Representatives of Their Own Choosing?: Certification, Elections, and Employer Free Speech, 1935–1959

John Logan*

The skilled practitioner, from the very first union leaflet or rumor of organization, knows that every move that is made by or on the behalf of the employer must lead inexorably to the right and opportunity to electioneer.¹

The certification election remains by and large the ultimate moment of truth in relation to the ability of unions to build membership.²

Trade unions’ recent declining success rate in National Labor Relations Board (NLRB, or Board) elections has contributed significantly to the fall in private sector union membership in the United States.³ In the late 1930s, unions won over eighty percent of NLRB elections, but union victory rates have fallen continuously since the mid-1940s, dropping to sixty-three percent by the late 1950s.⁴ By the mid-1970s, union victory rates had fallen below fifty percent, and by

---

* Lecturer, London School of Economics
1997 unions were winning only forty-eight percent of NLRB elections.5

While previous studies by industrial relations and legal scholars have scrutinized NLRB decisions and court rulings governing the conduct of representation elections,6 this paper analyzes instead the following issues, which are scarcely mentioned in the existing literature: why the NLRB “voluntarily” abandoned card certifications; how employers influenced and responded to developments in certification policy; and how changes in certification policy and employer electioneering affected the outcome of organizing campaigns. The paper focuses on the two decades following the NLRB’s 1939 decision to abandon card certifications, during which time employers played an increasingly active role in opposing unionization. When the NLRB first held secret ballot elections in the 1930s, it intended the elections to function as “nothing but an investigation, a factual determination of who are the representatives of employees.”7 Within two decades, however, a number of landmark NLRB decisions and court rulings, as well as a subsequent increase in employer electioneering, had transformed representation campaigns into fiercely contested struggles between unions and management for workers’ allegiance.

I. WHY DID THE NLRB ABANDON CARD CERTIFICATIONS?

[T]his issue of “cards versus ballots” . . . is central to our entire scheme of representation law, shaping the rest.

Paul Weiler, 19808

Section 9(c) of the 1935 National Labor Relations [Wagner] Act (NLRA) stated that the NLRB could determine a union’s majority status by ordering a secret ballot election, or by utilizing “any other appropriate method.”9 Between 1935 and 1939, the Board certified many unions on the basis of signed authorization cards or other
documentary evidence of majority support. ¹⁰ Employer associations and their congressional allies attacked card certifications, accusing the Board of "forcing unionism through labor policy rather than selling it to the American workingman."¹¹ Until the late 1930s, however, NLRB officials consistently defended card certifications. When questioned whether he believed authorization cards constituted "sufficient evidence" of majority support, NLRB General Counsel Charles Fahy responded that Board members "consider signed cards very strong evidence of the desire of those who signed the cards to have the union representation."¹²

By the late 1930s, however, Fahy recognized that employers' steadfast opposition to card certifications was creating serious procedural problems for the Board. In February 1938 Fahy asked regional NLRB attorneys to report on cases where employers had refused to recognize NLRB certifications based on authorization cards.¹³ In these disputes, employers challenged unions' claims of majority support "in practically all such cases . . . [and] argued that the employees were coerced and threatened by union officials or members in connection with the procuring of the applications for membership."¹⁴ Several NLRB officials believed that the questionable tactics of some union organizers had indeed contributed to problems over card certifications. Over-zealous union organizers, reported one NLRB attorney, "will

¹⁰. Approximately one quarter of all NLRB certifications between 1935–1939 were issued without secret ballot elections. See 1 NLRB ANN. REP. 1 (1936); 2 NLRB ANN. REP. 1 (1937); 3 NLRB ANN. REP. 1 (1938); 4 NLRB ANN. REP. 1 (1939); 5 NLRB ANN. REP. 1 (1940).
¹¹. Report of the Special Conference Committee, 1935, (Feb. 13, 1936), in Special Conference Committee Folder (Hagley Museum and Library). The National Association of Manufacturers (NAM) demanded that "no certification should be made by the NLRB as to the representatives of employees except as the result of a secret election." "Proposed Amendments to the Wagner Act," As Approved by the NAM Employment Relations Committee, November 30, 1938. (NAM papers, Industrial Relations Department, Box 21, Hagley Museum and Library).
¹³. Letter from Samuel G. Zack, 4th region, NLRB to Charles Fahy, NLRB General Counsel (Feb. 18, 1938); letter from Edward Schneider, 1st region NLRB, to Charles Fahy, NLRB General Counsel, (Mar. 1, 1938); letter from Christopher W. Hoey to David A. Moscovitz (Feb. 18, 1938) in 25 Records of the NLRB, Records of the Legal Division, 1935-39, Assistant General Counsel Witt's Records (Box No. 1, National Archives). In 1948 former NLRB chairman Harry Millis, wrote: "[C]oercion by unions in the signing of cards undoubtedly occurred, though how extensive it was no one knows." HARRY A. MILLIS & EMILY CLARK BROWN, FROM THE WAGNER ACT TO TAFT HARTLEY 257 (1950). According to former Board chairman Lloyd Garrison, the NLRB's election procedures were "partly worked out by Regional Attorneys, based on their experience." Interview with Lloyd Garrison, Oral History Project (5 Columbia University Oral History Collection).
¹⁴. HARRY A. MILLIS & EMILY CLARK BROWN, FROM THE WAGNER ACT TO TAFT HARTLEY 257 (1950).
themselves sign application cards in the name of the employees without permission."\(^{15}\) Another official believed that "unions have not exercised great care in this matter. . . . In every case, I have found duplications in the membership cards, and frequently there are signed cards from persons who have never worked for the employer."\(^{16}\) The regional attorneys agreed that cases involving employers' refusal to recognize the validity of authorization cards had caused the Board "severe problems" which would be solved if it were to require secret ballot elections prior to certification.\(^{17}\) Thus, in 1938, after three years of "almost unquestioned reliance" upon authorization cards, several NLRB decisions expressed doubts about this method of nonelection certification.\(^{18}\)

