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RELEASING THE CAPTIVES: HOW THE NATIONAL LABOR RELATIONS BOARD CAN CORRECT THE ANOMALOUS CAPTIVE AUDIENCE MEETING DOCTRINE

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I. INTRODUCTION

During any type of election campaign, parties are willing to push boundaries to sell their platform to voters. Union elections are no different. Union election campaigns demand constant communication, motivation, pressure, and persuasion from both employees and employers. Because of the power disparity between employers—who control the economic fates of their workers, and the employees—who seek to unionize, the National Labor Relations Act ("NLRA" or "the Act") was implemented to protect workers from employer "interfere[nce] . . . , restrain[t], or coerc[ion]."[1] Yet, somehow, employers are lawfully permitted to call a meeting during paid working hours, demand employees attend, lock the employees in the meeting room, discipline anyone who tries to leave, espouse anti-union propaganda, and refuse to allow any questions or provide a pro-union perspective.[2]

The captive audience meeting is a nearly universal tool used by employers to fend off unionization efforts, and a blunt one at that.[3] Captive audience meetings are gatherings called by an employer during paid working hours during which an employer pushes its anti-union views on its employees.[4] Though the National Labor Relations Board ("NLRB" or "the Board") initially declared these meetings unlawful in 1946,[5] the

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1. 29 U.S.C. § 158(a)(1).

2. *See* Livingston Shirt Corp., 107 N.L.R.B. 400, 408-09 (1953) (holding that captive audience meetings are not unfair labor practices and that union supporters are not entitled to an opportunity to respond to their employer's speech); Litton Sys., Inc., 173 N.L.R.B. 1024, 1030 (1968) ("An employee has no statutorily protected right to leave a meeting which the employees were required by management to attend on company time and property to listen to management's noncoercive antiunion speech designed to influence the outcome of a union election"); Bonwit Teller, Inc., 96 N.L.R.B. 608, 622 (1951) (declining to rule on whether locking entrances and physically restraining employees from leaving is an unfair labor practice).

3. According to a study of union elections occurring from 1999-2003, 89% of employers utilized captive audience meetings when waging their campaigns against unionization. KATE BRONFENBRENNER, NO HOLDS BARRED THE INTENSIFICATION OF EMPLOYER OPPOSITION TO ORGANIZING 10 (Economic Policy Institute, Briefing Paper #235, 2009).

4. Alan Story, *Employer Speech, Union Representation Elections, and the First Amendment*, 16 BERKELEY J. EMP. & LAB. L. 356, 414-15 (1995).

5. Clark Bros. Co., Inc., 70 N.L.R.B. 802, 805 (1946).

Board reversed course in fairly short order in 1953.[6] Ever since the Board deemed captive audience meetings lawful, employers have not been shy in utilizing them.[7]

The Board asserts these meetings are simply a valid, legal use of employer speech that is necessary to carry its message to workers, and that the NLRA already protects workers against threatening or coercive employer speech.[8] Yet, the Board's decision to deem captive audience meetings lawful has been met with continual resistance.[9] Opponents of captive audience meetings have argued that they are inherently coercive and threatening, pointing out that being locked in a room with the people who pay your wages is hardly a mere discussion of viewpoints.[10] Now, opponents of captive audience meetings have a powerful ally on their side.

Jennifer Abruzzo, General Counsel for the NLRB ("the General Counsel"), released a memorandum in April of 2022 declaring her intent to petition the Board to reverse course and declare captive audience meetings unlawful under the NLRA.[11] The memorandum, which came on the heels of Amazon's controversial use of captive audience meetings to prevent unionization of their warehouses,[12] derided captive audience meetings as a form of lawful coercion that is entirely inconsistent with the rest of labor law jurisprudence and the intent of the NLRA.[13]

This Comment argues that the General Counsel is correct, and that the Board must act to bring this aberration back within the purpose of the Act to protect workers from legal coercion. First, Section II provides background to lay the foundation upon which the current legal landscape for captive audience meetings stands. Next, Section II briefly discusses the history of how the originally unabashedly pro-labor NLRA was eroded by pro-management lobbying and legislation. It then summarizes

6. *Livingston Shirt Corp.*, 107 N.L.R.B. at 408-09.

7. BRONFENBRENNER, *supra* note 3, at 13.

8. Adam Doerr & Jon Anderson, *Commentary: NLRB Seeks to Reduce Company Speech About Unions*, MO. LAWS. MEDIA (May 5, 2022), https://molawyersmedia.com/2022/05/05/commentary-nlrb-seeks-to-reduce-company-speech-about-unions/.

9. *See generally* Charles J. Morris, *Freeing the Captives: How Captive-Audience Meetings Under the NLRB Can Be Controlled*, 69 ADMIN. L. REV. 869, 869-71 (2017).

10. Roger Hartley, *Freedom Not to Listen: A Constitutional Analysis of Compulsory Indoctrination Through Workplace Captive Audience Meetings*, 31 BERKELEY J. EMP. & LAB. L. 65, 69 (2010).

11. Memorandum from Jennifer Abruzzo, Nat'l Lab. Rels. Bd. Gen. Couns., to All Reg'l Dirs., Officers-in-Charge, and Resident Officers of the Nat'l Lab. Rels. Bd., on the Right to Refrain from Captive Audience and Other Mandatory Meetings (Apr. 7, 2022) [hereinafter Abruzzo Memo].

12. Noam Scheiber, *Mandatory Meetings Reveal Amazon's Approach to Resisting Unions*, N.Y. TIMES (Feb. 21, 2022), https://www.nytimes.com/2022/03/24/business/amazon-meetings-union-elections.html?searchResultPosition=1.

