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NEW FREEDOM FOR EMPLOYER COMMUNICATIONS

by Cynthia Milne*

Sections 8(c) and 7a of the National Labor Relations Act ("the Act") provide the employer's right to communicate with employees regarding unionization and the collective bargaining agreement, and the statutory schemes governing company and employee relations. Three recent decisions by the National Labor Relations Board indicate that the Board's current position regarding employer communications to employees in the workplace will permit a more frank exchange of views, opinions and information than has been permitted in the past. Some areas of employer speech, however, remain restricted, reflecting the tension which has historically existed between

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1. Section 8(c) provides as follows:
   The expressing of any views, argument, 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 of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit. 29 U.S.C. § 158(c) (1982). The Supreme Court established in NLRB v. Gissel Packing Co., 395 U.S. 575, 617 (1969), that § 8(c) was enacted to "implement the First Amendment." For a comprehensive analysis of § 8(c) as it effects all areas of employer speech in the workplace, see Shaffer, Some Gray Areas of Employer Free Speech, 6 CREIGHTON L. REV. 39 (1972-73).

2. Section 7 provides as follows:
   Employees shall have the right to self-organization, to form, to join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization in section 158(a)(3) of this title. 29 U.S.C. § 157 (1982).


the constitutional and statutory recognition of an employer's right to freely communicate with employees so long as the communication is noncoercive, and the Board's concern with enforcing the mandate of section 8(a)(1). The Board's previous efforts to reconcile this conflict by restricting employer communications have resulted in conflict in Board decisions and a general repression of employer speech. The recent decisions, however, suggest that the Board, with court approval, is discarding its sometimes paternalistic role as protector of helpless employees incapable of evaluating any communication from the employer, and permitting the "give and take" exchange of views which is the heart of first amendment protection.

I. **Rossmore House, Inc. and Employer Interrogation of Employees**

Despite statutory and judicial authority to the contrary, the Board's position for a number of years has been that any interrogation of an employee by an employer is a per se violation of the Act. In *Rossmore House, Inc.*, the Board held that a manager's interro-

5. Section 8(a)(1) provides as follows: "It shall be an unfair labor practice for an employer . . . to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in section 7 . . . ." 29 U.S.C. § 158(a)(1) (1982).

In Getman, *Labor Law and Free Speech: the Curious Policy of Limited Expression*, 43 Md. L. Rev. 4 (1984), he notes that the restriction of employer (and union) free speech is contrary to the usual enforcement of first amendment privileges, which is based on a recognition of "the value of diversity of expression and the ability of the hearer, as consumer, to make an intelligent choice." *Id.* at 12. Instead, in regard to labor relations, the courts have adopted a stance which "rests ultimately on the assumption that free choice is fragile—that it will be undermined by the type of robust debate encouraged by the first amendment in other areas." *Id.*

6. "Labor relations is the one area of law in which the policies of the first amendment have been consistently ignored, reduced, and held to be outweighed by other interests." Getman, *supra* note 5, at 4. Getman also discussed the areas, particularly picketing and boycotting, in which first amendment rights of unions have been restricted.

7. Getman notes that the cases limiting employer speech "manifest a common, stereotyped, and paternalistic vision of workers as people whose decisions are not made on the basis of ideas and persuasion but on the basis of fear, coercion and discipline." Getman, *supra* note 5, at 19-20. The Board has at times recognized that the paternalistic role is not necessarily desirable. See, e.g., Eagle Comtronics, Inc., 263 N.L.R.B. 515, 520, 111 L.R.R.M. (BNA) 1005 (1982) ("[I]t does a disservice to . . . employees to suggest that they are incapable of assessing for themselves the validity of their employer's remarks . . . ."). *Id.*

8. *E.g.*, Anaconda Co., 241 N.L.R.B. 1091, 1094, 101 L.R.R.M. (BNA) 1070, 1094 (1979) (casual questioning of employees who were union members by supervisors who knew them by their first names violated the act); Paceco, 237 N.L.R.B. 399, 399, 99 L.R.R.M. (BNA) 1544, 1545 (1978), *vacated in part and remanded in part*, 601 F.2d 180 (5th Cir. 1979), supplement decision, 247 N.L.R.B. 1405, 103 L.R.R.M. (BNA) 1327 (1980) (asking an employee why he supports the union is coercive even if no threats are made).

gation of an employee was not an 8(a)(1) violation per se, but that "all the circumstances" should be examined to determine if the interrogation tended to "restrain, coerce, or interfere with rights guaranteed by the Act." The Administrative Law Judge in Rossmore House found that both the manager and the owner had unlawfully interrogated the employee in violation of section 8(a)(1). The Judge relied on the rule of PPG Industries, in which the Board held that "an employer may [not] lawfully initiate questioning about employees' union sentiments [even] where the employees are open and known union supporters and the inquiries are unaccompanied by threats or promises." The Board reversed the Judge and overruled the PPG Industries line of cases at least in regard to open and active union supporters. At the same time, the Board indicated that it was readopting the "all the circumstances" test previously asserted in Blue Flash Express, Inc. which had been abandoned in PPG.

