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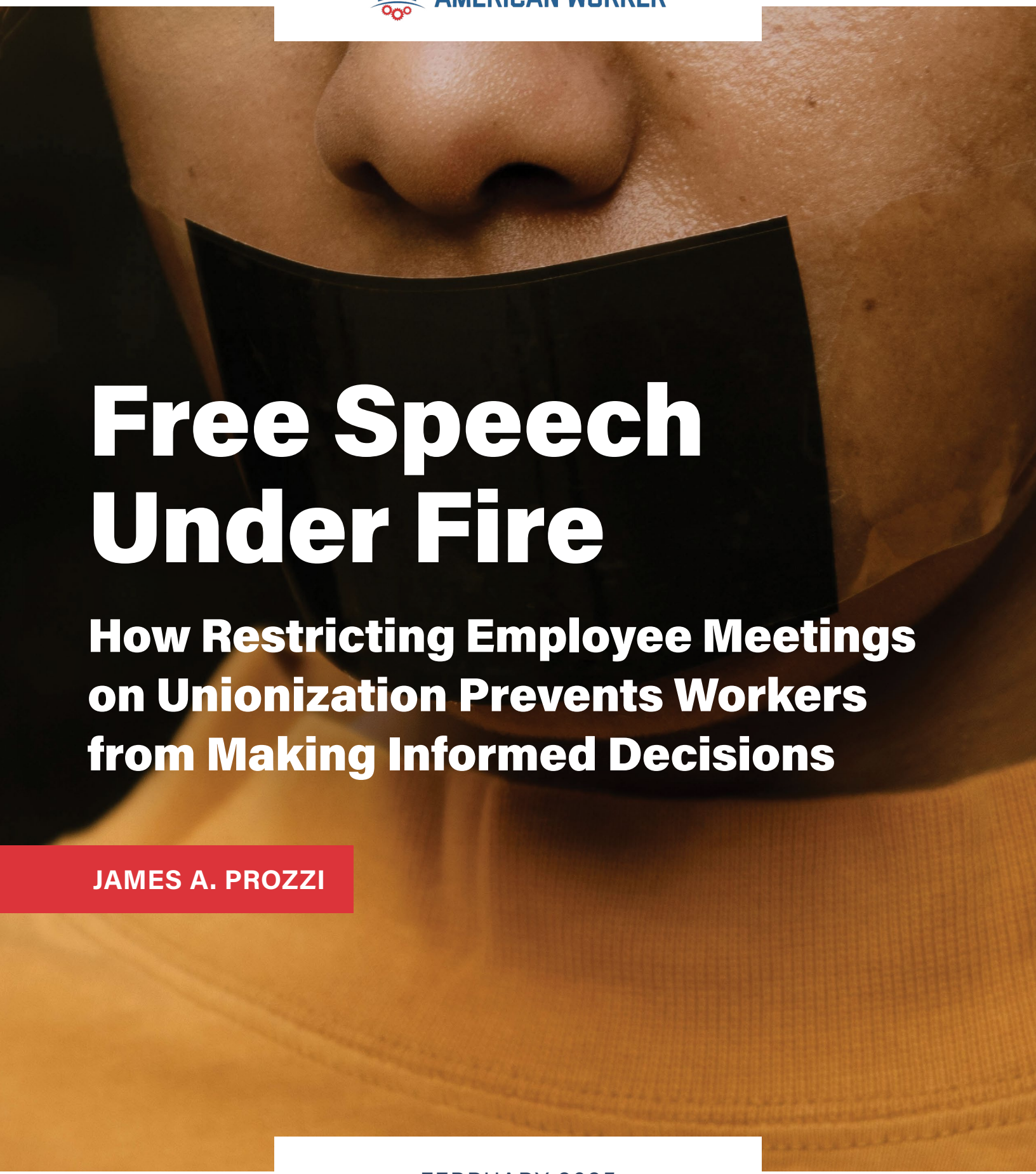

Free Speech Under Fire

How Restricting Employee Meetings on Unionization Prevents Workers from Making Informed Decisions