13. Abruzzo Memo, *supra* note 11.

the history of captive audience meetings: how they were initially deemed unlawful, the Board's subsequent reversal, and how this reversal mirrored the hijacking of the NLRA's initial purpose by pro-management forces. Finally, Section II discusses the current legal environment surrounding captive audience meetings and the General Counsel's crusade against them.

Section III of this Comment argues for a ban on mandatory captive audience meetings. It focuses on the inherently coercive nature of the meetings and how this coercive nature is in diametric opposition to the intent of the Act. Section III also discusses why an employer's right to free speech is already sufficiently protected through a litany of other means. Finally, Section IV provides a short conclusion finding that the original intent of the NLRA and Supreme Court precedent demand a ban on mandatory captive audience meetings.

II. BACKGROUND

The New Deal era spawned an unprecedented and unmatched amount of social and economic reforms.[14] Among President Franklin Delano Roosevelt's initial reforms was the National Industrial Recovery Act ("NIRA"), a predecessor to the NLRA.[15] Though the NIRA was ultimately held unconstitutional by the Supreme Court, it laid the groundwork for Senator Robert Wagner to will the NLRA into law.[16] This new legislation, also called the "Wagner Act," improved upon the NIRA and forcefully asserted workers' rights in an attempt to regulate the temperature of an increasingly hostile labor environment.[17]

This Section proceeds with a history of the staunchly pro-worker early days of the NLRA and the ensuing backlash by pro-employer forces. Though the history of the NLRA is rich with vital developments that have impacted workers' rights, the role of the federal government in workers' lives, and various areas of constitutional jurisprudence, this Section seeks only to provide a foundation for understanding why it is vital for the Board to put an end to coercive captive audience meetings.

14. *President Franklin Delano Roosevelt and the New Deal*, LIBR. OF CONG., https://www.loc.gov/classroom-materials/united-states-history-primary-source-timeline/great-depression-and-world-war-ii-1929-1945/franklin-delano-roosevelt-and-the-new-deal/.

15. SETH HARRIS ET AL., MODERN LABOR LAW IN THE PRIVATE AND PUBLIC SECTORS 41 (Carolina Academic Press, 3rd ed. 2021).

16. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 550-51 (1935).

17. HARRIS ET AL., *supra* note 15, at 42.

A. A Brief History of the NLRA

In the decades preceding the NLRA's adoption, the labor relations climate in the United States was rife with violence and unrest.[18] Before the 1938 passage of the Fair Labor Standards Act, workers had very few guaranteed labor rights.[19] As a result, employers took advantage of the brutally hostile legal landscape for workers and their vulnerability.[20] Courts used criminal and civil charges such as conspiracy, antitrust, and vagrancy as cudgels against workers attempting to assert even their most basic rights against employers.[21]

A lack of legal rights and recourse for workers combined with emboldened employers who were rarely made to answer for their actions created a tinderbox for violent confrontations. Deadly clashes between striking workers and furious employers became an epidemic across the country. In the early 1930s, dozens of people were killed and hundreds were injured in incidents across the country.[22]

Tension across the United States increased as unions gained popularity but still maintained no legal rights. The resulting violence eventually became untenable. In 1933, President Roosevelt enacted the NIRA in an attempt to ease the turmoil and assist the unions struggling to guarantee workers' rights.[23] This legislation, however, was fool's gold for workers. Though it finally gave employees a statutory right to organize and bargain collectively without interference from employers, the law lacked an enforcement mechanism.[24] Without any threat of reprisal from the government, many employers simply ignored the law and continued their old ways.[25] The NIRA finally went out with a whimper when the Supreme Court deemed it unconstitutional over Commerce Clause concerns just two years after its passage.[26]

The sole upside of the NIRA's shortfalls was that the legislation created an appetite for a labor relations law that could last. Unions were enjoying an upswing in public approval, but Congress's lack of motivation created

18. Ahmed White, *Industrial Terrorism and the Unmaking of New Deal Labor Law*, 11 NEV. L.J. 561, 562 (2011).

19. *See* Samuel Fleischman, *The History Behind the NLRA, America's First Modern Labor Law*, EMERGENCY WORKPLACE ORG. (Mar. 26, 2021), https://workerorganizing.org/the-history-behind-the-nlra-americas-first-modern-labor-law-1145/.

20. White, *supra* note 18, at 563.

21. *Id.*

22. *Id.* at 574.

23. *Labor Unions During the Great Depression and New Deal*, LIBR. OF CONG., https://www.loc.gov/classroom-materials/united-states-history-primary-source-timeline/great-depression-and-world-war-ii-1929-1945/labor-unions-during-great-depression-and-new-deal/.

24. HARRIS ET AL., *supra* note 15, at 41.

25. *Id.*

26. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 551 (1935).

difficult conditions for adopting legislation.[27] New York Senator Robert Wagner of New York made passing this kind of legislation his sole focus.[28] In 1935, Congress finally passed the NLRA, often referred to as the "Wagner Act."[29] The Wagner Act was a massive win for labor. In the words of the first Chairman of the NLRB, the "hope was that [Wagner's] law would make American working men free by permitting them to join forces with their fellow workmen instead of [forcing them to stand] alone and insignificant."[30] With this hope, legislators declared their intent to remedy the "inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association" through Section 1 of the Act.[31]

In the Act's attempt to empower workers, the NLRA was tremendously favorable to labor. The headlining provision granted workers the right to form unions, bargain collectively, and engage in other types of mutual aid and protection free from employer interference.[32] However, unlike its predecessor, the NLRA had teeth.[33] It declared a number of employer actions to be unfair labor practices, violations of the Act which were to be remedied by the newly formed National Labor Relations Board.[34] Chief among these declarations was Section 8(a)(1), which made it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7."[35] Perhaps most telling of the Act's intent was what it did not include—any provisions designating union actions as unfair labor practices.[36]

Despite the passage of this monumental legislation, employers continued to deprive workers of their rights guaranteed under the Act.[37] Employers were emboldened by the NIRA's recent demise and felt confident that the NLRA would soon meet the same fate. They thought that if they simply ignored the law, killing it in practicality, the Supreme

27. J. Warren Madden, *Origin and Early Years of the National Labor Relations Act*, 18 HASTINGS L.J. 571, 573 (1967).

28. *Id.*

29. *1935 Passage of the Wagner Act*, NAT'L LAB. RELS. BD., https://www.nlrb.gov/about-nlrb/who-we-are/our-history/1935-passage-of-the-wagner-act. This Comment refers to the original sections of the NLRA as the Wagner Act.

