed with the United States Circuit Court of Appeals for the Second Circuit on October 16, 1946.

[4] National Labor Relations Act §§ 7, 8(1), 49 Stat. 449 (1935), 29 U.S.C.A. §§ 157–58 (1942).

[5] "The employer has no more right to intrude himself into the employee's efforts to organize and select their representatives to represent them in collective bargaining than the employee would have to intrude himself into a stockholder's meeting to interfere with the election of the company's directors. . . ." NLRB v. W. A. Jones Foundry & Machine Co., 123 F. 2d 552, 555 (C.C.A. 7th, 1941).

[6] Matter of Citizen-News Co., 21 N.L.R.B. 1112 (1940), set aside 134 F. 2d 962 (C.C.A. 9th, 1943).

[7] Third Annual Report of the National Labor Relations Board (1938), at 59.

[8] NLRB v. Ford Motor Co., 114 F. 2d 905 (C.C.A. 6th, 1940), cert. den. 312 U.S. 689 (1941), noted in 8 Univ. Chi. L. Rev. 350 (1941).

[9] NLRB v. Federbush Co., Inc., 121 F. 2d 954, 957 (C.C.A. 2nd, 1941).

[10] NLRB v. Virginia Electric & Power Co., 314 U.S. 469 (1941).

Bending Co., the Second Circuit Court of Appeals interpreted this to mean that a speech and letter, containing no threats of reprisal and temperate in form, although it was delivered to employees on the eve of an election and presented to the contest as one between the union and the company, was privileged under the First Amendment.[11]

While it has accepted the doctrine of the *Tube Bending* case,[12] the Board has nevertheless tried to limit its application.[13] Thus in *Matter of J. L. Brandeis & Sons*,[14] where an employer had engaged in an all-out propaganda campaign to defeat a union, the Board held that the Act had been violated, even though the employer had promised the employees that no reprisals would follow. This organized campaign was distinguished from isolated utterances privileged under the *Tube Bending* doctrine. The Eighth Circuit Court of Appeals, in setting aside the Board's order, stated that "an employer may disseminate facts within the area of dispute, may even express his opinion on the merits of the controversy even though it involves labor organizations, may indicate a preference for individual dealings with employees, may state his policy with reference to labor matters, and may express hostility to a union or its representatives."[15] In a similar manner, other decisions have given employers more leeway in actively opposing self-organization among employees.[16] The Board has had difficulty in protecting the employees' freedom of choice in the selection of bargaining agents from gradual attrition in the absence of a clear-cut doctrine drawing the line beyond which this right could not be attenuated.

The approach of the instant case represents a new attempt by the Board to balance the conflicting employee-right of self-organization against the employer's correlative right of free speech. The Board now considers as an unfair labor practice an employer's act of directing his employees to listen to speeches on unionism in the plant during working hours, without regard to whether the contents of the speech would be privileged if delivered under other circum-

[11] NLRB v. American Tube Bending Co., 134 F. 2d 993 (C.C.A. 2nd, 1943).

[12] Matter of Arkansas-Missouri Power Corp., 68 N.L.R.B. 805, 18 Lab. Rel. Rep. Man. 1165 (1946); Matter of A. R. Benua, 67 N.L.R.B. No. 29, 17 Lab. Rel. Rep. 1229 (1946); Matter of Oval Wood Dish Corp., 62 N.L.R.B. 1129 (1945).

[13] Matter of Van Raalte, Inc., 69 N.L.R.B. 1326, 18 Lab. Rel. Rep. Man. 1312 (1946); Matter of Semet-Solvay Co., 68 N.L.R.B. 352, 18 Lab. Rel. Rep. Man. 1116 (1946); Matter of Goodall Co., 68 N.L.R.B. 252, 18 Lab. Rel. Rep. Man. 1119 (1946).

[14] 54 N.L.R.B. 880 (1944).

[15] NLRB v. J. L. Brandeis & Sons, 145 F. 2d 556, 564 (C.C.A. 8th, 1944). But see Peter J. Schweitzer, Inc. v. NLRB, 144 F. 2d 520, 524 (App. D.C., 1944).