Despite its rejection of the per se rule of PPG Industries, the Board's holding in Rossmore House continues to restrict an employer's statutory and first amendment rights to communicate to employees by instituting an "all the circumstances" test only when the employer's interrogation is directed at known union supporters. The Board's own stated rationale for its decision in Rossmore House does not require so restrictive a holding. The Rossmore House Board relied in part on the Third Circuit's approach in Graham Architectural Products v. NLRB, in which the court emphasized the need to recognize an employer's first amendment right to communicate with employees before assessing the nature of the employer's speech

10. 269 N.R.B. at 1177, 116 L.R.R.M. (BNA) at 1026. In Rossmore House, the employer's manager asked one of the employees, a known union supporter, about possible unionization and told the employee that both he and the owner would fight the union "to the hilt." Id. at 1176-77, 116 L.R.R.M. (BNA) at 1025-26.
11. Id. at 1176, 116 L.R.R.M. (BNA) at 1025.
13. Id. at 1147, 105 L.R.R.M. (BNA) at 1436.
Because production Supervisors and employees often work closely together, one can expect that during the course of the workday they will discuss a range of subjects of mutual interest, including ongoing unionization efforts. To hold that any instance of casual questioning concerning ongoing union sympathies violates the Act ignores the realities of the workplace. Moreover, . . . [i]f section 8(a)(1) of the Act deprived the employers of any right to ask non-coercive questions of their employees during such a campaign, the Act would directly collide with the Constitution.
Nothing in *Graham Architectural Products* suggests that the distinction between permissible and impermissible questioning of employees is to be determined simply on the known union sentiments of the interrogee. Instead, the Third Circuit endorsed a definition of permissible interrogation fully in line with the constitutional basis of section 8(c). Furthermore, when the Ninth Circuit enforced *Rossmore House*, it did not enforce the narrow rule espoused by the Board. Instead, the court enforced the "all-the-circumstances" test, newly resurrected but not completely implemented by the Board, which the Ninth Circuit had for the most part upheld since the days of *Blue Flash Express*.

Despite the clear indication by the Third and Ninth Circuits that an employer's freedom of speech should be restricted only if the speech violates section 8(a)(1), the narrow ruling of *Rossmore House* has been upheld in subsequent Board cases involving interrogation of employees whose union sentiments are unknown.


17. *Id.* Such questioning is not a per se violation which would ignore the employer's first amendment right, but is illegal only when it is actually coercive.


19. 760 F.2d 1006 (9th Cir. 1985). The Board ruled that only when the employee was a known union supporter, was the employer's interrogation of an employee not a per se violation of the Act.

20. We conclude that the Board acted within its province in returning to the flexible all-the-circumstances test which recognizes that an employer's questioning of an employee's union views is not necessarily coercive and may arise during casual conversation. Employers often mingle with their employees, and union activities are a natural topic of conversation. A standard which considers the totality of the circumstances surrounding an employee interrogation is a realistic approach to the enforcement of section 8(a)(1). It is a standard that is consistent with the Act because the Board and the administrative law judges can determine, on a case-by-case basis, whether all the fact demonstrate coercive behavior.

21. *Id* at 1009.

22. *See* NLRB v. Brooks Camera, 691 F.2d 912, 919 (9th Cir. 1982) (supervisor did not violate Act by stating that he had heard employees wanted a union, that he knew who the instigator was, and asking what the employees' grievances were); Lippincott Indus. v. NLRB, 661 F.2d 112, 114 (9th Cir. 1981) ("Interrogation of employees is an unfair labor practice when, under all the circumstances, the interrogation reasonably tends to restrain or interfere with the employees in the exercise of their free rights") (emphasis added); Penasquitos Village, Inc. v. NLRB, 565 F.2d 1074, 1080, (9th Cir. 1977) ("Employer interrogation . . . is not deemed per se unlawful . . . . Some circumstances, such as, for example, an express reassurance by the employer of no retaliation or a history of free and open discussion of union activities, may preclude any possibility of coerciveness.").