JAMES A. PROZZI

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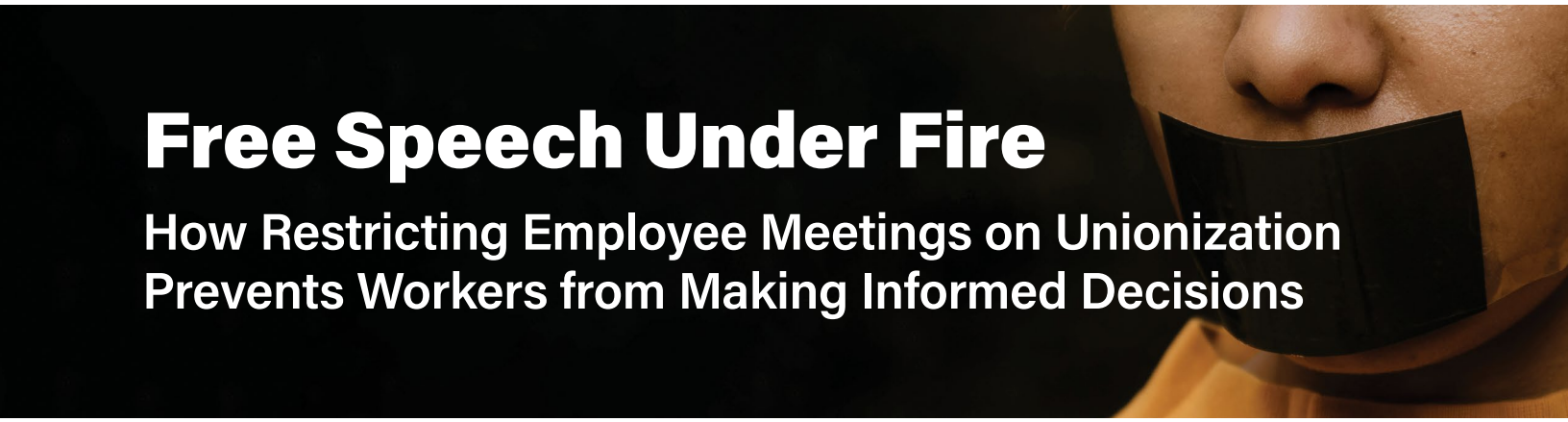

Free Speech Under Fire

How Restricting Employee Meetings on Unionization Prevents Workers from Making Informed Decisions

EXECUTIVE SUMMARY

Can employers warn workers about the impact of unionization, thereby empowering them to make the most informed decision?

The constitutional answer is yes, given the First Amendment's protection of free speech. But on November 13, 2024, the National Labor Relations board wrongly ruled the answer is no. In Amazon.com Services LLC, the Board's Democratic majority overruled its 1948 decision in Babcock & Wilcox Co. and held that an employer violates the National Labor Relations Act when it "compels employees to attend a captive audience meeting."

The Amazon decision is wrong for many reasons. As we show in the following report, "The NLRB's Flawed Discussion of Legislative History in its Decision Infringing on Employer Speech," by James A. Prozzi--who practiced labor and employment law for 43 years and is currently an Adjunct Professor of Law at Stetson University College of Law--the reason Amazon is wrong is easily proven by looking at the text of Section 8(c) of the Act and the debate leading up to its passage in 1947.

So-called "captive audience meetings"—which are more properly called "employer meetings on unionization"—are a common occurrence in unionization campaigns. Essentially businesses facing a unionization effort require workers to attend a meeting where they discuss the effects of unionization, just as they would for any number of other serious workplace matters. Many businesses use these meetings as a means of encouraging workers not to unionize. They are legally prohibited from threatening, interrogating, or promising anything to workers during these meetings. Workers are also paid for their time, since the meetings happen during the workday.

The meetings are essential to free and fair unionization campaigns. Labor unions themselves spend significant time painting a rosy picture of unionization to workers. Employer meetings on unionization are the primary means for businesses to provide workers with their perspective, ensuring workers can make the most informed decision.

The meetings are also broadly supported by the American public. Polling by the Institute for the American worker shows that only 12% of likely voters have a negative view of employer meetings on unionization. By contrast, 84% have a neutral or positive view. Americans broadly understand that employers have a right to talk to workers about unionization.