30. Madden, *supra* note 27, at 573.

31. NLRA § 1, 29 U.S.C. § 151.

32. NLRA § 7, 29 U.S.C. § 157.

33. 29 U.S.C. § 158(a).

34. *Id.*

35. *Id.*

36. Jonathan Harris, *Worker Unity and the Law: A Comparative Analysis of the National Labor Relations Act and the Fair Labor Standards Act, and the Hope for the NLRA's Future*, 13 N.Y. CITY L. REV. 107, 111 (2009).

37. HARRIS ET AL., *supra* note 15, at 43.

Court would come to the same conclusion as it had previously when it killed the NIRA.[38] Accordingly, whether through outright defiance or pretextual refusals to bargain, employers openly flouted the Act during its first years of existence.[39]

However, employers refusing to follow the Act led to even more violence across the country, with workers and employers ready to go to literal battle the moment working relations became contentious.[40] Indeed, for a period of time following the Act's passage, Republic Steel—a major United States steel producer—was the second largest purchaser of arms and ammunition in the United States, just behind the military.[41]

The Supreme Court decided the final fate of the NLRA in 1937. In *NLRB v. Jones & Laughlin Steel Corp.*, the Supreme Court upheld the Act's constitutionality under the Commerce Clause powers and the Court reiterated the important role of unions in creating an equal playing field for bargaining for workers and employers.[42] Workers finally had the full weight of the law behind them.

Despite the ruling in *Jones & Laughlin*, employers did not stop fighting back against the Act. Instead, they moved away from brutally repressing workers and began to smear the public image of unionism.[43] The massive surge of union participation brought along a wave of strikes and shutdowns that began to worry the public.[44] In 1946, the year following Japan's surrender to the United States in World War II, there were over 4,500 strikes involving nearly five million workers.[45] Employers and other anti-union actors seized upon the public's newfound trepidation towards unions and launched a proverbial full-court press against workers. They claimed that unions had grown too powerful—ignoring benefits like a growing middle class and narrowing income inequality that resulted from strong unions.[46] They also began to spread fear that unions and the NLRB were infiltrated by communists.[47]

38. White, *supra* note 18, at 573.

39. *Id.* at 596.

40. *Id.* at 574 (discussing strategies used to oppress unions, including "exploiting the provocation of union violence" to attack labor rights).

41. HARRIS ET AL., *supra* note 15, at 43.

42. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

43. Anti-union politicians and lobbyists smeared the NLRB as being too left-leaning and being filled with communists. *1935 Enforcement of the Wagner Act*, NAT'L LAB. RELS. BD., https://www.nlrb.gov/about-nlrb/who-we-are/our-history/1935-enforcement-of-the-wagner-act.

44. Charles Morris, *How the National Labor Relations Act Was Stolen and How It Can Be Recovered: Taft-Hartley Revisionism and the National Labor Relations Board's Appointment Process*, 33 BERKELEY J. EMP. & LAB. L. 1, 21 (2012).

45. HARRIS ET AL., *supra* note 15, at 45.

46. Dorothy Sue Cobble, *The Intellectual Origins of an Institutional Revolution*, 26 A.B.A. J. LAB. & EMP. L. 201, 204 (2011).

47. Morris, *supra* note 44, at 21.

Following a Republican takeover in Congress, anti-union actors dealt a massive blow to the NLRA with the Taft-Hartley Act of 1947.[48] The Taft-Hartley Act ("Taft-Hartley"), also known as the Labor Management Relations Act, was a solely pro-employer addition to the NLRA that made fundamental changes to the Act's functionality.[49] Notably, these new amendments purported to continue the Wagner Act's mission of protecting employees' free choice when deciding whether to join a union.[50] However, the reality was that the additions catered only to employer interests.[51] Taft-Hartley was couched in language about "equality in collective bargaining," but the new legislation significantly undercut union bargaining power by making some of workers' most effective tools unlawful.[52]

Taft-Hartley's most significant impact was that it allowed union actions to be deemed unfair labor practices under the NLRA.[53] The Wagner Act had conspicuously omitted union unfair labor practices and made only employer unfair labor practices unlawful since its purpose was, as stated in Section 1, to correct the inherent inequality in the bargaining position between employees and employers.[54] However, with the additions of Taft-Hartley in Section 8(b) of the Act, the NLRA could police unions as it had been policing employers. These additions seemingly reversed the government's strong support of unionism to accommodate employers' pleas to regulate unions similarly to employers.[55]

The most devastating blow to unions' bargaining power was Section 8(b)(4)'s ban on nearly all secondary activities, including secondary boycotts.[56] In secondary boycotts, striking workers use picketing or other means to pressure a third-party business to discontinue business with their employer.[57] Prior to Taft-Hartley, secondary boycotts played a key role in striking workers' efforts to secure leverage over employers, as the boycotts exerted additional economic pain on employers who were not willing to meet workers' terms.[58] But Taft-Hartley prevented workers

48. *Id.*

49. *Id.* at 22.