Several high profile disputes, in which competing American Federation of Labor (AFL) and Congress of Industrial Organizations (CIO) unions claimed the support of the same group of workers, further undermined the legitimacy of card certifications.\(^{19}\) Although NLRB Chairman J. Warren Madden initially dismissed these cases as "almost wholly hypothetical and imaginary," by 1939 he supported new Board member William Leiserson's demand for elections in cases in which employers or rival labor unions contested unions' claims of majority support.\(^{20}\) In the midst of intense conservative attacks on the

---

\(^{15}\) Id.

\(^{16}\) Id.

\(^{17}\) Id.


\(^{19}\) For example, on June 21, 1938, in Shipowners' Association of the Pacific Coast, 7 N.L.R.B. 1002 (1938), the Board certified Harry Bridge's CIO-affiliated International Longshoremen's and Warehousemen's Union as the bargaining representative for the entire Pacific Coast shipping industry on the basis of the submission of signed authorization cards. The AFL and its affiliate, the International Longshoremen's Association, had demanded secret ballot elections on a port-by-port basis. See also Christopher L. Tomlins, The State and the Unions: Labor Relations, Law, and the Organized Labor Movement in America, 1880–1960, 176–77 (1985).

\(^{20}\) See Memo from J. Warren Madden to Franklin D. Roosevelt, President of the United States (Nov. 2, 1938) in Franklin Roosevelt NLRB Official Papers 716 (Box No. 3, Roosevelt Library). Madden claimed that these cases were, in most instances, "the invention of hostile newspapers and politicians." Id. The AFL supported mandatory elections in cases where craft unions requested separate bargaining units or employers requested elections when faced with the claims of rival unions. See J. Michael Eisner, William Morris Leiserson: A Biography 70 (1967). In 1939 the Board also allowed employers a limited right to petition for an election when faced with the conflicting claims of two or more unions. NLRB Rules and Regulations 1-3 (1939). After leaving the Board, Madden stated: "We started out . . . in rather informal ways, signature cards, and so on. But . . . very shortly we got down to the right basis, namely, a secret ballot." According to Madden, the NLRB "recognized that you can go out to a man and say, 'Will you sign this card for the union?' And he'll sign it to get rid of the person
Wagner Act and the NLRB, Madden recognized that secret ballot elections would provide legitimacy to the embattled Board’s certification procedures.\(^{21}\) Thus, in “a radical departure from past practice,”\(^{22}\) the Board ordered elections in four 1939 representation cases in which regional labor boards had certified unions without secret ballot elections.\(^{23}\)

Although it continued to certify unions on the basis of authorization cards in exceptional cases, with these four decisions the NLRB “voluntarily” abandoned authorization cards as a regular method of certification. When the 1947 Taft-Hartley Act wrote mandatory elections into law, Madden argued, it “was just confirming what we were already doing.”\(^{24}\) Even in the late 1930s, however, NLRB attorney Joseph Rosenfarb feared that mandatory elections may provide hostile employers with “a means of sabotaging the bargaining process through dilatory tactics.”\(^{25}\)

II. “A TWILIGHT ZONE OF UNCERTAINTY”: EMPLOYERS AND ELECTIONS, 1939–1947

A twilight zone of uncertainty, however, seems to exist as to how far employers may carry through general propaganda to

---

who is asking him to do it. . . . It doesn’t mean very much.” Oral History with J. Warren Madden 130–31 (Labor-Management Documentation Center, Cornell University).

21. Memo from J. Warren Madden, supra note 20, at 716. This remains a powerful argument in the debate over labor law reform. Paul Weiler, the leading scholar of contemporary North American labor law, writes: “In the abstract, it is terribly compelling. It is hard to argue against the democratic procedure of a secret ballot.” WEILER, supra note 8, at 38.

22. Louis Stark, Labor Board Quits Card Certification, N.Y. TIMES, July 14, 1939, at 5. Leiserson had supported mandatory certification elections while chairman of the National Mediation Board. The Times labor correspondent, Louis Stark, a close associate of Leiserson’s, wrote that Leiserson “is believed to have been responsible” for the change in certification policy. Id. By 1939, however, many NLRB officials questioned the wisdom of authorization card certifications. Id.

23. See Armour & Co. of Delaware, 13 N.L.R.B. 1143 (1939); Alpena Garment Co., 13 N.L.R.B. 720 (1939); Armour & Co., 13 N.L.R.B. 567 (1939); Cudhay Packing Co., 13 N.L.R.B. 526 (1939). In all four cases Board member Edwin Smith dissented, arguing that the NLRB should continue to certify unions on the basis of documentary evidence.


deter their workers from associating themselves with an outside union.