23. *E.g.*, Sears, Roebuck & Co., 274 N.L.R.B. No. 2 at 2, 118 L.R.R.M. (BNA) 1347, 1348 (1985) (a nontthreatening statement of a supervisor to an open and active union supporter was noncoercive); Meadow Crest, Inc., 272 N.L.R.B. No. 181 at 2, 117 L.R.R.M. (BNA) 1484, 1485 (1984) (interrogation was unlawful because employee was not open and active
cases, the Board has found that the mere questioning of an employee whose union sentiments were unknown to the interrogator was sufficient to result in an 8(a)(1) violation, without an examination of all the circumstances to determine whether the interrogation was, in fact, coercive or threatening. Instead, the Rossmore House decision created a two-part test which looks to the identity of the interrogee rather than to the nature of the speech itself.

The statutory and constitutional bases of an employer's right to free speech, as well as judicial opinion and logic, clearly mandate that the Board should abandon the first part of this test and adhere solely to the second step, inquiring into the known sympathies of the employee only as part of a case by case examination of all the circumstances regarding the legality of employer interrogations. This approach to employer interrogation is evidenced in a recent case, Michael's Markets of Canterbury, in which the Board found that an employer's direct inquiry as to which employees were former union members did not constitute impermissible interrogation. Despite the fact that the employer's president was at the meeting and no assurances against reprisals were given, the majority determined that the management consultant who asked the question was merely trying to show that having union representation would provide no guarantee of job security as evidenced by the number of former union members who had lost their union jobs. Based on all the circumstances surrounding the question, the panel majority determined that the interrogation was non-coercive despite the presence of an "open union supporter".

union supporter); Premier Rubber Co., 272 N.L.R.B. No. 76 at 7, 117 L.R.R.M. (BNA) 1406, 1406 (1984) (innocent questioning of a known union supporter was not a violation of § 8(a)(1)).

23. Chairman Dotson has on more than one occasion protested against the Board's reluctance to fully enforce the "all-the-circumstances" test reaffirmed in Rossmore House. For example, in N & T Assoc., 273 N.L.R.B. No. 105, 118 L.R.R.M. (BNA) 1517 (1984), Chairman Dotson believed his colleagues were construing Rossmore House too narrowly. In that case, assuming that the interrogee was not an "open union supporter," the Board should still have assessed "all the circumstances" in determining whether or not the questioning "reasonably tends to interfere with rights guaranteed by the Act." Id. at 4 n.8, 118 L.R.R.M. (BNA) at 1518 n.8. Chairman Dotson found that the question asked of the interrogee did not restrain, coerce or interfere with the employee's rights. Id.

24. 269 N.L.R.B. 1176, 1176-77, 116 L.R.R.M. (BNA) 1025, 1026. Part I of the new test inquires into the known union sympathies of the interrogee. If an employee's union sentiments are unknown to the employer, any interrogation of the employee by the employer is a per se violation of § 8(a)(1). If the interrogee is a known union supporter, only then is the question asked whether, under all the circumstances, the interrogation tends to coerce, threaten or unduly promise benefits to the employee.

25. 274 N.L.R.B. No. 105, 118 L.R.R.M. (BNA) 1476 (1985) (Chairman Dotson and Member Hunter comprising the majority and Member Dennis dissenting in relevant part).

26. Id. at 6, 118 L.R.R.M. (BNA) at 1478.
ence of employees whose union sentiments were unknown to the employer.27

II. **W & F Building Maintenance Co. and Employer Expressions of Opinion**

Section 8(c) expressly deals with an employer's first amendment right to express his opinion, views, or arguments.28 The test for impermissible opinion speech is to determine whether or not the employer communication contains a threat of reprisal or promise of benefit.29 The Board has in the past few years condoned a wide variety of isolated negative remarks by supervisors indicating their negative opinion of unions.30 All of these communications, however, oc-

27. The Board also found no violation in regard to letters which were distributed to employees blaming unionization for the decline in working conditions at the writer's previous place of business. The Board held that "[t]he exercise of free speech in these campaigns should not be unduly restricted by narrow construction. . . . Merely apprising employees of the experiences and opinions of others is in no way a prediction or threat of retaliatory conduct by an employer." *Id.* at 3, 118 L.R.R.M. (BNA) at 1477.