[16] NLRB v. Montgomery Ward & Co., 19 Lab. Rel. Rep. Man. 2008 (C.C.A. 8th, 1946); NLRB v. American Pearl Button Co., 149 F. 2d 311 (C.C.A. 8th, 1945); Big Lake Oil Co. v. NLRB, 146 F. 2d 967 (C.C.A. 5th, 1945); NLRB v. Brown-Brockmeyer Co., 143 F. 2d 537 (C.C.A. 6th, 1944); Edward G. Budd Mfg. Co. v. NLRB, 142 F. 2d 922 (C.C.A. 3rd, 1944); see Jacksonville Paper Co. v. NLRB, 137 F. 2d 148 (C.C.A. 5th, 1943).

stances.[17] And it took the trouble expressly to enunciate this new doctrine, even though the respondent's other conduct furnished ample grounds otherwise to support its findings of unfair labor practices.[18]

The Board argued that while the Act guarantees to employees "full freedom to receive aid, advice, and information from others" concerning their right of self-organization,[19] it also leaves employees free to determine whether or not to receive such aid, advice, and information, concluding that to force employees to do so interferes "with the selection of a representative of the *employees'* choice."[20] The soundness of this argument standing alone seems questionable. Clearly an employer may communicate to his employees by mail his opinions regarding the selection of a bargaining agent.[21] And it is most improbable that

[17] The fact that an employer delivered a speech to employees on working time was first singled out as an element in the question of the employer's freedom to express anti-union views in a decision a year and a half prior to the Clark Bros. case. Matter of Thompson Products, Inc., 60 N.L.R.B. 1381 (1945). While occasionally noted as a factor in decisions subsequently rendered, Matter of Wennonah Cotton Mills Co., Inc., 63 N.L.R.B. 143 (1945); Matter of Montgomery Ward & Co., Inc., 64 N.L.R.B. 432 (1945); Matter of Monumental Life Insurance Co., 67 N.L.R.B. No. 35, 17 Lab. Rel. Rep. 1230 (1946), it had never been raised to the status of an independent unfair labor practice until the instant case. The following are other examples of activity held by the Board to constitute independent unfair labor practices: the anti-union employment contract, National Licorice Co. v. NLRB, 309 U.S. 350 (1940); the blacklisting of union members, NLRB v. Waumbec Mills, Inc., 114 F. 2d 226 (C.C.A. 1st, 1940); the questioning of employees concerning union membership, activity or interest, NLRB v. Fruehauf Trailer Co., 301 U.S. 49 (1937). Cf. Matter of Peyton Packing Co., 49 N.L.R.B. 828 (1943), where the promulgation of a rule prohibiting union solicitation on company premises outside of working hours was held to create a rebuttable presumption of unfair labor practice rather than necessarily constituting an unfair labor practice.

[18] Discriminatory application of a blanket no-solicitation rule held to be an unfair labor practice, NLRB v. May Department Stores Co., 154 F. 2d 533 (C.C.A. 8th, 1946); see International Association of Machinists v. NLRB, 311 U.S. 72 (1940). Promulgation of rule prohibiting union solicitation at any time on company premises held to be an unfair labor practice, Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945). Surveillance over union activities held to constitute an unfair labor practice, NLRB v. Collins & Aikman Corp., 146 F. 2d 454 (C.C.A. 4th, 1944). The Supreme Court has stated that "pressure exerted vocally by the employer," if it is part of a coercive course of conduct, "may no more be disregarded than pressure exerted in other ways." NLRB v. Virginia Electric & Power Co., 314 U.S. 469, 477 (1941); NLRB v. American Laundry Machinery Co., 152 F. 2d 400 (C.C.A. 2nd, 1945).

[19] Matter of Harlan Fuel Co., 8 N.L.R.B. 25, 32 (1938).

[20] Matter of Clark Bros. Co., Inc., 70 N.L.R.B. No. 60, 18 Lab. Rel. Rep. Man. 1360, 1361 (1946). The right is necessarily an interpolation from Section 7 of the Act which lists the "Rights of Employees" as follows: "Employees shall have the right 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. 449 (1935), 29 U.S.C.A. § 157 (1942). "The Wagner Act did not undertake the impossible task of specifying in precise and unmistakable language each incident which would constitute an unfair labor practice. On the contrary, that Act left to the Board the work of applying the Act's general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms." Republic Aviation Corp. v. NLRB, 324 U.S. 793, 798 (1945). Cf. Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941).