Paul Douglas, 1939

After the Board decided to certify bargaining representatives largely on the basis of secret ballot elections, a vital question remained to be settled: what role should employers play in the election process? During the early years of NLRB elections, the Board insisted that employers maintain "strict neutrality" during representation campaigns. If the employer became involved in the election process in any way, argued David Saposs, head of the NLRB's Division of Economic Research, he was "injecting himself into matters that are supposed to be the sole concern of the workers." Predictably, management organizations insisted that the NLRB's policy violated employers' constitutional right to free speech. As part of an extensive campaign in the late 1930s targeting both Congress and public opinion, the National Association of Manufacturers, the Chamber of Commerce, and various congressional conservatives proposed free speech amendments to the NLRA. Employers' associations protested that since the passage of the Wagner Act, "the Labor Board has steadily whittled down the right of management to express its opinion." The Board, they maintained, believed that "the position of management was so much more powerful than labor's that intimidation necessarily followed the mere expression of an opinion by an employer.

NLRB officials consistently defended the policy of strict neutrality, denying that it in any way interfered with employers' First

27. See Statement of David Saposs, March 12, 1937, in RG 25, Records of the NLRB, Records of the Assistant General Counsel, Records Relating to the Preparation of the Board's Case, 1939-1940 (Box No. 2, National Archives).
28. Id.
29. In the late 1930s, employers' strategy on NLRB elections changed from one of arguing that employers should have the right to advise their workers on questions of unionization to one of lobbying in defense of employers' constitutional right of free speech. See, e.g., Letter from J.C. Argetsinger, president and general counsel, Youngstown Sheet and Tube Co., to Hoyt A. Moore (May 8, 1939); letter from Tower, secretary, American Iron and Steel Institute, to Hoyt A. Moore, (May 8, 1939) in American Iron and Steel Institute papers, Files of Hoyt A. Moore and Chester A. McLean (Box 92 Re: Proposed Amendments to the NLRA, Hagley Museum and Library).
30. ROSENFARB, supra note 25, at 176.
31. INTERNATIONAL STATISTICAL BUREAU, PROTECTING MANAGEMENT'S RIGHTS IN LABOR RELATIONS (1945).
32. Id. at 106 (emphasis added).
Amendment rights. Paul Herzog, chairman of the New York State Labor Relations Board, argued that none "of the decisions so far issued . . . raise any such constitutional question. Once the constitutional issue is eliminated, the question becomes, as the lawyers say, a legislative one." 33 In the early 1940s, however, the Supreme Court decided that employer speech was indeed a constitutional question, and in two landmark cases the Court ruled that employers could discuss unionization with their employees so long as their speech was not "coercive." In its 1941 ruling, NLRB v. Virginia Electric \\& Power Co., 34 the Court upheld the Board's right to restrict employers' election speech in certain circumstances, but not by the doctrine of strict neutrality. 35 In the 1943 American Tube Bending Co. case, 36 the circuit court upheld employers' right to distribute antiunion letters to the homes of their employees during representation campaigns, and the United States Supreme Court agreed. 37 After the Board's defeat in the Tube Bending case, Assistant Solicitor General Paul Freund denied the NLRB's requests to take free speech cases to the Supreme Court, and that, argued NLRB attorney Mozart Ratner, was the "kiss of death" for the Board's policy of employer neutrality. 38 And although the Court restated the limits of permissible management communication in American Tube Bending Co., many antiunion employers interpreted the decision as an open invitation to engage in aggressive electioneering. 39

Employer associations immediately recognized the significance of these rulings expanding the boundaries of legal electioneering. The International Statistical Bureau (ISB) argued that Virginia Electric \\& Power and American Tube Bending Co. decisions "permit employers to deviate from complete neutrality to allow free expression so long as their actions do not coerce their employees." 40 The ISB also recog-

33. Paul Herzog, Address at the National Conference on Civil Liberties, New York City (Oct. 14, 1939) in Paul Herzog Papers, Speeches, and Articles, 1937-1940 (Box 3 Truman Library).
34. 314 U.S. 469 (1941).
35. Id. at 479-80. NLRB attorney Mozart Ratner argued that the Virginia Electric \\& Power ruling "left the Board in a hole." Ratner recounted that "employer free speech was one of the bitterest experiences at the Board. . . . The courts ran with employer free speech from the beginning." Oral History interview with Mozart Ratner 38-39, 41 (Labor-Management Documentation Center, Cornell University).
36. NLRB v. American Tube Bending Co., 134 F.2d 993 (2d Cir. 1943).
39. The American Tube Bending Co. case disrupted "[t]he comparative quiet that had pervaded this section of the legal front since the Virginia Power decision. . . ." Free Speech, Ltd., BUS. WK., July 1, 1944 at 93.
40. INTERNATIONAL STATISTICAL BUREAU, supra note 31, at 20.
nized the legal limits of managerial participation in representation campaigns, however, and cautioned that the employer had overstepped the bounds of permissible conduct "where [he] took the attitude that the election was a contest between himself and the union." The management journal The Labor Trend, in contrast, openly advocated vigorous electioneering: "The entire process of setting up machinery for determining whether a union really represents a majority of the company's workers is a bargaining tool par excellence for industry." The journal lamented, however, that "through ignorance, most employers neglect to use this tool; they thereby forgo a splendid opportunity for themselves."

