COMMENT ON RECENT DECISIONS

ADMINISTRATIVE LAW—N. L. R. B.—COERCION OF EMPLOYEES BY WORDS—FREEDOM OF SPEECH—[Federal].—Petitioner, the National Labor Relations Board, in seeking to have a cease and desist order enforced, asserted that respondent took measures, in violation of Section 8(1, 2) of the National Labor Relations Act,[1] to compel its employees to join a company union and not to join a C. I. O. affiliate. Among the acts by which petitioner asserted the employer interfered, restrained, and coerced its employees was the distribution of a pamphlet to each of the employees. This pamphlet was headed with an American flag and a verse from the "Star-Spangled Banner." It purported to explain the meaning of the National Labor Relation Act. One prominent heading was: "None Required to Join Any Organization." Pain was taken to express the negative aspect of the law, what employees could not be compelled to do in the way of labor organization, and very little emphasis was placed upon the positive aspect of what the employees could do under the law. The union particularly objected to a passage headed "Harmony and Confidence," reciting that the employees had never had to strike, that they had always had a fair hearing, that there had always been an amicable adjustment of all reasonable complaints, and asking the employees whether they wanted to gamble on strikes and unemployment. A section headed "Agitators," asserted that no agitator could run a factory, get orders, or furnish jobs as the company had done for 47 years. *Held:* The letter construed in its entirety contained nothing which could be called a threat or an attempted coercion of the employees, in violation of section 8(1, 2) of the National Labor Relations Act. *National Labor Relations Board v. Gutmann & Co.*[2]

Under the first amendment to the Constitution of the United States, freedom of speech is guaranteed to all, employer and employee alike. An employer, therefore, may express his opinion freely on any labor situation. However, the National Labor Relations Act provides that an employer shall not interfere with, restrain, or coerce his employees in choosing their representatives for collective bargaining.[3] Conceivably, interference, restraint, or coercion could be by means of words alone. The problem is to reconcile the employer's constitutional freedom of speech with his obligation to refrain from the unfair labor practices prohibited by the act. The solution

1. 49 Stat. 449, 452, c. 372, §8; 29 U. S. C. A. §158(1, 2). "It shall be an unfair labor practice for an employer—

"(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title.

"(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it; *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay."

2. (C. C. A. 7, 1941) 121 F. (2d) 756.

3. See note 1, supra.

reached by the courts, stated in broad terms, is that an employer, in expressing his opinion on a labor situation, may not put that expression in such form as to amount to coercion. The classic generalization of this limitation on constitutional guaranties of freedom of speech was made by Justice Holmes in *Aikens v. Wisconsin*:[4] "No conduct has such an absolute privilege as to justify all possible schemes of which it may be a part. The most innocent and constitutionally protected of acts or omissions may be a step in a criminal plot, and if it is a step in a plot, neither its innocence nor the constitution is sufficient to prevent the punishment of the plot by law." More concretely, the courts have held that if the expression of opinion by the employer is not itself coercive and if it is not uttered in a background of coercion, the utterance is under the protection of the first amendment.[5] One authority has said that the general opinion expressed by the employer may be even mildly anti-union in character.[6] A statement of an employer in the nature of a threat, however, will not be countenanced,[7] although there may be no other background of coercion; for the establishment of coercion may result from speech alone.[8] But isolated statements of anti-union opinion, in the absence of a policy of discrimination, interference, restraint, and coercion will not make the employer accountable under section 8(1).[9] Intense or extremely forceful opinion, even in the absence of a policy of discrimination, and in the absence of the element of threat, comes under the interdict of the act, for, because of the master and servant relationship, a strong statement by an employer may carry such influence that the words may be coercive.[10] It has been held that slight suggestions by the employer may have undue influence among men who know the consequences of incurring the employer's displeasure.[11] In fact, it has been suggested that anything an employer says with respect to labor is inherently coercive, because of the economic relationship between him and the men who hear the statements.[12]

4. (1904) 195 U. S. 194.