A future Board, with the current vacancies filled by new members appointed by President Trump, could reverse the faulty Amazon decision. The constitutional rights of both employers and workers alike hang in the balance.

The NLRB's Flawed Discussion of Legislative History in Its Decision Infringing on Employer Speech

©2024, James A. Prozzi. J.D. 1977, University of Pittsburgh School of Law; Adjunct Professor of Law, University of Pittsburgh School of Law, 2012-2019; Adjunct Professor of Law, Stetson University College of Law, 2019-present.

INTRODUCTION

On November 13, 2024, the National Labor Relations Board issued its decision in *Amazon.com Services LLC*.[1] In *Amazon*, the Board's Democratic majority overruled the Board's 1948 decision in *Babcock & Wilcox Co.* and held that an employer violates the National Labor Relations Act (Act) when it "compels employees to attend a captive-audience meeting." The position of the Board majority is that "the largely unexplained holding of *Babcock & Wilcox* is not compelled by the text or the legislative history of the Act."[2]

The position of the Board's General Counsel at the time, Jennifer Abruzzo, was initially stated in a three-page Memorandum issued in April 2022.[3] In her March 2023 brief to the Board in *Amazon*, the General Counsel stated that the Board should "overrule *Babcock & Wilcox Co.*," and return to what the Board "properly recognized" two years earlier in its 1946 decision in *Clark Brothers Co.*: an employer's "right to speak does not carry with it a right to coerce employees to listen by threatening reprisal should they exercise their right to refrain."[4] The General Counsel's position was that in *Babcock & Wilcox*, the Board "incorrectly concluded that an employer does not violate the Act by compelling its employees to attend meetings in which it makes speeches urging them to reject union representation."[5] The Board majority in *Amazon* agreed.

The portion of the General Counsel's March 2023 brief which addressed why the Board should overrule its 75-year-old precedent in *Babcock & Wilcox* was just four pages long.[6] The Board had not requested supplemental briefing by the parties or issued an invitation to *amici* to file briefs, even though neither the Board nor any court had questioned *Babcock & Wilcox* since it was issued in 1948. Member, now Chairman, Kaplan noted in his dissenting opinion in *Amazon* that this "failure to allow public briefing is indefensible."[7]

This report will address several specific points in the Board majority's discussion of the legislative history of Section 8(c) in *Amazon* and show--contrary to the Board majority-- that Congress intended to reverse the Board's 1946 *Clark Bros.* decision when it enacted Section 8(c) as part of the Taft-Hartley amendments to the Act in 1947. Indeed, the Board was correct when it stated a year later in *Babcock & Wilcox* that the legislative history of Section 8(c) "make[s] it clear that the doctrine of the *Clark Bros.* case no longer exists" to support a violation of the Act.[8]

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1 373 NLRB No. 136 (2024)(hereinafter "*Amazon*")

2 *Id.*, slip op. at 1.

3 Memorandum GC 22-04 (April 7, 2022).

4 *Amazon.com Services, LLC* (Case 29-CA-280153), Counsel for the General Counsel's Brief in Support of Exceptions at 38-39 (March 31, 2023). The General Counsel first asserted her position before the Board in the *Amazon* case. She later took the same position, using the identical argument, in many other cases currently pending before the Board. Memorandum GC 23-06 (April 17, 2023) at 20-21.

5 Memorandum GC 22-04, *supra* note 3, at 2.

6 Counsel for the General Counsel's Brief, *supra* note 4, at 38-41.

7 *Amazon*, *supra* note 1, slip op. at 26.

8 *Babcock & Wilcox Co.*, 77 NLRB 577, 578 (1948). Section 8(c) provides: "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 Act, if such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. §158(c).