Contrary to The Labor Trend's conclusion, a 1946 NLRB survey investigating management behavior revealed after the American Tube Bending Co. decision that many employers were already participating aggressively in representation elections. In December 1946 NLRB Director of Field Division Oscar Smith asked regional directors to report on the effect of employers' "Tube Bending activity" (i.e., letters and speeches expressing employers' opposition to unionization during NLRB elections) on the outcome of representation campaigns. Almost without exception, the regional directors reported that employers frequently opposed unions and that antiunion electioneering influenced significantly the outcome of representation elections. One regional director wrote that employers engaged in "Tube Bending electioneering" in approximately half of the NLRB elections in his region, and that this activity "often turns the scale against the union." Another NLRB examiner reported that "employers are indicating their views to employees prior to elections with increasing frequency. . . . It is obvious that [employer electioneering] is having a substantial effect in combating union organization."

Antiunion electioneering exercised its greatest impact in those regions of the country where unionization was weak. Most regional

41. Id.
42. The Election, LAB. TREND, July 9, 1946.
43. Id.
44. See Memo from James Shields, Director, 18th Region NLRB, to Oscar Smith (Jan. 17, 1947), in RG 25, Records of the Assistant General Counsel, Records Relating to the Preparation of the Board's Case, 1939-1940 (Box No. 2, National Archives).
45. See Memo from James Shield, supra note 44.
46. Memo from George J. Bott, Director of the 13th Region, to Oscar S. Smith (Jan. 8, 1947), in RG 25, Records of the Assistant General Counsel, Records Relating to the Preparation of the Board's Case, 1939-1940 (Box No. 2, National Archives).
47. Memo from Stanley Liebling, Examiner, to John J. Carmody, Acting Regional Director, NLRB (Jan. 8, 1947), in RG 25, Records of the Assistant General Counsel, Records Relating to the Preparation of the Board's Case, 1939-1940 (Box No. 2, National Archives) (emphasis added).
Directors agreed that where "a plant has not been previously organized, an American Tube Bending letter probably will carry greater weight with the employees and be more likely to influence their decision." Unions frequently encountered previously unorganized workplaces in the South, and many southern employers engaged in virulent antiunion electioneering. Because of the aggressive content of southern employers' antiunion propaganda, one NLRB official advised: "The Board must consider these letters and speeches with the eyes and minds of the worker who is on the receiving end, rather than with those of a lawyer sitting... in Washington." Expressing the sentiments of many NLRB officials, another regional director wrote that he had "no doubt that Tube Bending electioneering... has the effect of inducing employees... to bring about the defeat of the union," and concluded that if such electioneering were legal, "then certainly no additional legislation specifically allowing such conduct is necessary or desirable." Whether or not it was "necessary or desirable," six months after the NLRB's investigation into employer opposition, Congress passed the Taft-Hartley Act, thus creating "additional legislation" specifically allowing for antiunion electioneering during representation campaigns.

Court rulings were not alone in deregulating employers' speech; in the immediate postwar period, a number of NLRB decisions allowed employers a greater voice in the election process than that provided for by Virginia Electric & Power and American Tube Bending Co. The 1946 midterm elections had produced Republican majori-

48. Memo from Thomas P. Graham, Director, 19th Region, to Oscar S. Smith (Jan. 7, 1947), in RG 25, Records of the Assistant General Counsel, Records Relating to the Preparation of the Board's Case, 1939-1940 (Box No. 2, National Archives).

49. Memo from Paul Styles, Director, 10th Region, NLRB, to Oscar S. Smith (Jan. 13, 1947), in RG 25, Records of the Assistant General Counsel, Records Relating to the Preparation of the Board's Case, 1939-1940 (Box No. 2, National Archives).

50. Id. Styles reported that he found evidence of employer participation in election campaigns "in most cases in Georgia. South Carolina always has interference." Id.

51. Memo from Hugh E. Sperry, Director of 21st Region, to Oscar S. Smith, (Jan. 14, 1947), in RG 25, Records of the Assistant General Counsel, Records Relating to the Preparation of the Board's Case, 1939-1940 (Box No. 2, National Archives).

52. In a number of representation disputes in the mid-1940s, the Board ruled that employers' antiunion speeches, letters, and pamphlets were not in themselves unlawful interference with workers' rights of self-organization where the employer had otherwise not engaged in unfair practices. See, e.g., Bausch & Lomb Optical Co., 72 N.L.R.B. 132 (1947); Fisher Governor Co., 71 N.L.R.B. 1291 (1946); Arkansas-Missouri Power Corp., 68 N.L.R.B. 805 (1946); M.T. Stevens & Sons Co., 68 N.L.R.B. 229 (1946). The Board justified this new policy by arguing that the labor relations climate of the late 1940s was very different from that of the mid-1930s. In Detroit Edison Co., 74 N.L.R.B. 267, 279 (1947), for example, the Board argued, "This is 1947, not 1935; in the interim employees have learned much about protecting their own rights and making their own choices with the full facts before them."
ties in both the House and Senate for the first time since 1930, and in this conservative climate, the Board desperately wanted to avoid rulings that its political enemies could attack as undemocratic restrictions on employers' constitutional right to free speech. As a result of these decisions, the Bureau of National Affairs concluded that several months prior to the enactment of Taft-Hartley, the NLRB "has apparently abandoned one of its fundamental theories...the idea of management's fictional unconcern about the agent with whom it may have to deal on wages, hours, and working conditions."