[21] NLRB v. American Tube Bending Co., 134 F. 2d 993 (C.C.A. 2nd, 1943).

an employee would not read a special delivery letter sent to him at his home by the president of the company, even though he arguably remained free to toss it unread into the wastebasket.[22] This speculation seems justified, even though it be admitted that the same employee, in a practical sense, would not be as free to walk out of a meeting being held on working time.

Now the Board stresses the infringement of the abstract right of an employee to choose whether or not he shall listen to his employer's utterances. It is submitted that this is not the real heart of the violation of employee self-organizational rights in the type of situation under discussion. The real offense is, rather, the subtle coercion implicit in an employee's being forced to listen to an employer's speech in the plant itself. The Board's finding of an independent violation of Section 8(1) in the employer's use of "its superior economic power in coercing its employees to listen to speeches relating to organizational activity"[23] seems to have real significance when viewed in this light.

Words uttered by an employer to a compulsory audience within the everyday working surroundings of the plant have far different import and effect than if these very same words were read by an employee in his own home. As Judge Learned Hand has so realistically observed: "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."[24]

Social scientists have noted the existence of what might be called deference patterns, which predispose people to respond automatically towards those to whom they have been in the custom of responding.[25] Thus, while they are in the plant, employees customarily obey the instructions of company supervisors and officials. Habitual responses of this type tend to operate whether the employee is responding to the desires of the employer that he should perform some shop operation or that he should pursue some less objective course—such as voting against a certain union.[26] Hence it seems not unreasonable to deny the employer

[22] It seems apparent, however, that any employee with such determined anti-employer sentiments would hardly be deterred by anything an employer might say within the present permissible area of employer free speech under the Act.

[23] Matter of Clark Bros. Co., Inc., 70 N.L.R.B. No. 60, 18 Lab. Rel. Rep. Man. 1360, 1361 (1946).

[24] NLRB v. Federbush Co., Inc., 121 F. 2d 954, 957 (C.C.A. 2nd, 1941). "And yet, the voice of authority may . . . . provoke fear and awe quite as readily as it may bespeak fatherly advice. The position of the employer . . . . carries such weight and influence that his words may be coercive when they would not be so if the relation of master and servant did not exist." NLRB v. Falk Corp., 102 F. 2d 383, 389 (C.C.A. 7th, 1939).

[25] See Chapple & Coon, Principles of Anthropology 26–72 (1941); Roethlisberger & Dickson, Management and the Worker 358–59, 564–68 (1939); Gardner, Human Relations in Industry 65–84, 168–70 (1945).

[26] This is not to suggest that all employees will react in the same manner. The studies indicate, for example, that some employees react strongly against such tactics, but these will

the opportunity of utilizing the plant pattern of response to defeat employee self-organization. For to justify such behavior as an appeal to the employee's reason ignores elementary precepts in the field of industrial human relations.[27] And in addition the display of power inherent in the compulsory audience is itself of considerable psychological significance. Field studies indicate how deep-rooted is the feeling among workers that their future welfare depends upon "not crossing the boss."[28] As the Supreme Court has observed, "Intimations of an employer's preference, though subtle, may be as potent as outright threats of discharge."[29] It seems particularly true in cases of this sort, where two unions are competing, that the employees would reasonably get the idea from their employer's conduct that he would be more generous in making them concessions if the union of his choice were selected. Yet it is perfectly obvious that if the employer actually made an overt statement to that effect, he would be guilty of an unfair labor practice.[30]

In the instant case the employer availed himself of an additional psychological advantage by making his final appeal only a few minutes before the polls opened.[31] This is a considerable advantage which adheres to the employer through his control over working time.[32] Thus the employees went to the polls

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be drawn largely from the union adherents. In close situations it is quite likely to affect a sufficient number of those employees on the fence to be decisive in the election. See Whyte, Who Goes Union and Why?, 23 Personnel Journal 215 (1944).

[27] See Whitehead, Leadership in a Free Society 89–90, 97–98, 111–20 (1936); Mayo, Human Problems of an Industrial Civilization 164 (1933).

[28] See Gardner, Human Relations in Industry 8, 10, 98 (1945).