I discussed the General Counsel's effort to overturn *Babcock & Wilcox*, as well as the legislative history of Section 8(c), in greater detail my article in the Fall 2023 issue of the *Labor Law Journal*. The article focused upon a critical aspect of that legislative history, which I referred to as the "decisive but forgotten role" of Gerard Reilly.[9] Reilly was a Board Member from 1941 to 1946; he dissented from the *Clark Bros.* decision in 1946 on the last day of his term. A few months after his term ended, Reilly wrote that under *Clark Bros.*, "if the employer... addresses his employees during working time, the board has denied him the right to speak his mind about the union under such circumstances." He stated that "such a rule of decision is unsound, if an employer's arguments stop short of threats or economic reprisal."[10]

Reilly brought the "unsound" *Clark Bros.* "rule of decision" to the attention of Congress when he became Special Counsel to the Senate Committee on Labor and Public Welfare in early 1947. He thereafter was involved in all the important aspects of the Congressional discussion of the "captive audience" issue and the ultimate Congressional enactment of Section 8(c) as part of the Taft-Hartley Act. Reilly detailed his efforts regarding *Clark Bros.* in his 1955 law review article, *A Return to Legislative Intent*.[11]

Reilly generally provides the basis for rebutting several incomplete and misleading portions of the Board majority's discussion of the legislative history of Section 8(c).

THE NLRB'S FLAWED CLAIM #1

> *"The legislative history of the Taft-Hartley Act reflects little consideration of the issue of captive audience meetings....The Senate Report accompanying the Senate bill is the only piece of legislative history that even mentions Clark Bros."*[12]

The stage was set for the reversal of the *Clark Bros.* decision in November 1946, when the mid-term elections resulted in Republican majorities for the first time since 1930. At the start of the new Congressional session, Republican Senator Joseph Ball asked Reilly to assist him in preparing legislation to amend the Act. Ball proposed a bill, S. 360, which Reilly characterized as "a thoroughgoing revision of the [Act]." The bill was written largely by Reilly and "became the basic framework for the amendments to the Wagner Act embodied in Title I of the Labor-Management Relations Act."[13]

There is no reference to S. 360 by the Board majority in *Amazon*. But it's crucial to the modern discussion, because on January 31, 1947, Senator Ball placed in the record a document entitled, "Analysis of S. 360", which Senator Ball stated, "was prepared for me by Gerard D. Reilly, an attorney here in Washington, former member of the National Labor Relations Board." One of the proposed changes in S. 360 was to amend the Act to provide that: "The Board shall not base any finding of unfair practice upon any statement of views or argument, whether written or oral, if such statement contains no threat of force or economic reprisal." In his "Analysis of S. 360", Reilly stated this amendment was necessary because the Board:

> *"continued to hold speeches by employers to be unfair labor practices... if the speech was made in the plant on working time (Monumental Life Insurance,*

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9 James A. Prozzi, *The Employer "Captive Audience" Speech and the Legislative History of Section 8(c) of the National Labor Relations Act: The Decisive but Forgotten Role of NLRB Member Gerard Reilly*, 74 Lab. L.J. 105 (2023).

10 Gerard Reilly, "Labor Law Change Urged to Control Strike Threat," Washington Evening Star (Oct. 13, 1946) at C-1.

11 Gerard Reilly, *A Return to Legislative Intent*, 43 Geo. L.J. 372 (1955). Reilly's article, written just eight years after the passage of the Taft-Hartley Act, was not mentioned in *Amazon*.

12 373 NLRB No. 136, slip op. at 11, 18

13 Gerard Reilly, *The Legislative History of the Taft-Hartley Act*, 29 Geo. Wash. L. Rev. 285, 290 (1960).

69 NLRB 247; Re Clark Brothers, 70 NLRB N0. 60). It is the purpose of this amendment to prevent restrictive decisions of this character being made in the future."[14]

These issues were subsequently discussed in the Senate Labor and Public Welfare Committee along with other proposed bills. The result was a "clean draft" of a bill, S. 1126, submitted by the Committee Chairman, Senator Robert Taft, on April 17, 1947, along with a 99-page Senate Report prepared by Reilly and another committee counsel, Thomas Shroyer, who was a former Regional Attorney for the Board. This is the Senate Report mentioned by the Board majority in *Amazon*. Reilly stated in his 1960 law review article that both he and Shroyer "kept detailed notes of the committee's deliberations", and in order "to make the committee's intent unmistakably clear, we referred to numerous Board and court decisions" —including *Clark Bros.*—to show "the extent to which S. 1126 was meant to modify or reaffirm their doctrines."[15]

Contrary to what the Board majority stated in *Amazon*, the first time *Clark Bros.* was mentioned in the legislative history of Section 8(c) was Reilly's January 1947 "Analysis of S. 360", and the purpose of the amendment drafted by Reilly was to "prevent restrictive decisions of this character being made in the future." Furthermore, the second time *Clark Bros.* was mentioned in the legislative history was in the Senate Report prepared by Reilly and Shroyer several months later, in language about *Clark Bros.* which was almost identical to what Reilly initially wrote in his "Analysis of S. 360."