By the mid-1940s, court decisions and NLRB rulings providing employers greater electioneering rights had already contributed to the defeat of numerous organizing drives, especially in the South and Southwest where employers frequently conducted aggressive anti-union campaigns. Even before the enactment of Taft-Hartley, unions were winning significantly fewer elections than they had won in the late 1930s. In industries such as textiles, furniture, leather, and mining, which were largely concentrated in the South and Southwest, unions won only about sixty percent of NLRB elections. And in response to postwar Board decisions and court rulings expanding management electioneering, as many who opposed the new policy had predicted, employers "began to push this new opportunity of defeating unionism to the limit."

III. TAFT-HARTLEY: "A NEW BILL OF RIGHTS FOR MANAGEMENT"

Employer associations and their conservative congressional allies had campaigned vigorously for a free speech amendment to the NLRA since the late 1930s. With the enactment of the Labor-Management Relations [Taft-Hartley] Act in June 1947, they finally succeeded. Section 8(c) of the Taft-Hartley Act states:

54. One cannot, of course, attribute unions' declining success rates in NLRB elections in the 1940s and 1950s exclusively to employers' vigorous antiunion electioneering. Unionization campaigns in the South and Southwest, in particular, encountered serious obstacles for a complex variety of political, economic, and cultural reasons. However, NLRB officials, academics, and labor leaders believed that employers' electioneering influenced the outcome of representation elections. Employers' organizations apparently agreed: they devoted significant resources in the 1940s and 1950s to educating their membership on management electioneering rights.
55. From April-June 1944, outside unions won only 12 out of 20 elections in the furniture industry, 14 out of 22 elections in the leather industry, 17 out of 38 elections in the mining industry, and 29 out of 46 elections in the textile industry. NLRB ELECTIONS HIT A PEAK, BUS. Wk., Sept. 30, 1944, at 108.
The expressing of any views, arguments, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any provisions of this act, if such expression contains no threat of reprisal or force or promise of benefit.57

Most conservatives lauded section 8(c) as a necessary corrective to NLRB's "one-sided" policy on employer speech.58 Supporters of collective bargaining, in contrast, considered the free speech provision one of Taft-Hartley's most objectionable features.59 As a result of the free speech provision, former NLRB member William Leiserson argued that "no one who really believes in the original Wagner Act has any business staying on administering the new law."60

After the enactment of Taft-Hartley, the NLRB immediately expanded the scope of permissible employer electioneering. In several 1948 decisions, the Board reversed its 1946 Clark Brothers "captive audience" doctrine and ruled that employers could compel workers to listen to antiunion speeches on company time and property so long as the speeches contained no "threat of reprisal or force or promise of benefit."61 The Board stressed that this reversal in policy was a direct result of Taft-Hartley's free speech provision. "The language of Section 8(c) and its legislative history," the Board argued in dismissing a complaint against the Babcock & Wilcox Co., "make it clear that the doctrine of the Clark Brothers case no longer exists" as a basis for an unfair labor complaint.62 In the Mylan-Sparta case, also in 1948, the Board ruled that management statements which prophesied that the employer might have to close down the plant for economic reasons, if

58. The joint Senate-House conference on Taft-Hartley (which had a "pro-employer" majority) reported that section 8(c) deprived the NLRB of "a lot of latitude and is desirable because, in the past, the Board has effectively prevented employers expressing their opinions even in the face of provocative and unfair union propaganda." Analysis of H.R. 3020 as amended and approved by Senate-House Conference (May 29, 1947), in Clark Clifford Papers (Labor-H.R. 3020-Taft-Hartley Bill—Analysis, Box 7 Truman Library).
60. Letter from William Leiserson, to William Isaacson, (June 26, 1948); in William Leiserson Papers (Box 40 (Taft-Hartley), Box 28 (NLRB), State Historical Society of Wisconsin).
62. Babcock & Wilcox Co., 72 N.L.R.B. 1256 (1948). The employer held four "captive audience" antiunion meetings immediately prior to a representation election which the union lost.
the union won the representation election, were not coercive under Taft-Hartley. The Board also overturned the results of several certification elections because of "coercive" statements made by union organizers during pre-election campaigning, thus illustrating the full extent in the transformation in NLRB policy under Taft-Hartley. The management broadsheet Executive's Labor Letter reported that "these decisions make it clear that the NLRB will uphold the employer's right to conduct an anti-union campaign."

In the late 1940s, however, the moderately "pro-labor" Herzog NLRB still sought to strike a balance between workers' free choice and employers' free speech. In the 1948 General Shoe Corporation case, the Board ruled that the employer's intensive electioneering created an oppressive environment in which the intimidation of workers was inevitable, even though the campaign itself did not violate Taft-Hartley. Even in General Shoe, the NLRB emphasized the limited nature of state intrusion in election campaigns, arguing that it would set aside elections "only in the rare 'extreme case' where an employer's activities so far exceeded an appeal to his employees' reasoning faculties" that a free election would be impossible.

Employer associations immediately attacked the General Shoe decision. One management publication wrote:

The green light the Taft-Hartley Act gave to free speech for employers has changed colors. Caution is now the watchword for management when discussing unions and unionization. . . .

[The Board] has uncorked a controversy on an old subject:

63. Mylan-Sparta Co., 78 N.L.R.B. 144 (1948). Distinguishing between a "threat" and a "prediction," the Board argued that the employer's statements did not include threats to use his economic power to fulfill the prophecy. Id.