29. *Id.*

30. *E.g.,* Haynes Motor Lines, Inc., 273 N.L.R.B. No. 221 at 2, 118 L.R.R.M. (BNA) 1351, 1351 (1985) (terminal manager's comments that "he was a company man and did not want the Union" and that "it would be fine if the employees wanted the Union, but they should not follow [a co-worker] as a leader because he was organizing the Union out of revenge because the Company did not give him a salesman's job," was found protected by § 8(c)); Ralph's Toys, Hobbies, Cards & Gifts, Inc., 272 N.L.R.B. No. 36 at 10, 117 L.R.R.M. (BNA) 1260, 1261 (1984) (manager was merely stating his displeasure and did not violate § 8(a)(1) when he told them, "It's too bad you guys had to start all this shit; we had a good thing going"); Greensboro News Co., 272 N.L.R.B. No. 28, at 1-2 n.2, 117 L.R.R.M. (BNA) 1290, 1291 (1984) (a manager's statement that employer and "employees could not just sit and talk about financial or family problems if we had a union, that everything would just have to go through proper channels" did not violate section 8(a)(1) of the Act); Agri-International, Inc., 271 N.L.R.B. 925, 117 L.R.R.M. (BNA) 1127, 1128 (1984) (employer's plea to employees to "see this situation through without a union" in order to provide [the employer] 'a chance to succeed and you won't be sorry'" was protected free speech and did not violate § 8(a)(1)); Gerber Co., 270 N.L.R.B. 1235 n.3, 116 L.R.R.M. (BNA) 1274, 1275 (1984) (Company's statement that "it could guarantee employees work for 52 weeks" was not viewed as a promise of benefits to the employees as opposed to what the union could offer them); Peck, Inc., 269 N.L.R.B. 451, 456, 116 L.R.R.M. (BNA) 1204, 1205 (1984) (memorandum read to employees by president stating that union membership could be dangerous and might subject the employees to "dues, fees, fines" and other financial obligations was not sufficiently coercive or restraining to violate § 8(a)(1)); Mid-South Refrigerated Warehouse Co., 268 N.L.R.B. 1229, 116 L.R.R.M. (BNA) 1305 (1984) (no violation of section 8(a)(1) where supervisor called each employee into his office to advise him individually of a pay raise and told two of them that he hoped that they would "be for the Company" and "stay away" from the union); Fisher-Haynes Corp., 262 N.L.R.B. 1274, 1274 n.2, 110 L.R.R.M. (BNA) 1432, 1432 (1982) (vice president's remarks of "shock and disappointment" upon learning that employees were involved in the union did not violate the employees' rights); Burlington Indus., 257 N.L.R.B. 712, 722, 107 L.R.R.M. (BNA) 1598, 1602 (1981), enforced in relevant part, 680 F.2d 974 (4th Cir. 1982) (a supervisor's statement to an employee that "the Union is
 occurred during pre-election campaigns.31

In W & F Building Maintenance Co.,32 the Board confronted the question of an employer’s right to express its opinion regarding an incumbent union. In that case, in response to an employee’s inquiry, a supervisor told the employee and his co-worker that unions were a waste of money, that the employees’ security lay in doing good work and that even the union could not keep them from getting fired if their work was unsatisfactory. The Board upheld the Judge’s ruling that such unfavorable personal opinions did not violate section 8(a)(1) in the absence of unfair labor practices.

The Board is yet to consider a case in which an employer offers a negative opinion of an incumbent union to employees, which opinion is neither the personal opinion of a supervisor nor isolated. For example, no Board decision has condoned the practice of a unionized employer who systematically tells each new employee that, in the employer’s opinion, the union is a waste of the employee’s money, the employee does not need the union to get ahead in the company, and that the employee’s advancement depends on his job performance and not on the union.

There is Board precedent in pre-election campaign cases for such formal exercise of the employer’s right to offer its opinion.33 In going to brainwash you” was only an expression of opinion and not a violation). Compare Peabody Coal Co. v. NLRB, 725 F.2d 357, 364 (6th Cir. 1984) (a supervisor’s statements, although jocular in nature, violated section 8(a)(1) of the Act because they hinted that the employees’ jobs or seniority would be jeopardized if the union won. “After warning of the possible consequences of unionization . . . he went on to inquire whether [the employee] had signed a union authorization card and to ask what it was that [the employee] expected to gain from union membership.” Id. at 361).

31. For a history of the efforts of the Board and courts to balance the employer’s right to free speech and the employee’s right to organize, see Comment, Employer Free Speech: Threats, Opinions, Predictions of Dire Consequences—the Advent of a Clearer Standard, 18 S.D.L. REV. 441 (1973). This comment examines the cases and conflicts which gave rise to NLRB v. Gissel Packing Co., 395 U.S. 575 (1969), establishing the test still used to determine the lawfulness of employer pre-election campaign communication. For an examination of the Gissel standard in relation to pre-election campaign predictions by an employer, see Note, Employer Free Speech—Use of the Gissel Guidelines in Determining Predictions or Threats, 74 W. VA. L. REV. 382 (1972).