These facts indicate that, contrary to the Board majority's claim in *Amazon*, the Taft-Hartley Act dealt directly and intentionally with employee meetings on unionization—specifically with an eye to protecting them.

THE NLRB'S FLAWED CLAIM #2

"With relatively little debate, Congress also included, among the Taft-Hartley Act's provisions, Section 8(c)."[16]

The Board majority did not provide any evidence to support this statement, and in fact, the opposite was in fact the case: There was a good deal of debate in 1947 about Section 8(c) and the captive audience decision in *Clark Bros*.

A few days after the Board issued its decision in *Babcock & Wilcox*, Reilly wrote a newspaper article in which he stated that the Board had just "overruled the decision in the *Clark* case," which was "criticized by many of the witnesses who appeared before the labor committees of congress last year."[17] In his 1955 law review article, Reilly wrote that in *Clark Bros.*, "a majority of the Board effectively silenced employers by inventing the famous 'captive audience' theory." But in 1947, he continued, when Congress undertook to amend the Act, "these holdings were called to the attention of the Senate and House labor committees and resulted in the adoption of Section 8(c), in which the right of free speech was written into the law, so long as the speaker refrained from threats or promises of benefit."[18]

The Board majority in *Amazon* also failed to mention that the Senate Report contained a minority report signed by three Democratic senators. While the minority committee members objected to various provisions of

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14 *Hearings on Labor Relations Program Held Before the Senate Committee on Labor and Public Welfare*, 80th Cong., 1st Sess. 301 (1947) (emphasis supplied)(The citations are as set forth in the original document.)

15 Reilly, *supra* note 13, at 297. Senator Taft wrote a year later that his Committee "employed two very able attorneys", Reilly and Shroyer, "who had expert knowledge of the inner workings of the Board and of the Wagner Act. They knew its faults and its merits." Fred A. Hartley Jr., Our New National Labor Policy: The Taft-Hartley Act and the Next Steps (1948) at xi.

16 373 NLRB No. 136, slip op. at 10.

17 Gerard Reilly, "Checkoff of Union Dues Broadened to Cover Fees," Washington Evening Star (May 23, 1948) at C-4.

18 Reilly, *supra* note 11, at 379.

the Senate bill, there was one provision to which they raised no objection. In a section entitled, "Acceptable Provisions of the Bill", the minority report stated: "We agree with the excellent protection of the right to free speech accorded by Section 8(c)."[19]

When the Senate held hearings on S. 360 from January to March 1947, several witnesses specifically referred to the need to repudiate the *Clark Bros.* decision. Counsel for the National Association of Manufacturers, for instance, testified on March 5 that "The Board's holding [in *Clark Bros.*] has not been repudiated," and that "of late, there has been a tendency to disallow speeches, themselves not coercive [sic], upon finding a pattern of interfering conduct by the employer. NLRB's latest edict was the 'captive audience' case (*Clark Bros Co.*, Aug. 1946)."[20]

The Senate debated S. 1126 in April 1947. During the floor debate on April 28, Senator Allen Ellender, a Democratic member of the Senate committee who generally supported the need to amend the Act, and who did not sign the minority report on S. 1126, stated the following about *Clark Bros.*: "Even recently the Board has held that if an employer made a speech during working hours, although the employer did not use any coercive language, yet *the fact that he spoke to the employees while they were at work constituted coercion*...."[21]

As such language shows, Congress debated this issue at length, ultimately passing Section 8(c) out of an express desire to protect employer meetings on unionization.