64. In G.H. Hess Inc., 82 N.L.R.B. 463 (1949), for example, the International Ladies' Garment Workers' Union (ILGWU) won the election by a two-to-one margin, but the NLRB refused to certify the union after the company complained that an ILGWU organizer had threatened a worker with loss of her job if she voted against the union. Id. The NLRB ruled that the organizer's statements were a "threat of economic reprisal" and thus the election did not "reflect the employees' free and uncoerced choice of bargaining representatives." Id. National Labor Relations Board, N.L.R.B. S ets Aside Election Because of Union Organizer's Pre-Election Threats, April 1, 1949, in Clark Clifford Papers (Box 10 National Labor Relations Board, Truman Library).

65. EXECUTIVE'S LABOR LETTER, May 25, 1948.


67. Id. During the General Shoe dispute, the employer had called workers into his office in small groups and read them an intemperate antiunion address, while plant supervisors visited workers at their homes to further distribute antiunion propaganda. Paul Herzog, The National Labor Relations Board Today, Address before the Commonwealth Club of California, April 23, 1948, in Paul Herzog Papers (Box No. 5 Speeches and Statements, 1947–1950, Truman Library).
'How far can an employer go in trying to influence a union election?' 68

Despite their discontent with General Shoe, in the late 1940s, most employers acknowledged that NLRB decisions were progressing, in the words of Paul Herzog, "in one direction"—management's. 69 Employers' publications openly celebrated the change in the conduct of representation elections under Taft-Hartley. The Labor Trend commented that "the most important single achievement of the Taft-Hartley law . . . has been the restoration to employers of the right to address their employees." 70 "Compared with the tongue-tying restraints which used to prevail," the journal argued, "the present law amounts to a new bill of rights for management." 71 Other management publications printed extensive lists of what employers could say under Taft-Hartley's free-speech provision, and encouraged employers to familiarize themselves with, and take full advantage of, their expanded rights of participation in representation elections. 72

More important than section 8(c)'s impact on NLRB policy was its role in stimulating aggressive antiunion electioneering. The House sponsor of the new labor law, Representative Fred Hartley of New Jersey forecast in 1948 that section 8(c) would have a significant effect upon employer behavior:

The original NLRB had distorted the intent of Congress . . . to such an extent that the simplest expression of opinion had come to be considered evidence of coercion by the employer. Most employers so far have proceeded cautiously under the new law, with a vivid recollection of what had happened in previous years, but I predict that this particular provision will prove increasingly beneficial in time to come. 73

Other commentators believed that many employers were already exercising their new election rights to considerable advantage. The Labor Trend argued that "during the first year of the Taft-Hartley law, employers have been making wide use of their newly restored rights," and it pointed to "dozens of cases in which management has openly fought against unions in representation elections." 74

---

71. Id.
74. *Management Rights, supra* note 70.
War Labor Board member Ed Witte, a leading authority on labor policy, claimed that while section 8(c) had made only slight changes, if any, in the legal rights of employers, "[t]he spelling out of their right in the Taft-Hartley Act, however, has had the effect of making many employers much bolder" in resisting unionization. As Witte indicated, antilabor employers viewed section 8(c) as a powerful ally in the fight against unionization.

Unquestionably, section 8(c)'s greatest impact was on employers' behavior in the South. By the late 1940s, Operation Dixie, the CIO's ill-fated "holy crusade" to extend industrial unionism to the South, had stalled, largely because of employers' aggressive opposition during NLRB elections. Southern employers won dozens of representation elections in the late 1940s and early 1950s through aggressive campaigning during the pre-election period.

Labor economist Emily Brown wrote: "Most important in the South . . . has been the increased use of 'the right of free speech' by employers to intervene frankly in elections." Regarding this antilabor electioneering, Brown posed the question, "Where should a line be drawn to prevent the antilabor employer from using his position of influence to interfere with the right of employees to decide for themselves as to organization?"

The NLRB and the courts grappled with this question throughout the 1940s and 1950s, and consistently decided in favor of further deregulating employer electioneering.

National statistical evidence on unions' declining success rates in representation elections corroborated reports on the effectiveness of employers' antilabor electioneering in the South. During the first year of Taft-Hartley's operation, unions won 72.5% of NLRB elections, fewer than in any year under the Wagner Act. In the first twelve years of NLRB certification under the Wagner Act, unions won over eighty-one percent of representation elections. Union election victories fell by over ten percent between 1946 and 1949, and by 1950 unions "testified almost universally" that organizing had become more difficult as a result of Taft-Hartley's free speech provision.

76. For a full account of employer electioneering from a union's perspective, see ISADORE KATZ, TAFT-HARTLEYISM IN SOUTHERN TEXTILES: FEUDALISM WITH A NEW FACE (1950).
77. EMILY CLARK BROWN, NATIONAL LABOR POLICY: TAFT-HARTLEY AFTER THREE YEARS, AND THE NEXT STEPS 33-34, 49 (1950).
78. Brown reported that section 8(c) had transformed the entire "climate" of union organizing. Id. See also HERBERT NORTHROP & GORDON BLOOM, GOVERNMENT AND LABOR; THE ROLE OF GOVERNMENT IN THE UNION-MANAGEMENT RELATIONS 77 (1963).
80. BROWN, supra note 77, at 49.
However, in the years immediately following the enactment of Taft-Hartley, the full impact of the new rules governing representation elections was not yet apparent. "Pro-labor" members constituted a majority on the NLRB, and full employment ensured that trade unions continued to make overall gains in membership. Nevertheless, Ed Witte identified certain "reasons to believe that [Taft-Hartley] will prove more restrictive and injurious [to labor] in the not very distant future." These reasons included a "pro-employer" majority on the NLRB and a drastic change in the relatively prosperous postwar economy. Although the profound change in economic conditions did not occur until the 1970s, the "pro-employer" majority on the NLRB arrived shortly after Dwight Eisenhower's 1952 presidential election victory.