33. See cases cited supra note 30. Board opinions regarding “serious harm” communications by employees in pre-election campaigns also indicate that pro-company speech is not a per se violation of the Act. See, e.g., Butler Shoes New York, Inc., 263 N.L.R.B. 1031, 1032, 117 L.R.R.M. (BNA) 1225, 1226 (1982) (employer speeches including the statements “[Please don’t] let someone else decide your future” and “I personally feel that, as of right now, you have a good job and a good place to work” found not in violation of Act); Hasbro Indus., Inc., 254 N.L.R.B. 587, 592-93, 106 L.R.R.M. (BNA) 1131, 1132 (1981), enforced in relevant part, 672 F.2d 978 (1st Cir. 1982) (a document stating, inter alia, that “NO UNION can get you more than you can get for yourself” and “NO UNION can get for you more than
these pre-election cases, the Board appears to look at the context of the employer's speech, a test fully in keeping with the Ninth Circuit test in *Rossmore House, Inc.* and the language of section 8(c).\textsuperscript{34}

If the content of a unionized employer's communication to new employees stays within the confines of noncoercive speech, the systematic nature of the communication should not violate section 8(a)(1), as systematic pro-company indoctrination of employees during a union organizing campaign has been held not to be a per se violation of section 8(a)(1). For example, in *A & E Stores, Inc.*\textsuperscript{35}, the Board found no violation of section 8(a)(1) even though the employer maintained a practice of meeting with employees throughout the campaign regarding the employer's position on organization.\textsuperscript{36} The Judge held that the communication neither made apparent the employer's desire as to how individual employees should vote nor indicated employer displeasure at employee support for the Union. The Board upheld the Judge's decision, finding that while the employer's actions might in some cases amount to coercion, they did not establish coercion per se.\textsuperscript{37}

The pre-election campaign cases clearly establish the policy that systematic pro-company speech to employees should be permitted so long as it is not coercive or threatening and does not interfere with

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34. A test which examines the context of a speech rather than turning solely on an often hair-splitting interpretation of semantics, is the key to a proper determination of the validity of pre-election campaign communications. Shaffer, supra note 1, at 51. To fail to examine the context of a speech has resulted in decisions which "draw the line far short of the First Amendment guarantee of free speech." *Id.* at 48. "[I]n the face of a union campaign, the employer is not required to remain silent, but may pursue his position with the same aggressiveness and vigor as the union, provided he refrains from threats, coercion and promises." *Id.* The same considerations are equally applicable to both employer and union efforts to assert their positions after a union has won the election.


36. *Id.* at 3, 117 L.R.R.M. (BNA) at 1394. Approximately two or three times a week the supervisors would hold conferences with their employees, during which they would discuss with the employees literature explaining the employer's belief that employees should not join the union. Although the Judge found that at least one of the employees felt "harassed" by the meetings with the employer, the harassment consisted only of her annoyance at being called to the meetings and did not amount to harassment perpetrated by the employer to impede her free exercise of her rights. *Id.* at 13-14, 117 L.R.R.M. (BNA) at 1396.

37. *Id.* at 3-4, 117 L.R.R.M. (BNA) at 1394. Cf., *Blue Flash Express, Inc.*, 109 N.L.R.B. 591, 34 L.R.R.M. 1384 (1954). ("[T]he fact that . . . interrogation is systematic does not, in itself, impart a coercive character to the interrogation." *Id.* at 593, 34 L.R.R.M. (BNA) at 1385.)
the employees’ right to unionize.\textsuperscript{38} Section 8(c) alone is sufficient to provide the basis for permitting non-coercive speech to new employees in which the employer expresses its opinion that the new employees do not need the union to have successful careers, if the employer makes no attempt to keep the employee out of the union and takes no reprisal if the employee does join the union.\textsuperscript{39} The Board has ample opportunity to find such speech permissible when this issue is presented to it in the future.

III. \textit{Indiana Cabinet Co. and Employer’s Right to Initiate The Idea of Decertifying A Union}

The Board’s position regarding an employer’s conduct in regard to decertification petitions is broadly stated. The conduct is permissible as along as “the preparation, circulation, and signing of the petition constituted the free and uncoerced act of the employees concerned.”\textsuperscript{40} This rule, however, has been interpreted not only to prohibit employer initiation of a decertification petition, but to forbid even the suggestion by an employer that such a petition be circulated.\textsuperscript{41} In short, for an employer to volunteer the suggestion of a decertification petition was per se to coerce the employees. For example, in \textit{Craftool Manufacturing Co.},\textsuperscript{42} the employer violated section 8(a)(1) by its sponsorship of a decertification petition when one

\textsuperscript{38} See Livingston Shirt Corp., 107 N.L.R.B. 400, 405, 33 L.R.R.M. (BNA) 1156, 1157 (1953), in which the Board found that “[a] basic principle directly affecting any consideration of this question is that section 8(c) of the Act specifically prohibits us from finding that an uncoercive speech, \textit{whenever delivered} by the employer, constitutes an unfair labor practice.” (emphasis added).