50. *Id.*

51. *Id.*

52. *Id.* (quoting language from Ohio Senator Robert Taft, one of the bill's namesake authors).

53. HARRIS ET AL., *supra* note 15, at 45.

54. 29 U.S.C. § 151.

55. Morris, *supra* note 44, at 22.

56. 29 U.S.C. § 158(b)(4).

57. *Secondary Boycotts (Section 8(b)(4))*, NAT'L LAB. RELS. BD., https://www.nlrb.gov/about-nlrb/rights-we-protect/the-law/secondary-boycotts-section-8b4.

58. Megan Stater Shaw, *"Connote No Evil": Judicial Treatment of the Secondary Boycott Before Taft-Hartley*, 96 N.Y.U. L. REV. 334, 335-36 (2021).

from using their full economic might. Taft-Hartley also banned closed shops, excluded supervisors from NLRA coverage, gave workers the right to "refrain from" Section 7 activities, and more.[59]

Taft-Hartley also laid the groundwork for a paradigm shift in how the Board viewed employer speech and behavior with its so-called "free speech proviso" in Section 8(c). This proviso stated that "[t]he expressing of any views, argument, or opinion . . . shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit."[60] Section 8(c) would become the saving grace for captive audience meetings, as employers argued that the section provided a wide range of free speech benefits so long as employers did not directly threaten employees with adverse consequences.[61]

As Taft-Hartley's pro-employer tendencies slowly matriculated through the Board's decisions and court opinions in the decade after it passed, private sector union membership in the United States began to nosedive.[62] Employers reaped the rewards of their fight against the NLRA in the form of weakened union bargaining position, favorable Board rulings, and declining union density. Though Taft-Hartley's supposed mission was to further safeguard employee choice by allowing employers more latitude in expressing their opinions on unionism, the decidedly one-sided results revealed that the amendments significantly altered the way the NLRA was interpreted to favor employers.

B. Captive Audience Meetings and Employer Speech

As time passed, the Board and the Supreme Court continued to grant employers leeway in their campaigns against unionism. Part B of this Section briefly covers the history of captive audience meetings pre- and post-Taft Hartley and the judicial decisions that slowly reinforced employers' ammunition against unions.

59. HARRIS ET AL., *supra* note 15, at 45. A closed shop is a workplace that requires membership in a specific union as a condition of employment. *See 1947 Taft-Hartley Substantive Provisions*, NAT'L LAB. RELS. BD., https://www.nlrb.gov/about-nlrb/who-we-are/our-history/1947-taft-hartley-substantive-provisions.

60. 29 U.S.C. § 158(c).

61. *See infra* Part II.B.2.

62. HARRIS ET AL., *supra* note 15, at 46. The United States' union density in 1953 was at 35%, but fell to just 20.1% by 1983. *Union Members Summary*, U.S. BUREAU OF LAB. STATS., (Jan. 19, 2023, 10:00 AM), https://www.bls.gov/news.release/union2.nr0.htm#. As of 2022, union density had declined all the way to 10.3%. *Id.*

1. Pre-Taft Hartley

In the Wagner Act's early days, before Taft-Hartley's employer-friendly additions, the Act was far more restrictive of employer speech than it was after Taft-Hartley's adoption. The Board adopted a broad interpretation of what is now Section 8(a)(1), which prohibits employers from interfering, coercing, or restraining employees in their right to engage in concerted activity or mutual aid and protection.[63] In the early days, the Board did not merely require employers to abide by restrictions on certain types of speech, but encouraged employers to be completely neutral on the topic of unionism.[64]

The Board was reticent to provide employers with the ability to speak on union organizing campaigns because of the clear power imbalance between employers and their employees. In one of the first cases heard before the NLRB, the Board voiced its concern:

> The prohibition of [Section 8(a)(1)] clearly reaches the employer who urges and persuades men in his employ not to form a labor union. Such "advice" is not the advice of a person on an equal plane and having an unprejudiced mind. It is the "advice" of an employer who has the right to discharge the employee to whom the "advice" is given—to control to a large extent [the employee's] economic position and thus his welfare.[65]

This statement set the tone for the next decade and evidenced the agency's intention to interpret the Wagner Act as it was originally understood: strongly in favor of unions and wary of any employer attempts to meddle in employees' union decisions.

While the Board continued pushing against employers' anti-union campaigns, it did not rule on captive audience meetings until 1946 in *Clark Bros. Co., Inc.*[66] In this case, two competing unions engaged in a run-off election to see which union would gain majority status and represent the workers at a Clark Brothers plant.[67] The employer strongly preferred one of the unions to the other and ran a tenacious campaign to defeat the disfavored union, the Congress of Industrial Organizations ("CIO").[68] The employer's anti-CIO campaign resulted in multiple unfair labor practice charges, including a violation of Section 8(a)(1) for the captive audience speeches the employer gave.[69] The Section 8(a)(1)

63. 29 U.S.C. §§ 157, 158(a)(1).

64. Paul M. Secunda, *The Future of NLRB Doctrine on Captive Audience Speeches*, 87 IND. L.J. 123, 130 (2012).

65. Penn. Greyhound Lines, 1 N.L.R.B. 1, 22-23 (1935).

66. Clark Bros. Co., Inc., 70 N.L.R.B. 802, 805 (1946).

67. *Id.* at 803.

68. *Id.*

69. *Id.* at 805.

charge presented the Board with a chance to set a precedent for captive audience speeches.