[29] NLRB v. Link-Belt Co., 311 U.S. 584, 600 (1941).

[30] Cf. Medo Photo Supply Corp. v. NLRB, 321 U.S. 678 (1944); Matter of Agar Packing & Provision Corp., 58 N.L.R.B. 738 (1944).

[31] The Board has always sought to prevent campaigning "at or near" the polling place on election day, so as to safeguard the free choice of employees. Should the court reverse the Board's finding that the compulsory audience constitutes an unfair labor practice, the Board could still exercise its own judgment in determining whether such conduct interfered with the employee's free choice and, if it so found, could set aside the election results. Matter of A. J. Thrall, 65 N.L.R.B. No. 15, 17 Lab. Rel. Rep. 652 (1945). Such action by the Board, coming under Section 9 of the Act, is not subject to court review, unless it later becomes part of the record in unfair labor practice charge proceedings under Section 8(5). American Federation of Labor v. NLRB, 308 U.S. 401 (1940); National Labor Relations Act § 9(d), 49 Stat. 449 (1935), 29 U.S.C.A. § 159 (1942).

[32] In one case an employer worked his employees overtime to prevent them from attending a scheduled union meeting. Matter of Tidewater Iron & Steel Co., Inc., 9 N.L.R.B. 624 (1938). In another an employer was held to have interfered with his employees' freedom of choice where he approached them individually at their machines to discuss an impending union election. The Board termed this "a subtle form of coercion more potent than an employer's address to a forced audience of his employees." Matter of A. J. Thrall, 65 N.L.R.B. No. 15, 17 Lab. Rel. Rep. 652 (1945). Employers apparently believe that they are free to subject their employees to a variety of high-pressured influences as long as they pay them to listen. Unless the Board can establish that employees have some rights concerning the pressure an employer may subject them to, nothing is to prevent an employer from scheduling an anti-

under the influence of the emotional charge contained in the employer's last minute speech, without adequate time to consider intellectually the arguments presented and without an opportunity having been afforded the union to offer a rebuttal. A speech delivered under these circumstances seems the antithesis of an appeal to reason. Indeed, if appeal to reason had been the employer's object, would he not have addressed the employees some days prior to the election or have presented his message in printed form, so that his employees could have studied and evaluated its worth? After all, the Board's new doctrine does not deny the employer means of communicating his ideas to his employees. Its refusing him the avenue of a compulsory audience in no way affects his ability to communicate with his employees by mail, circulars, or at a voluntarily attended meeting. These, indeed, are the only media of communication open to the union.

If an employer's conduct is coercive, the Supreme Court has indicated that no question of constitutional privilege is involved in declaring it to be an unfair labor practice.[33] The question of whether coercion is a conclusion of fact or of law has been the subject of considerable discussion and differences of opinion among the courts.[34] The problem is important in that, under the National Labor Relations Act, findings of fact by the Board are conclusive if supported by evi-

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union rally on the night preceding the election, to which he can compel the attendance of his employees. Employers who had once been unable to express even a critical opinion to their employees on unionism would have swung around to the point where they could command their attendance at the most strategic moments, tactically precluding by their economic control any opportunity for union competition for the employee's time or even for rebuttal by the union. Moreover, the actual overtime payments for attending the meeting would amount to a subtle form of economic allurement which would attract employees even to "voluntary" meetings.

[33] See NLRB v. Virginia Electric & Power Co., 314 U.S. 469, 477 (1941); Virginia Electric & Power Co. v. NLRB, 319 U.S. 533 (1943).