\textsuperscript{39} “The very essence of Section 8(c) is that the employer has the right to present his side of the question to his employees.” Shaffer, supra note 1, at 42.

\textsuperscript{40} Eastern States Optical Co., 275 N.L.R.B. No. 58, at 5, 119 L.R.R.M. (BNA) 1107, 1109 (1985) (quoting KONO-TV Mission Telecasting, 163 N.L.R.B. 1005, 1006, 65 L.R.R.M. (BNA) 1082 (1967); \textit{accord}, University of Richmond, 274 N.L.R.B. No. 182 at 2, 118 L.R.R.M. (BNA) 1579 (1985) (“[A]n employer may lawfully assist employees in the revocation of their authorization cards when employees initiate the idea of withdrawal and have the opportunity to continue or stop the revocation process without the interference or knowledge of the employer.” (footnote omitted)); Best Western Executive Inn, 272 N.L.R.B. No. 202, 117 L.R.R.M. (BNA) 1487 (1984) (the Board found no violation when the employees requested help with decertification, even though the company’s lawyer met with the employees in a meeting room provided by the employer free of charge); Quinn Co., 273 N.L.R.B. No. 107, 118 L.R.R.M. (BNA) 1239 (1984) (“an employer does not violate the Act by providing accurate information regarding the mechanics of decertification, in response to questions from its employees”).

\textsuperscript{41} The Board’s narrow interpretation of an employer’s rights in regard to decertification petitions, has been colorfully characterized as follows: “For many years, management executives were careful to whisper when discussing decertification.” Krupman and Rasin, \textit{Decertification: Removing the Shroud}, 30 Lab. L.J. 231 (1979).

of its high management officials initiated the suggestion of circulating a petition. Although in this case the employer also encouraged employee signatures and engaged in other conduct to assist the decertification procedure, the Administrative Law Judge appears to have found the employer's initiation of the idea significant. 43

More recently, the Board in *Weisser Optical Co.* 44 found that an employer violated the Act by implanting the idea of decertification in the employees' minds when it requested one of its employees to sponsor a decertification effort and gave him a booklet explaining the Board's decertification procedure. 45 Because the idea of decertification originated with the employer, the Board found that the employer could not rely on a petition signed by 18 of 22 bargaining unit employees to justify a refusal to bargain. 46

In *Browning-Ferris Industries of Pennsylvania, Inc.*, 47 the Board adopted the opinion of the Administrative Law Judge who squarely confronted the question of whether the mere mention of decertification by an employer, without more, is sufficient to violate the Act. During the 90 to 60 day period in which a decertification petition could be filed with the Board prior to the expiration of the collective bargaining agreement, the employer's operations manager asked one of the employees if he had thought about decertifying the union, and briefly explained what decertification might mean to the employees. The Judge determined, without analysis of the employer's 8(c) right, that the unsolicited discussion of decertification violated section 8(a)(1) because the circumstances "convey[ed] the implication that the employer was using his leverage to influence the employee on a question of union representation." 48

In a second incident in the same case, another supervisor, in response to an employee's question regarding the company's poor competitive position, stated that he disfavored dealing with the Union and suggested that the employees contact the Board if they had considered decertifying the union. 49 The Judge, not surprisingly,
given the innocuous circumstances of the exchange, did not find that the supervisor's statements were coercive. He held instead that the employer's suggestion violated the Act by leading the employees to believe their continued support of the Union was futile. The Judge's justification for this holding is instructive:

It is clear that Medrick [the supervisor] was very troubled by BFI's wage scale, which he laid at the Union's door. Getting rid of both these wage scales and their cause—the Union—was at the top of his list. With one-half of the open period remaining in which to decertify the Union, it was too tempting not to suggest it without being too pushy, which Medrick was wise enough to know could backfire. His hope was that there was enough griping about the Union in the shop that his idea would bear fruit. Medrick's statements tended to interfere with employees' Section 7 rights, and, hence, are violative of section 8(a)(1) of the Act.