The employer held multiple captive audience speeches, with one being a mere hour before the election polls opened.[70] Employees were ordered to assemble and listen to anti-CIO campaign speeches given by the company's officials.[71] The employer made every effort to make sure that employees could not avoid the speeches: they were held during working hours, machinery was shut down, operations were paused, and the speech was broadcast throughout the plant over the public address system to ensure no employees missed hearing them.[72] Indeed, the Board noted that the only way the employees could have avoided the speeches was to leave the plant, which would have subjected them to discipline for missing work.[73]

The Board unequivocally condemned the employer's use of economic intimidation against its employees by holding that captive audience meetings were per se violations of employees' Section 7 rights, constituting an unfair labor practice under what is now known as Section 8(a)(1).[74] The Board stressed that employees have a right to choose whether they want to be represented in collective bargaining and are free to seek advice on this decision however they choose.[75] However, if an employer holds an economic gun to the head of its employees and forces them to listen to the employer's point of view, the employer impermissibly interferes with that essential right.[76] When employers force this information upon employees, they rob employees of the guarantees provided in Section 7, including the right to freely partake in the decision-making process of whether to be represented by a union.

The Board held that the way in which employer speech is delivered is separate and distinct from employer speech itself. The Board explained that simply because speech is constitutionally protected does not mean a speaker has a right to impart that speech on an unwilling listener.[77] To point out the absurdity of captive audience meetings, the Board invoked the comparison of physically restraining someone to ensure the person's attention, analogizing physical force to an employer's economic power, and asserting the Board's duty to protect employees against employers'

70. *Id.* at 804.
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.* at 804-05.
75. *Id.*
76. *Id.* at 805.
77. *Id.*

abuse of their dominant economic position.[78] After this case, the law was clear: captive audience meetings are unlawful under the Wagner Act.

Clark Bros. was yet another win for labor under the Wagner Act. However, workers' legal strength would prove to be short lived, as Congress passed the Taft-Hartley Act less than a year after the *Clark Bros.* decision.

2. Post-Taft Hartley

Taft-Hartley was a major boon for employers, especially in the realm of employer speech. The Wagner Act vigorously defended workers from employer speech and coercive employer tactics, illustrated by the holding of *Clark Bros*.[79] This dynamic changed as a result of the inclusion of the Section 8(c) free speech proviso in Taft-Hartley. Republican members of Congress had grown wary of union power and strived to give employers the ability to push back on union campaigns.[80] In short order, Section 8(c) began working as its creators intended.

In 1948, less than a year after Taft-Hartley's passage, the Board reversed its decision in *Clark Bros.* and declared that captive audience meetings were no longer per se unlawful.[81] In *Babcock & Wilcox Co.*, the Board authored a curious opinion that claimed only that "the language of Section 8 (c) of the amended Act, and its legislative history, [made] it clear that the doctrine of the *Clark Bros.* case no longer exists as a basis for finding unfair labor practices in circumstances [concerning captive audience meetings]."[82] Though it was a fairly significant decision that gave employers significantly more freedom to impose their ideas onto their workers, the Board's analysis was surprisingly short. Indeed, one could make the case that there was almost no analysis provided at all, and instead just a conclusory statement. Despite claiming that Section 8(c)'s language necessitated overturning *Clark Bros*., the Board neither identified the specific language that compelled this conclusion nor elaborated with any legal reasoning.[83] Additionally, the opinion used Taft-Hartley's legislative history as a basis for overturning *Clark Bros.* yet failed to cite any legislative history that supported its decision.[84] Further, although Section 8(c)'s language refers only to speech itself, the

78. *Id.*

79. *See id.* at 804-05.

80. Morris, *supra* note 44, at 24-26.

81. Babcock & Wilcox Co., 77 N.L.R.B. 577, 578 (1948).

82. *Id.*

83. Paul M. Secunda, *The Contemporary "Fist Inside the Velvet Glove": Employer Captive Audience Meetings Under the NLRA*, 5 FIU L. REV. 385, 406-07 (2010).

84. *Id.* at 407.

Board failed to make a connection between Section 8(c)'s speech provision and employer conduct that occurs while holding captive audience meetings. This failure was particularly frustrating given that the Board had just drawn a legal distinction between speech and the way in which speech is delivered in *Clark Bros.*[85] Nevertheless, *Babcock & Wilcox* was one of the first cases in a long line of employer-friendly decisions in the Taft-Hartley era.

After the Board declared without much elaboration that captive audience meetings were no longer inherently unlawful, employers and workers alike sought clarification regarding what exactly fell within the parameters of the NLRA. The Board took its first swing at reshaping the doctrine in a case factually similar to *Clark Bros.* In *Bonwit Teller Inc.*, the employer ran an aggressive anti-union campaign that included a speech given at a captive audience meeting.[86] In reaction to the captive audience speech, the union sought the chance to respond to the employer's arguments with its own speech, but the employer denied its request.[87] The Board sided with the union, holding that employers who hold captive audience meetings must provide the union with an opportunity to address employees "under the same advantageous circumstances" as the employer.[88] Though captive audience meetings were no longer per se unlawful, this approach attempted to counter the lopsided messaging advantage given to employers through these meetings. Unfortunately, this brief claw back of workers' rights was short-lived.

Two years later, in *Livingston Shirt Corp.*, the Board abandoned the equal opportunity doctrine established by *Bonwit Teller*.[89] In *Livingston Shirt*, the Board again claimed that "Congress specifically repudiated [captive audience meetings being unfair labor practices], and said so, when it enacted Section 8(c) of the Act" without citing to specific legislative history or clarifying why Section 8(c) allowed employers to deliver their message in this specific manner.[90] The Board scolded the *Bonwit Teller* majority for what it viewed as a resurrection of the *Clark Bros.* doctrine in disguise and held that, absent other tactics that would interfere with Section 7 rights, "an employer does not commit an unfair labor practice if he makes a preelection speech on company time and

85. *Clark Bros. Co., Inc.*, 70 N.L.R.B. 802, 805 (1946).
86. Bonwit Teller, Inc., 96 N.L.R.B. 608, 612-13 (1951).
87. *Id.* at 632.
88. *Id.* at 613.
89. Livingston Shirt Corp., 107 N.L.R.B. 400, 407 (1953).
90. *Id.*

premises to his employees and denies the union's request for an opportunity to reply."[91]

For the past seventy years, the captive audience doctrine has remained fairly steady, with the Board carving out just a few exceptions.[92] Taft-Hartley completely altered how employer speech was viewed in the context of Section 7 employee rights. Over the course of a few years, the Board flipped from maintaining that captive audience meetings were per se unlawful to allowing employers to hold captive audience meetings without needing to provide unions an opportunity to respond. The transformation of the captive audience meeting doctrine is a profound example of how Taft-Hartley was used to pervert the original intent of the NLRA.