THE NLRB'S FLAWED CLAIM #3

> *"The Senate Report simply cannot bear the weight that Babcock & Wilcox placed on it.... Indeed, it is noteworthy that...one of the two Senate staffers authoring the Report was former Board Member Reilly, the dissenting Board member in Clark Bros."*[22]

In its effort to diminish the significance of the Senate Report, the Board majority in the above excerpt, as Chairman Kaplan stated in his *Amazon* dissent, "implies that [the Senate Report] should be given less weight because a co-author of the report was a Senate committee staffer named Gerard Reilly, who had previously served as a Board Member and dissented in *Clark Brothers*."[23]

This attempt to diminish the importance of the Senate Report, as well as the role played by Reilly, is misleading: The Senate Report should really be given *greater* weight because of the views of its co-authors.

Reilly's co-author, as noted above, was Thomas Shroyer. The Board majority in *Amazon* may have thought that Reilly and his co-author (who was never mentioned in *Amazon*) disagreed with the view that *Clark Bros.* should be overruled. But Shroyer in fact was even more conservative than Reilly was at that time. Reilly notes in his 1960 law review article that Shroyer was appointed as Republican counsel to the Senate Labor and Public Welfare Committee by Senator Robert Taft, and that Philip Ray Rodgers was Shroyer's clerk; Reilly joined Shroyer on the Senate Committee as Special Counsel "after the hearings [on S. 360] were over."[24] (Rodgers was later a Republican Member of the Board from 1953 to 1963.) Shroyer was proposed by a group of twenty Republican conservative senators in 1970 for a seat on

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19 Senate Report No. 105, 80th Cong. 1st Sess. (1947) at 41.

20 *Hearings on Labor Relations Program*, *supra* note 15, at 1799, 1820.

21 93 Cong. Rec. 4137 (1947)(emphasis supplied). The three senators who signed the minority report were Senators Thomas, Murray and Pepper. Reilly, *supra* note 13, at 297.

22 373 NLRB No. 136, slip op. at 19.

23 373 NLRB No. 136, slip op. at 34, n. 70.

24 Reilly, *supra* note 13, at 294.

the Board; he was described in a news article at that time as "an aide to the late Senator Robert A. Taft of Ohio when the Taft-Hartley Act was passed."[25]

THE NLRB'S TELLING HISTORY

Chairman Kaplan stated in his *Amazon* dissent that as the Board's "'contemporaneous construction' of Section 8(c)", *Babcock & Wilcox* is "'entitled to very great respect.'"[26] Chairman Kaplan's point is fully supported by a review of what the members of the Board did during the twenty-one months between the *Clark Bros.* and *Babcock & Wilcox* decisions.[27]

At the time of the *Clark Bros.* decision in 1946, the Board consisted of three members: Chairman Paul Herzog and Members John Houston and Reilly. The Board's 2-1 decision in *Clark Bros.*, from which Reilly vigorously dissented, was the first time the Board had ruled that employee attendance as a "captive audience" at an employer speech regarding unionization was raised to the status of an independent violation of the Act.

This seems to have been an obvious concern for Chairman Herzog.

On September 9, 1946, just a few weeks after the *Clark Bros.* decision was issued, Herzog gave a speech before a trade association. He stated that the issue of employer free speech can arise in several ways, one of which is in a speech delivered to a captive audience. Then, referring to the *Clark Bros.* decision, Herzog told the association:

> *"[W]e recently held it to be an unfair labor practice for an employer to compel employees to assemble and listen to an anti-union speech when their time was not their own and they had to do his bidding. It remains to be seen whether we are right or wrong on this difficult question."*[28]

The answer to that "difficult question"—at least as the Herzog Board seems to have understood it—came soon thereafter when Congress amended the Act and added Section 8(c).

The Taft-Hartley Act also expanded the Board from three to five members, and by the time the Board considered *Babcock & Wilcox* in 1948, the Board consisted of Chairman Herzog and Members Houston, Reynolds, Murdock, and Gray.[29]

Babcock & Wilcox issued on May 13, 1948, by a three-person panel, consisting of Houston, Murdock and Gray.[30] Their unanimous decision noted that the Trial Examiner had "relied upon the 'compulsory audience' doctrine enunciated in *Matter of Clark Bros, Inc.*" The Board concluded that "the language of Section 8(c) of the amended Act, and its legislative history, make it clear that the doctrine of the *Clark Bros.* case no longer exists as a basis for finding unfair labor practices in circumstances such as this record discloses."[31] As Chairman Kaplan stated in his *Amazon* dissent, *Babcock & Wilcox* was "decided by a unanimous panel that included Member Houston, who was part of the *Clark Brothers* majority."[32]

We therefore have evidence of how three members of the Board felt in 1948 about whether the "doctrine of the *Clark Bros.* case" survived the passage of Section 8(c).