IV. "THE JIG IS UP": THE EISENHOWER NLRB AND ANTIUNION ELECTIONEERING

If the Board is going to be pro-employer [on certification issues], the jig is up.

NLRB Legal Division, 1935

In late 1952 Robert Taft complained about the "distinctly pro-labor" Herzog NLRB. But, Taft explained, the newly-elected Republican administration would fix the Board's bias: "We are going to . . . [select] two additional members who are not completely pro-labor." In fact, the early retirement of Chairman Herzog in summer

82. See id.; Edwin Witte, Recent Labor Legislation of Interest to Labor, Address at the Summer Labor Institute of the Institute of Industrial Relations of the University of California, Pacific Grove, Cal. (July 9, 1948) in Clark Clifford Papers, Labor Developments Under Taft-Hartley, 1947-49 (Box 8 Truman Library); see also Hywell Evans, Government Regulation of Industrial Relations 84-85; Wayne Morse, Industrial Peace and the Taft-Hartley Act, in PROCEEDINGS OF THE NEW YORK UNIVERSITY FIRST ANNUAL CONFERENCE ON LABOR 596 (Emanuel Stein ed. 1948). Fear of future repression during a period of high unemployment also, in part, explains labor's extreme reaction to the enactment of Taft-Hartley.
84. NLRB Legal Division, Analysis of the 1935 Wagner Labor Bill in RG 25, Records Relating to the Legal Division, 1935-39 (Correspondence File, National Archives).
85. Letter from Robert A. Taft, United States President, to C.E. Stevenson, President Youngstown Steel Tank Co. (Dec. 18, 1952), in Robert A. Taft, Sr. Papers (Box 1236, Labor, Library of Congress).
86. Id.
1953 allowed Eisenhower to appoint three new members to the labor board—Albert Beeson, Philip Rodgers, and new chairman Guy Farmer—the first Republican appointments to the NLRB.87 During the Roosevelt and Truman administrations, the courts and Congress assumed the leading role in deregulating employer speech during representation campaigns; in the Eisenhower years, the NLRB usurped this role.

By the mid-1950s, the new labor board had overturned many of the Herzog NLRB's policies on employer electioneering, and in the process transformed Taft-Hartley's free speech provision into a powerful weapon for employers intent on defeating union organizing campaigns. In the landmark 1954 Blue Flash decision, the Board reversed a long established NLRB policy and ruled that an employer could "interrogate" his workers about their union activities if no implication of reprisal or benefit were involved.88 Under intense criticism from the labor movement and its academic allies,89 Chairman Farmer responded that although the term "interrogation" had "sinister implications, seeming to suggest a sort of rigorous third degree," this questioning was, in many cases, "no more than a casual friendly inquiry by a minor supervisor directed to one of his personal friends."90

The Farmer NLRB reversed the Herzog Board's policy on permissible employer electioneering on several other crucial issues. In Livingston Shirt Corp., the labor board rejected the "Bonwit Teller doctrine" (in which the Herzog NLRB had ruled that an employer who made a "captive audience" speech must give the union the right to respond)91 and ruled that "an employer does not commit an unfair labor practice if he makes a pre-election speech on company time and premises and denies the union's request for an opportunity to reply."92

87. Starting on March 2, 1954, the reconstituted NLRB, which Taft-Hartley enlarged from three to five members, had a three to two "pro-employer" majority.
90. Guy Farmer, Free Speech in Labor Relations, Conference on Current Problems in Labor Relations and Arbitration, Cornell University, April 13, 1955, in RG 25, Speeches of NLRB Chairmen, Other Board Members, and of the General Counsel, 1934–1962 (Box No. 2, National Archives) (emphasis added). In subsequent decisions, the Farmer N.L.R.B. elaborated its policy in support of employers' interrogation of workers. For example, in the 1955 Mall Tool Co. case, 112 N.L.R.B. 171 (1955), the Board ruled that under Taft-Hartley both employers and unions were free to use "legitimate methods of electioneering and that discussing unionization with workers on an individual basis "did not exceed the bounds of permissible campaigning." Id. (emphasis added).
According to Farmer, the *Livingston Shirt* decision was "the result of a natural and inevitable evolution of the law relating to employer speeches..." The ruling simply brought [the Board's] decisional doctrine in line with the First Amendment and section 8(c) of the [Taft Hartley] Statute." As a result of *Livingston Shirt*, however, employers gained exclusive access to "the single most effective pre-election forum."