[34] A basic disagreement has arisen among the circuit courts as to whether there can be court review involving re-evaluation of the evidence, of the Board's finding that an employer's utterances, otherwise privileged, are part of a coercive course of conduct and hence themselves unfair labor practices. The dispute hinges on whether coercion is a question of fact or of law, since the Supreme Court has held that findings of fact by the Board, if supported by substantial evidence, are not subject to judicial review. NLRB v. Link-Belt Co., 311 U.S. 584 (1941). "The determination of the category into which the remarks fell was a question of fact for the Board . . . . and the Board's finding on the fact may not be disturbed." Elastic Stop Nut Corp. v. NLRB, 142 F. 2d 371, 378 (C.C.A. 8th, 1944). NLRB v. American Laundry Machinery Co., 152 F. 2d 400 (C.C.A. 2nd, 1945); Peter J. Schweitzer, Inc. v. NLRB, 144 F. 2d 520 (App. D.C., 1944); NLRB v. Trojan Powder Co., 135 F. 2d 337 (C.C.A. 3rd, 1943), cert. den. 320 U.S. 768. Contra: NLRB v. Montgomery Ward & Co., 19 Lab. Rel. Rep. Man. 2008 (C.C.A. 8th, 1946); NLRB v. J. L. Brandeis & Sons, 145 F. 2d 556 (C.C.A. 8th, 1944); NLRB v. American Pearl Button Co., 149 F. 2d 311 (C.C.A. 8th, 1945); Big Lake Oil Co. v. NLRB, 146 F. 2d 967 (C.C.A. 5th, 1945). For a general discussion of this subject, see Brown, Fact and Law in Judicial Review, 56 Harv. L. Rev. 899 (1943).

The Supreme Court has indicated that at least as to the applicability of a broad statutory term, as "coerce" is in this case, the functions of a reviewing court are limited. NLRB v. Hearst Publications, Inc., 322 U.S. 111, 130–31 (1944). The question of the scope of review of the Board's findings where a constitutional issue is involved, however, has not yet been determined.

dence.[35] However this matter may be legally categorized, practically it presents a problem of determining what effect certain conduct and circumstances have on the employees' subjective freedom of choice. And this consideration reminds us forcefully of the judicial observation that "the state of a man's mind is as much a fact as the state of his digestion."[36] Hence it is submitted that the determination of the state of an employee's mind is a matter—if you please, of fact—requiring professional analysis by specialists. And it is obvious that the Board is best equipped for such an analysis.[37] To determine where persuasion leaves off and coercion begins necessitates the weighing of numerous intangible factors. "The detection and appraisal of such imponderables are indeed one of the essential functions of an expert administrative agency."[38] Some circuit court of appeals judges seem to deny the possibility of coercion wherever the employer has at some point assured his employees that they were free to vote either way without reprisal.[39] In its failure to appreciate the decisive emotional

[35] Section 10(e), 49 Stat. 449 (1935), 29 U.S.C.A. § 160 (1942).

[36] Bowen, L. J., in Edgington v. Fitzmaurice, 29 Ch. Div. 459, 483 (C.A., 1885).

[37] The Second Circuit Court of Appeals, in an opinion by Judge Learned Hand, handed down since the landmark Tube Bending decision, properly observed that "the question of how deeply an employer's relations with his employees will overbear their will" is the sort of problem "to decide which a board, or tribunal chosen from those who have had long acquaintance with labor relations, may acquire a competence beyond that of any court." NLRB v. Standard Oil Co., 138 F. 2d 885, 887 (C.C.A. 2nd, 1943). "That there can be issues of fact which courts would be altogether incompetent to decide, is plain. If the question were, for example, as to the chemical reaction between a number of elements, it would be idle to give power to a court to pass upon whether there was 'substantial' evidence to support the decision of a board of qualified chemists. The court might undertake to review their finding so far as they had decided what reagents had actually been present in the experiment, for that presumably would demand no specialized skill. But it would be obliged to stop there, for it would not have the background which alone would enable it to decide questions of chemistry; and indeed it could undertake to pass upon them only at the cost of abandoning the accumulated store of experience upon the subject." Ibid. The court notes that labor relations has "been made the occasion of wide study, and a very large literature has arisen, with which those only are familiar who have become adepts. Like any other group of phenomena, when isolated and intensively examined, these relations appear to fall into more or less uniform models or patterns which put those well skilled in the subject at an advantage, which no bench of judges can hope to rival." Ibid., at 887–88.

[38] International Association of Machinists v. NLRB, 311 U.S. 72, 79 (1940).