Despite the Board's declarations that Section 8(c) and congressional intent require captive audience meetings to be considered lawful, the reasoning provided to justify these assertions has been anything but sound. Below, Section III advances two main arguments. First, it asserts that declaring captive audience meetings unlawful does not run afoul of the employer free speech rights granted by Section 8(c). Second, Section III argues that because the Board regulated the conduct element of captive audience meetings in the past, it has paved a way to extend that reasoning even further.

III. DISCUSSION

The Board's hardheaded stance in support of captive audience meetings has remained stubbornly persistent over the past seven decades.[93] The flimsy holding in *Babcock & Wilcox* declaring captive audience meetings lawful has endured thanks to the Board's insistence that the meetings fall under the protection of Section 8(c).[94] However, the current General Counsel for the NLRB, Jennifer Abruzzo, is now aiming to take down the house of cards that is the captive audience meeting doctrine. Abruzzo, a staunchly pro-labor figure, is on the warpath to make union formation easier than it has been in decades and is not shy about

91. *Id.* at 407, 409.

92. Paul M. Secunda, *Toward the Viability of State-Based Legislation to Address Workplace Captive Audience Meetings in the United States*, 29 COMP LAB. L. & POL'Y J. 209, 221-22 (2008) (listing the exceptions as "(1) where the employer or union wants to hold a captive audience speech within twenty-four hours of a union election, (2) where the employer has combined coercive workplace captive audience speech with an unfair no-solicitation rule, and (3) where 'access' remedies for the union are appropriate in extraordinary cases involving particularly egregious unfair labor practices and 'access is needed to offset harmful effects that have been produced by that conduct'").

93. *See id.*

94. *Livingston Shirt*, 107 N.L.R.B. at 407.

using her position as the agency's leader to protect workers' rights.[95] The Board, which is, as of 2023, composed of a majority of members appointed by the Democratic, pro-labor President Joseph Biden, has already begun restoring workers' rights.[96]

This Section advances and supports the General Counsel's memorandum calling for an end to captive audience meetings. This Section illustrates how Section 8(c) employer free speech rights are entirely compatible with a ban on captive audience meetings, as a ban would merely regulate the coercive conduct surrounding the speech. This Section also examines previous Board and Supreme Court decisions that have separated speech from conduct and shows that this approach is consistent with established precedent.

A. Regulating Captive Audience Meetings as Conduct

A fundamental misinterpretation of the relationship between the free speech proviso of Section 8(c) and captive audience meetings may be the driving force behind the anomalous captive audience meeting doctrine. Section 8(c) states that "[t]he expressing of any views, argument, or opinion . . . shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit."[97] The *Babcock & Wilcox* Board tersely concluded that this necessarily precludes a ban on captive audience meetings, but it failed to give Section 8(c) more than a cursory reading and address the question at the heart of the captive audience meeting doctrine.[98] A more accurate perspective, however, reveals that a ban on captive audience meetings would not *actually* prohibit the expression of an employer's point of view.

The Trial Examiner (the Board's equivalent of a trial judge) who first heard the *Babcock & Wilcox* case offered a succinct summation of how he viewed the captive audience meeting in question before determining that such speeches did, indeed, constitute an unfair labor practice:

> Standing individually, [the employer's] statements in his speeches to the employees and statements of [managers] in private conversations with [the employee] before the election, though openly anti-[u]nion, contain no

95. Lauren Kaori Gurley, *The Lawyer Who Could Deliver on Biden's Wish to Be the Most Pro-Union President*, WASH. POST (Oct. 17, 2022, 1:41 PM), https://www.washingtonpost.com/business/2022/10/15/jennifer-abruzzo-union-biden-nlrb/ ("I was able to effectuate what I believe is our congressional mandate, which is to protect workers' rights.").

96. *See* McLaren Macomb, 372 N.L.R.B. No. 58 (2023) (restoring workers' previously held rights; the Board held in this case that employers may no longer draft overly broad severance packages for employees that waive their rights under the NLRA).

97. 29 U.S.C. § 158(c).

98. Babcock & Wilcox Co., 77 N.L.R.B. 577, 578 (1948).

> language that on the surface exceeds the bounds of free speech. If they constitute a violation of the [NLRA], it is because coercion is to be imputed to them from the circumstances under which they were uttered and which affect their meaning.[99]

The Trial Examiner had an entirely different understanding of how captive audience meetings related to the Act than the Board that would later overturn his decision. His analysis split the employer's words from the manner in which they were communicated, pointing out that the circumstances around the words made all the difference.[100]

Captive audience meetings consist of two components: the actual speech used by the employer and the coercive conduct used to communicate that speech.[101] There is little doubt that Section 8(c) protects an employer's right to communicate its views on unionism to its employees so long as its speech falls within the bounds set by the NLRA and other Board decisions.[102] Indeed, the entire purpose of the NLRA, along with the additions of Taft-Hartley, was to provide employees with the option to be represented by a labor organization.[103] To allow employees to make a fully informed decision on whether to unionize, some input from an employer is necessary to understand how the employer may react, and the free speech proviso of Section 8(c) codified the right for employers to express their "view[s], argument[s], or opinion[s]."[104] However, the method used by an employer to communicate its message is easily distinguishable from the expression itself, thereby removing captive audience meetings from the protection of Section 8(c).