The Judge's ruling and rationale overlook the obvious implication that section 8(c) would be unnecessary if employers only made statements indicating that they favored unions and wanted their employees to belong to one. The provision assumes that any employer statement needing the provision's protection would necessarily be one which the employer hoped would "bear fruit" in the form of dissuading employee support of the union. Consequently, an employer's desire not to have a union is insufficient to constitute interference or coercion, and a per se rule based solely on such dislike, absent other coercive factors, is a misreading of section 8(a)(1). Second, the per se rule overlooks the fact that unions may in some cases not be likely to inform employees of their right to decertify. Hence, employer information to that effect merely informs the employees of a statutory right of which they may otherwise remain ignorant. Finally, it is unlikely that an employee's mere knowledge of his statutory rights during a meeting with union stewards.

50. Id. at 1 n.1, 119 L.R.R.M. (BNA) at 1123 n.1.
51. Id. at 8, 119 L.R.R.M. (BNA) 1123 (footnote omitted).
52. "An employer is not required to favor unions or even have a neutral attitude toward them in order for his speech to be protected under 8(c)." Shaffer, supra note 1, at 59.
53. The need for lawful participation by employers in decertification cases is discussed by Krupman and Rasin, supra note 41, at 233. These authors point out that, "[c]ertainly an incumbent union will not provide disgruntled employees with any assistance. In fact, Board decisions have upheld union expulsion of members who initiate decertification proceedings." Id. See also Shaffer, supra note 1, at 56, who notes that "[o]ne would not expect the union to tell the employees of any adverse consequences of union adherence, and there should be nothing wrong with the employers doing so." Id.
54. To deny employers the right to inform their employees of their statutory rights "assumes employee ignorance which it is unlawful to correct." Getman, supra note 5, at 10.
will cause him to feel that union participation is futile simply because such knowledge came from the employer. In any event, such risks are inherent when both sides in a dispute have first amendment rights.

The Board's position defining employer initiation of a decertification petition presented a contrast to its longstanding rule that an employer can permissibly bring to the employees' attention their right to resign from a union and to revoke their dues checkoff authorizations "so long as the communication is free from any threat or coercion." The seminal Board cases on an employer's right to give information to employees are Perkins Machine Co. and Cyclops Corp. In Perkins the employer sent each employee a letter informing him of the fifteen-day "escape" period provided in the contract. The letter also contained assurances that the company did not care if the employee acted on the information, and the anonymous delivery of the information precluded the employer from determining if any employee used the enclosed revocation forms. The Board found that absent other evidence of coercion, the communication did not violate section 8(a)(1). Most important for later cases was the fact that the information sent by the company had not been requested by any employee.

In Cyclops, the employees asked the manager of industrial relations how to withdraw their union dues checkoff authorizations. Subsequently, the employer enclosed this information as well as the employee's anniversary date for calculating the escape period in each employee's paycheck. The Board found no violation of section 8(a)(1) despite its acknowledgement that "any notification by a company to its employees of their right to withdraw from a union carries with it at least the notion that the company 'wants' the employees to withdraw." Even in the absence of specific assurances that no reprisals would be taken against the employees if they did not resign, the distributed information was found not to be threatening.

A recent case from the Board reaffirmed the principles of Perkins and Cyclops, suggesting that the Board was in a position to re-

56. 141 N.L.R.B. 697, 52 L.R.R.M. (BNA) 1276 (1963), enforced, 326 F.2d 488 (1st Cir. 1964).
60. Id. at 858, 88 L.R.R.M. (BNA) at 1500.
examine an employer's freedom to communicate noncoercively statutory rights to employees. In *Peoples Gas Systems, Inc.*, the employer sent the employees at one of its facilities a letter informing them of the terms and effective dates of the dues checkoff provision contained in the collective bargaining agreement. The Board held that the employer's letter did not violate the Act, citing the rule of *Cyclops* and *Perkins*. The Board stressed that an employer could distribute this information on its own initiative, based on the employee's rights embodied in section 7 of the Act, absent circumstances suggesting coercion, intimidation or anti-union animus.