[39] This appears to have been the premise on which the court acted, for example, in NLRB v. J. L. Brandeis & Sons, 145 F. 2d 556 (C.C.A. 8th, 1944). Similarly, it has been suggested that since the National Labor Relations Act "specifically provides protection to employees against the consequence of incurring an employer's strong displeasure," such "unwarranted fears or inferences" should presumably be ignored by the Board. Employer Freedom of Speech in Labor Relations, 14 Fordham L. Rev. 59, 62–63 (1945). This argument, if carried to its logical conclusion, would apply equally to outright threats of discharge for union activity, since the employee should be presumed to know that such discrimination is proscribed by Section 8(3) of the Act. Yet such threats have universally been recognized as violative of the Act. Ibid., at 63–64. It is submitted that coercion must be judged by the effect of pressure techniques without regard to whether an employee can be said to be "justified" in his fears, if the average employee would so react. Courts have previously taken judicial cognizance of irrational fears. "The question is, not whether the fear is founded in science, but whether it exists; not whether

patterns influencing group behavior, such naïveté amply illustrates the wisdom of trusting these complex problems primarily to specialists in industrial relations.[40]

In this case there was evidence from which the Board could reasonably conclude that the compulsory audience interfered with the exercise of the employees' rights to self-organization guaranteed by the Act. Hence, a favorable review of the Board's findings would seem to be justified.[41] Should the circuit court of appeals so decide, the Board will have succeeded in protecting employees' freedom of choice from the dangers inherent in the employer's control of working time and his dominant position in the plant. At the same time it will have preserved to employers an adequate area within which they may exercise their right to communicate to employees their opinions on labor problems and policies.

Municipal Corporations—Tax Anticipation Warrants—Validity of Warrants with Respect to Subsequent Reduction of Assessment—[Illinois].—The plaintiffs, holders of unpaid tax anticipation warrants issued by the West Chicago

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it is imaginary, but whether it is real, in that it affects the movement and conduct of men. Such fears are actual, and must be recognized by the courts as other emotions of the human mind. That fear is real in the sense indicated, and is the most essentially human of all emotions, there can be no doubt." Everett v. Paschall, 61 Wash. 47, 51, 111 Pac. 879, 880 (1910).

An even more fundamental error, however, is the tacit assumption of the learned author that all the consequences of incurring "an employer's strong displeasure" are capable of legal remedy. The Board has admitted its inability to proceed on charges involving objectively trivial types of discrimination, Matter of A. S. Abell Co., 5 N.L.R.B. 644 (1938); yet it is submitted that what may be incognizable by a court, either because it is de minimis or intangible, may be vitally important to an employee. Gardner, Human Relations in Industry 16–23 (1945); Whitehead, Leadership in a Free Society 11–21 (1936); Roethlisberger & Dickson, Management and the Worker 361–64, 543–45 (1939).

[40] The Supreme Court has recognized that "Perhaps the purport of these utterances may be altered by imponderable subtleties at work, which it is not our function to appraise." NLRB v. Virginia Electric & Power Co., 314 U.S. 469, 479 (1941). See Whyte (ed.), Industry and Society (1946); Gardner, Human Relations in Industry (1945); Mayo, Social Problems of an Industrial Civilization (1945). It should be noted that in the present state of the social sciences no conclusive evidence could be presented to "prove" propositions as complex as those indicated herein. It is suggested, however, that work being done in these fields is sufficiently indicative of the conclusions advanced above to make reasonable such inferences by the Board. To recognize the tenuous nature of the findings of the social sciences is not at all to suggest that anyone unfamiliar with developments along these lines is equally competent to deal with the problems arising within their general framework.

[41] The Eighth Circuit Court of Appeals has recently rejected the Board's finding that a compulsory audience was coercive. NLRB v. Montgomery Ward & Co., 19 Lab. Rel. Rep. Man. 2008 (C.C.A. 8th, 1946). Should the Second Circuit Court uphold the Board in the instant case, a clear conflict between the circuits would be apparent. And in accordance with tradition such conflict would presumably be resolved by the Supreme Court. Compare Republic Aviation Corp. v. NLRB, 142 F. 2d 193 (C.C.A. 2nd, 1944), with LeTourneau Co. of Georgia v. NLRB, 143 F. 2d 67 (C.C.A. 5th, 1944). The Supreme Court granted certiorari because of the conflict between these two cases. Republic Aviation Corp. v. NLRB, 323 U.S. 688 (1944); NLRB v. LeTourneau Co., 323 U.S. 698 (1944). The Board's position was sustained in Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945), which reversed the Fifth Circuit Court of Appeals and affirmed the Second Circuit Court of Appeals on the point of law involved.