The Act has always protected employees from coercive actions by employers through Section 8(a)(1).[105] The Supreme Court has stated that "[i]f the total activities of an employer restrain or coerce his employees in their free choice, then those employees are entitled to the protection of the Act."[106] Of course, the free speech proviso makes this showing difficult in the context of captive audience speeches when employer

99. *Id.* at 595.

100. *Id.*

101. Secunda, *supra* note 83, at 394.

102. *Id.* at 392.

103. *Id.* at 391-92.

104. 29 U.S.C. § 158(c).

105. *See* 29 U.S.C. § 158(a)(1).

106. NLRB v. Virginia Elec. & Power Co., 314 U.S. 469, 477 (1941). This decision preceded the Taft-Hartley amendments and therefore considers the employer's actual speech *combined with* the conduct instead of *separate from* the conduct. *Id.* Nevertheless, the discussion of the employer's conduct still applies. The Court distinguishes the speech from the conduct when analyzing the employer's coercive effects, though it later looks at them in totality, which would likely be prohibited today (under Section 8(c)) without the presence of overtly coercive speech. *Id.* at 477-78.

speech is completely protected. The Supreme Court, however, has acknowledged that an employer's free speech rights, even under Section 8(c), need to be balanced against employees' rights in consideration of the economic power an employer wields over employees. Chief Justice Earl Warren discussed this balance when writing for the majority in *NLRB v. Gissel Packing Co.*:

> Any assessment of the precise scope of employer expression, of course, must be made in the context of its labor relations setting. Thus, an employer's rights cannot outweigh the equal rights of the employees to associate freely, as those rights are embodied in § 7 and protected by § 8(a)(1) and the proviso to § 8 (c). And any balancing of those rights must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear.[107]

Here, the Court illustrated the importance of the circumstances in which employer speech takes place. Simply because employers enjoy Section 8(c) free speech rights does not mean that employers are free to weaponize those rights to intimidate workers under the guise of free speech. In short, the Court articulated that context plays a vital role in determining whether employer speech is protected.

Captive audience meetings are precisely the type of scenarios the Court has historically warned against. Employers order employees into these meetings to listen to their anti-union speeches with the cloud of reprisal hanging over their heads. Employees are well aware that failure to attend can result in discipline or termination. Not only are employees forced to listen to the employer's speech, but they cannot defiantly challenge their employer's position without being subject to discipline.[108]

The fact that the threat of discipline or termination forces employees to attend captive audience meetings implicates both the "economic dependence of the employees on their employers" and the threatening undertones the Court warned against in *Gissel*.[109] As the Court mentioned, the words themselves may not be threatening, but the circumstances impute a coercive atmosphere that cannot be avoided.[110] The words spoken by the employer and the ability to hold a forum to persuade employees to vote against a union are components protected by Section 8(c), but forcing employees to endure such a forum is conduct *separate* from the speech itself. This conduct can be regulated without impinging on the employer's right to hold a forum that employees may voluntarily

107. NLRB v. Gissel Packing Co., 395 U.S. 575, 617 (1969).

108. NLRB v. Prescott Indus. Prods. Co., 500 F.2d 6, 11 (8th Cir. 1974).

109. *Gissel*, 395 U.S. at 617.

110. *Virginia Elec. & Power*, 314 U.S. at 477.

attend.

Despite its reticence to reconsider the captive audience meeting doctrine over the past several decades, the Board is no stranger to regulating captive audience meetings because of their status as conduct. In 1953, five years after the Board claimed that nothing could be done to curtail captive audience meetings because of Section 8(c), it heard the case of *Peerless Plywood Co.*, in which an employer gave a noncoercive captive audience speech to employees the night before a union election.[111] The election was set aside for other reasons, but the Board considered whether holding captive audience meetings so close to an election impaired employees' freedom of choice as protected by the NLRA.[112]

Ultimately, the Board was concerned enough about the power of these speeches to bar them from occurring within twenty-four hours of a union election.[113] The Board held that speeches given on company time, whether they are captive audience speeches held by the employer or speeches held by the union that are voluntarily attended, could not be held within this time period.[114] It reasoned that "the use of company time" and close proximity to the union elections combine to "destroy freedom of choice and establish an atmosphere in which a free election cannot be held," and had no problem regulating the timing of captive audience speeches.[115] However, the Board was sure to affirm its blessing of captive audience meetings when it noted "that noncoercive speeches made prior to the proscribed period will not interfere with a free election, inasmuch as our rule will allow time for their effect to be neutralized by the impact of other media of employee persuasion."[116]

Regardless of the Board's confirmed support of captive audience meetings, *Peerless Plywood* was an overlooked development for one crucial reason: it treated employer speech as conduct. In choosing to prohibit speeches for only a certain period of time before elections, the Board separated the timing and location of the speeches from the actual content—the speech—and regulated these two elements, conduct and speech, without proscribing employers' messages. Indeed, the Board explicitly conceded in another decision issued on the same day as *Peerless Plywood* that "[t]he rule laid down in *Peerless Plywood* is a rule of conduct," making it all but irrefutable that employer conduct could be

111. Peerless Plywood Co., 107 N.L.R.B. 427, 428 (1953).

112. *Id.* The Regional Director initially set aside the election because the *Bonwit Teller* doctrine, which required employers to give equal time to unions if they hold a captive audience meeting, was violated. *Id. Bonwit Teller* had been overturned since the employer appealed, but the Board still took the case to address captive audience meetings held in such close proximity to an election. *See id.* at 428-29.