Supporters of unionization argued that the evidence of employer intimidation in *Livingston Shirt* was overwhelming, and they believed that the Farmer NLRB had seized upon the case simply to overturn the *Bonwit Teller* doctrine at the first available opportunity. In common with several of the new labor board's landmark decisions on employer speech, *Livingston Shirt* involved a southern company whose employees had not previously been unionized. Employers and their congressional allies justified the new policy on employer electioneering by pointing out that the labor movement was significantly stronger in the 1950s than it had been when Congress passed the Wagner Act; the NLRB, they argued, should adapt labor policy to accommodate this transformation. However, many of the important free speech disputes ruled on by the Herzog and Farmer NLRBs involved southern companies that had operated nonunion since the passage of the Wagner Act and which conducted aggressive antiunion campaigns to defeat union organizing efforts in the late 1940s and 1950s. Whatever the merits of employers' arguments concerning the need to subject powerful unions to the same legal restrictions as powerful employers, the NLRB's new electioneering policy most affected vulnerable unions that were attempting to organize new groups of workers, often in hostile regions of the country.

---

93. Farmer, supra note 90.
95. Willard Wirtz reported "an extraordinary combination of employer and community pressures upon the employees." *Id.* at 107.
97. Other Farmer NLRB decisions expanding the boundaries of employer speech included the 1953 *Chicopee Manufacturing* decision, 107 N.L.R.B. 106 (1953), which established the "prophecy doctrine" allowing employers to state that a vote to unionize might result in relocation of the plant; the *Esquire, Inc.*, decision, 107 N.L.R.B. 1238, 1239 (1954), establishing employers' right to say that they would refuse to bargain with the union even if it won the upcoming election, because this statement was "merely an expression of the employer's legal position"; and the *Southwestern Co.* decision, 111 N.L.R.B. 805 (1955), upholding employers' right to tell alien workers that they might be deported if they voted for a communist union.
The Farmer NLRB's decisions allowed employers a freedom to
electioneer greater than ever envisaged by the authors of the Wagner
Act. The cumulative effect of the new Board's reinterpretation of
section 8(c)'s intent was, according to one labor expert, "that the law
has become, in this area, a matter of relatively little significance and
that economic power has re-emerged as the decisive factor in deter-
mining the result of representation elections." During the 1950s, the
labor board recognized employers' electioneering as a "legitimate"
weapon with which to fight unionization, albeit one subject to state
regulation, and thus the transformation of NLRB certification from
"factual determination" to electoral contest was more or less complete.
Union victories in certification elections, moreover, had slumped to an
all-time low. In 1959 unions won only sixty-three percent of NLRB-
supervised elections, lower than any year on record since the passage
of the Wagner Act.

V. CONCLUSION

The possibilities for communicating forcefully and legally [dur-
ing election campaigns] are almost endless.

Union-avoidance manual, 1980

In his 1939 congressional testimony opposing amendments to the
Wagner Act, NLRB Chairman J. Warren Madden stressed the need
for employer impartiality during the organizing and certification pro-
cesses. Madden argued that the major provisions of the NLRA "estab-
lish a plain and precise standard of conduct which an employer must

98. For a comprehensive account of labor policy under the Farmer NLRB, see JAMES A.
GROSS, BROKEN PROMISE: THE SUBVERSION OF U.S. LABOR RELATIONS POLICY, 1947–
1994, 92-121 (1995). Predictably, employers' publications openly welcomed this transformation
in NLRB policy, and devoted considerable space to educating their members about new "Legiti-

99. Wirtz, supra note 94, at 103. Throughout the Eisenhower years, the courts exercised
an additional conservative influence on the Board's interpretation of section 8(c). For example,
in the 1954 case NLRB v. F.W. Woolworth Co., 214 F.2d 78 (6th Cir. 1954), the U.S. Court of
Appeals overturned an NLRB ruling against an employer who held a captive audience speech in
violation of his own no-solicitation rule and subsequently refused the union's requests to address
workers on company premises during working hours. Id. at 85. The court ruled that ordering an
employer who exercised his right of free speech to provide an equal opportunity to the union
would limit the application of the right of free speech and nullify the purpose of that provision as
found in the act's legislative history. Id.

100. By 1961, union victories had fallen to fifty-six percent. Just seven years earlier, unions
had won seventy-three percent of NLRB elections.

101. JAMES L. DOUGHERTY, UNION-FREE LABOR RELATIONS: A STEP-BY-STEP
GUIDE TO STAYING UNION FREE 118 (1980).
maintain in his relations with employees."

"Broadly speaking," Madden continued, "they require that the employer shall adopt an attitude of strict neutrality toward the efforts of his employees to organize for collective bargaining." Madden emphasized this critical point: "Upon this fundamental principle—that an employer shall keep his hands off the self-organization of employees—the entire structure of the act rests. Any compromise or weakening of that principle strikes at the roots of the law."

In the years after Madden's testimony, in the context of tremendous employer and congressional hostility toward the NLRB, the courts and the embattled labor board increasingly protected the employers' right to free speech rather than the workers' right to select bargaining representatives free from employer interference. In doing so, as Chairman Madden had predicted, they undermined the "entire structure" upon which the NLRA was constructed. Today, many labor scholars and activists believe that certification elections, rather than facilitating workers' free choice of bargaining representatives, actually inhibit that choice. Indeed, in July 1999 Business Week reported that during representation campaigns, "the reality is...a disturbing trend of management coercion that inhibits [workers' choice of bargaining representatives]." And in the political climate of the late 1990s, the "substantial reform" of NLRB certification procedures called for by labor experts seems less likely than ever.


103. Id.

104. Id. (emphasis added).