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25 "Business Lawyer Named to NLRB," The New York Times (Feb. 19, 1970) at 1.

26 373 NLRB No. 136, slip op. at 30, quoting *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 2257 (2024).

27 Paul Herzog was Board Chairman from July 1945 to June 1953. https://www.nlrb.gov/about-nlrb/who-we-are/board/board-members-1935

28 Paul Herzog, Words and Acts: Freedom of Speech and the NLRB, (Sept. 9, 1946) ,18 L.R.R. (BL) 338 (emphasis supplied).

29 https://www.nlrb.gov/about-nlrb/who-we-are/board/board-members-1935.

30 *Babcock & Wilcox*, *supra* note 8, at 577, n.1.

31 *Babcock & Wilcox*, *supra* note 8, at 578.

32 373 NLRB No. 136, slip op. at 30.

Regarding Member Reynolds, his partial dissenting opinion in a decision, issued just one month before *Babcock & Wilcox*, provides compelling evidence. In *General Shoe Corporation*, which was a full Board decision issued on April 16, 1948, Member Reynolds (joined by Member Gray) stated as follows:

> *"In enacting Section 8(c), Congress evinced a definite awareness of the Board's decision in the Clark Brothers case, and made it abundantly clear that an employer's privileged efforts to persuade to action with respect to joining or not joining unions should not be restricted by the time or place of such efforts, so long as they were not accompanied by any threat of reprisal or force or promise of benefit."*[33]

Member Gray, as noted above, was on the unanimous panel which soon overruled *Clark Bros.* in *Babcock & Wilcox*.

Insofar as Chairman Herzog is concerned, Chairman Kaplan noted in his dissent in *Amazon* that Herzog, who did not participate in the *Babcock & Wilcox* case, "surely would have protested the overruling of *Clark Brothers* if he thought he had any basis for doing so."[34] But the reason he did not protest may be because of his approach to the Congressional effort to amend the Act in 1947. As Professor James Gross notes, Chairman Herzog "chose a non-belligerent approach to the House and Senate labor committees." Herzog stated in his NLRB Oral History interview in 1972 that he took a "non-belligerent approach" because:

"I thought the only thing to do was to save the institution. The Board simply had to be saved…and the only thing to do was not to try to convince them that we were always right and not to refuse to admit that we were wrong where I thought we were wrong…[I]f we had taken a more belligerent position on certain occasions the Board…would have been swept away."[35]

The current NLRB majority has ignored this history to justify its renewed ban on employer meetings on unionization. Yet the history is quite clear: Before now, the NLRB knew full well what Section 8(c) provided—namely, that employer meetings on unionization were lawful.

CONCLUSION

A few days after the 1948 *Babcock & Wilcox* decision, Gerard Reilly published an article in which he stated that "a wholesome trend in the direction of giving complete effect to the intention of the framers of the new labor act was indicated this week…in a decision of the National Labor Relations Board construing the amendments to the Wagner Act as having overruled the decision in the *Clark* case."[36]

Another "wholesome trend" could be for the Board to reverse its decision in *Amazon* and finally accept, as Gerard Reilly put it, "[t]here is no doubt" that the purpose of the Congressional enactment of Section 8(c) in 1947 was "to overrule by legislation the captive audience doctrine."[37]

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33 *General Shoe Corporation*, 77 NLRB 124, 130 (1948)(emphasis supplied).

34 373 NLRB No. 136, slip op. at 30.

35 James Gross, *The Reshaping of the National Labor Relations Board: National Policy in Transition*, 1937-1947, at 256 (1981).

36 Reilly, *supra* note 17, at C-4.

37 Reilly, *supra* note 11, at 379.

ABOUT THE AUTHOR

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