In light of the Board's new willingness to expand employer rights to free speech in the workplace, it could be anticipated that the Board would break from the per se rule prohibiting an employer from informing employees that the union could be decertified. The basis for such a decision was clearly available in previous Board decisions; there is little distinction between an employer's *Cyclops*/*Perkins* rights and the right to inform employees that they can decertify a union. In addition to employees' general right to be informed of their rights under section 7, section 8(c) at the least permits an employer to publish to employees, in a non-coercive, non-threatening manner, the contents of the labor relations statutes. Furthermore, there seems to be no reason to permit employers to engage in non-coercive communications to employees prior to elections but prohibit them from communicating statutory rights to employees after unionization. If anything, an employer's speech, if it is to be censored at all, should be more restricted before an election. During that time the Board seeks to preserve the "laboratory conditions" conducive

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62. The employer's letter included a copy of a letter for the employees to send to the union discontinuing their dues checkoff authorization cards and submitting their resignation. The employer's letter requested the employees to mail a copy of this letter to the employer. The employer's letter contained assurances that the employee's decision to revoke their dues checkoff authorizations and to resign from the union was a matter of personal choice, free of company or union pressure. *Id.* at 4-6, 119 L.R.R.M. (BNA) at 1150.
63. *Id.* at 11, 119 L.R.R.M. (BNA) at 1151-52.
64. *See supra* note 1.
65. The "laboratory conditions test" was formulated by the Board in *General Shoe Corp.*, 77 N.L.R.B. 124, 21 L.R.R.M. (BNA) 1337 (1948), as follows:
   
   In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees. It is our duty to establish these conditions; it is also our duty to determine whether they have been fulfilled. When . . . the requisite laboratory conditions are not present . . . the experiment must be conducted over again.

*Id.* at 127, 21 L.R.R.M. (BNA) at 1341; accord *Dal-Tex Optical Co.*, 137 N.L.R.B. 1782, 50
to providing a free and uncoerced choice to employees. After an election the union has been established as the employees' bargaining representative and must be dealt with by the employer.66

The Board finally broke with the past in Indiana Cabinet Co.,67 in which the panel majority ruled in effect that employer initiation of the idea of decertification was no longer a per se violation of the Act. In this case, a supervisor approached two newly hired employees and stated that he had heard that they "were not satisfied with the Union, and advised them [that] they could file a decertification petition but the Company could not assist them."68 The majority found no violation,69 on the basis that the supervisor's statement was not a request that the employees initiate a decertification petition, and the statement occurred in a context free of employer unfair labor practices. The majority opinion cited to R.L. White Co., Inc.,70 which espoused the Perkins/Cyclops rule that employers could lawfully inform employees of their rights to revoke their dues checkoff authorization cards.71 The majority noted that the supervisor in Indiana Cabinet Co. did not attempt to learn whether the employees started an anti-union petition before specifically informing them that the company could not help them if they started one. The Board thus moved from its previous position prohibiting an employer from communicating statutory rights to its employees to a new rule that the employer can on its own initiative tell employees that they can decertify the union if the atmosphere is free of employer unfair labor practices and the employer refrains from any action compelling the

L.R.R.M. (BNA) 1152 (1962), enforcement denied, 325 F.2d 78 (5th Cir. 1963).


68. Id. at 9, 120 L.R.R.M. (BNA) at 1013.

69. The Board majority noted specifically that "we do not believe that [the supervisor's] mere informing of [the employees] about the procedure by which a union [decertification] could be circulated created a situation in which [they] would tend to feel peril if they refrained from circulating such a petition." Id. at 4, 220 L.R.R.M. (BNA) at 1012.


employees to actually sponsor such a petition. 72

IV. CONCLUSION

Section 8(c) was passed by Congress to ensure an employer's first amendment right to disseminate its views, opinions and arguments in a noncoercive manner to its employees, not only during an election campaign, but after a union is in place. The cases discussed above, Rossmore House, Inc., 73 W & F Building Maintenance Co., 74 and Indiana Cabinet Co., 75 indicate a move by the Board toward a more realistic view of the workplace. Rossmore House, Inc. 76 is a step in the right direction, based on the fact that supervisors and employees will, in the course of the workday, exchange questions and information regarding an election campaign. Nevertheless, section 8(c) should permit non-coercive, non-threatening inquiries regarding unionization even in regard to known union supporters. And while W & F Building Maintenance Co. 77 permits non-coercive negative opinions to be expressed by supervisors in isolated remarks about an incumbent union, the Board should rely on its own precedent, as well as on section 8(c), to permit an employer to give its opinion frankly to each new employee regarding what the employer feels the company can do for the employee without the union. Finally, the Board has held in Indiana Cabinet Co. 78 that an employer may inform employees of their right to decertify a union, bringing this area of employer communication in line with previous law permitting employers to inform employees of their statutory rights. These cases are examples of the Board's proper performance of its function of enforcing section 8(a)(1) without assuming an unwarranted role as arbitrary censor of free speech in the workplace.

72. Indiana Cabinet at 4, 120 L.R.R.M. (BNA) at 1012.
76. See supra notes 9-27 and accompanying text.
77. See supra notes 32-39 and accompanying text.
78. See supra notes 67-72 and accompanying text.