113. *Id.* at 429.

114. *Id.*

115. *Id.* at 429-30.

116. *Id.* at 430.

separated from speech and regulated without piercing the protections of Section 8(c).[117]

Considering the Board's explicit willingness to regulate conduct separately from speech, it is within the bounds of Board precedent to prohibit the involuntary, or forced, aspect of employer captive audience meetings. When the Board separates this involuntary aspect of captive audience meetings from the substance of the employer speech, the correct course of action becomes clear, especially when balancing employer rights against employees' rights to freedom of association under Section 7. Using a similar approach to the one used by the Supreme Court in *Gissel*, the Board could consider whether mandatory attendance at employer anti-union speeches invokes the economic dependence of the employees and raises any implications of coercion that violates employees' Section 7 rights.[118]

Forcing employees to attend meetings conducted to espouse the evils of unionism and urge employees to vote against unionizing not only invokes the economic dependence of employees, but brazenly displays an employer's economic might. Threatening the employees who wish not to attend those meetings with discipline or termination is blatant abuse of employees' economic dependence. In fact, it may be difficult to identify a more straightforward indication of this power imbalance. The coercive intent underlying employers' actions in these situations is apparent—the employer removes its employees' ability to ignore the employer's views without risking their employment.

Prohibiting the involuntary component of captive audience meetings by requiring employer campaign speeches to be voluntarily attended would protect employees' freedom of association while still complying with Section 8(c). Under such an approach, employers would not be prohibited from engaging in campaign speech with employees or even from holding meetings as they did before—they simply could not create the coercive environment resulting from mandatory attendance. Indeed, employers would still have a litany of campaign tools at their disposal that allow for effective communication. In fact, many rules that the Board and the courts have created to govern campaign tactics are highly deferential to employers.

In *Gissel*, in which the Court discussed the need to balance employer and employee rights, the Supreme Court upheld a Board ruling that allows an employer to predict the effects a union would wreak on the company, and communicate that prediction to employees, so long as the prediction is made on "the basis of objective fact."[119] Permitted predictions include

117. Livingston Shirt Corp., 107 N.L.R.B. 400, 408 (1953).

118. NLRB v. Gissel Packing Co., 395 U.S. 575, 617 (1969).

119. *Id.* at 618.

those foretelling decreased wages, job losses, and plant closures, so long as the company can piece together some information that makes the prediction slightly plausible. Later, the Board weakened the few safeguards it had on sneaky campaign speech by parties to a union election in *Midland National Life Insurance Co.*, where it held that it will "no longer probe into the truth or falsity of parties' campaign statements, and that [it] will no longer set elections aside on the basis of [employers'] misleading campaign statements."[120] Under this decision, parties to a union election are free to lie or mislead throughout campaigns as long as they do it without using forgery.[121] These cases show how employers are not exactly limited in what they can communicate to employees during a union campaign.

Further, technology has completely transformed the manner and ease in which employers communicate with their employees. The captive audience meeting doctrine was established in 1948.[122] At that time, few means of communicating with employees existed outside of face-to-face interaction and mail. The captive audience meeting at least had utility outside of coercion—it was the most efficient way to convey a message to a large number of employees. Fast forward to the present, and the need for large-scale, face-to-face meetings has drastically decreased. Employers are no longer limited to in-person meetings or the U.S. Postal Service to communicate with large groups of employees. Employers now have a nearly endless list of ways to connect with their employees that are far more efficient than using paid work time to convene for a meeting. In fact, as of 2017, 95% of employers use email as the primary mode of internal communication with employees, which allows for instant communication without the coercive environment created by captive audience meetings.[123] Outside of email, employers have social media and video conferences, among other options that provide an immediate connection to communicate their opinions without coercive undertones. With so many efficient communication tools available to employers that don't cause paid work stoppage and decreased productivity, it would seem that the only unique characteristic of captive audience meetings is their inherent coercion.

It is well past the time for the Board to restore the captive audience doctrine, and the Board must follow the NLRA by regulating employer conduct surrounding speech independently from an employer's words

120. Midland Nat'l Life Ins. Co., 263 N.L.R.B. 127, 133 (1982).

121. *Id.*

122. Babcock & Wilcox Co., 77 N.L.R.B. 577, 578 (1948).

123. Valerie Bolden-Barrett, *Despite New Technologies, 95% of Companies Still Use Email as Main Communication Tool*, HRDIVE (June 21, 2017), https://www.hrdive.com/news/despite-new-technologies-95-of-companies-still-use-email-as-main-communic/445490/.

themselves. As they are currently permitted, captive audience meetings are inherently coercive because of the overarching threat of retaliation, regardless of whether the employer's speech follows the Act's guidelines. Employers have the uncontroverted right to speak their minds to employees only so long as the speech follows the Act's limitations. Employers do not have a right to force employees into coercive environments, and the Board must recognize this as soon as a chance presents itself and overturn *Babcock & Wilcox* and deem captive audience meetings behavior violating workers' Section 7 rights.

IV. CONCLUSION

The General Counsel's memo calling to overturn *Babcock & Wilcox* brought the captive audience meeting doctrine to the forefront of labor law. As unionization efforts swell across the country, especially within the ranks of employers with nearly unlimited resources such as Amazon and Starbucks, it is critical for the Board to act now. Though opponents claim a ban would violate Section 8(c), regulation of the involuntary attendance element of captive audience meetings is entirely consistent with prior Board and Supreme Court precedent. Not only is a ban consistent, but it is necessary to protect employees' Section 7 rights and shield them from unlawful employer coercion. The Board must restore the captive audience doctrine to follow the NLRA and prohibit the involuntary element of captive audience meetings by overturning *Babcock & Wilcox*.