5. Consolidated Edison Co. v. N. L. R. B. (1938) 305 U. S. 197; N. L. R. B. v. Sands Mfg. Co. (1939) 306 U. S. 332; N. L. R. B. v. Union Pacific Stages (C. C. A. 9, 1938) 99 F. (2d) 153; Press Co., Inc. v. N. L. R. B. (App. D. C. 1940) 118 F. (2d) 937; Continental Box Co., Inc. v. N. L. R. B. (C. C. A. 5, 1940) 113 F. (2d) 93; Midland Steel Products Co. v. N. L. R. B. (C. C. A. 6, 1940) 113 F. (2d) 800; Foote Bros. Gear & Machine Corp. v. N. L. R. B. (C. C. A. 7, 1940) 114 F. (2d) 611.

6. Comment (1938) 48 Yale L. J. 54, 72. But see N. L. R. B. v. Ford (C. C. A. 6, 1940) 114 F. (2d) 905, wherein intensely anti-union statements were upheld.

7. Virginia Ferry Corp. v. N. L. R. B. (C. C. A. 4, 1939) 101 F. (2d) 103.

8. N. L. R. B. v. New Era Die Co. (C. C. A. 3, 1941) 118 F. (2d) 500.

9. Martel Mills Corp. v. N. L. R. B. (C. C. A. 4, 1940) 114 F. (2d) 624.

10. Virginian Ry. v. System Federation No. 40 (1937) 300 U. S. 515; N. L. R. B. v. Falk Corp. (C. C. A. 7, 1939) 102 F. (2d) 383.

11. International Ass'n of Machinists v. N. L. R. B. (1940) 311 U. S. 72.

12. Note, N. L. R. B. and Free Speech (1938) 7 I. J. A. Bul. 25, 36; Smith, Employers, Unions and Free Speech: View of N. L. R. B. (1938) 2 L. R. R. index 707.

It is settled, however, that statements by employers uttered "in a context of violence"[13] do not come within the protection of the Constitution.[14] The utterance loses its significance as an appeal to reason, and becomes an instrument of force. Consequently, there is no longer any reason to lend the protection of the first amendment.

It is submitted that the court, in the instant case, in construing the letter in its entirety, completely misconstrued the case. In order to decide whether or not there has been interference, restraint, or coercion, it is necessary to go behind any particular document and construe all the facts in the background of the case. The remarks complained of are certainly not so innocuous that it is inconceivable that they could be coercive in nature, in the proper background. The background of an anti-union policy did exist in this case, and the National Labor Relations Board found it easy indeed to conceive the coerciveness of the expression. This finding of fact, properly within the province of the board, has been overruled by a narrow construction of the elements of the case by the court.

M. G.

AGENCY—RESPONDEAT SUPERIOR—AGENT'S NEGLIGENT USE OF PUBLIC DOOR—[Missouri].—Defendant's route boy violently entered a revolving door, which was provided for public use, and crushed the plaintiff, inflicting serious injuries. The defendant, a credit rating corporation, employed route boys to deliver reports to its customers, but it furnished them no means of conveyance. Plaintiff brought an action for damages against the defendant and recovered. Defendant appealed and assigned as error the trial court's refusal to sustain its demurrer, on the ground that it was not liable for its employee's negligent use of the public door. *Held:* Affirmed;[1] since it was necessary to use the door to effectuate the duties of the employment, the boy was, at the time of the injury, acting in the scope of his employment. *Salmons v. Dun & Bradstreet.*[2]

The general rule of *repondeat superior* is that a master is responsible to third persons for injuries occasioned by the negligence or misconduct of his servants acting within the scope of their employment.[3] This doctrine

13. Milk Wagon Drivers' Union v. Meadowmoor Dairies, Inc. (1941) 312 U. S. 287.

14. N. L. R. B. v. Link-Belt Co. (1941) 311 U. S. 584; N. L. R. B. v. Colten (C. C. A. 6, 1939) 105 F. (2d) 179; Montgomery Ward & Co. Inc., v. N. L. R. B. (C. C. A. 7, 1939) 107 F. (2d) 555; N. L. R. B. v. Sunshine Mining Co. (C. C. A. 9, 1940) 110 F. (2d) 780; N. L. R. B. v. Viking Pump Co. (C. C. A. 8, 1940) 113 F. (2d) 759; N. L. R. B. v. Elkland Leather Co. Inc. (C. C. A. 3, 1940) 114 F. (2d) 221; N. L. R. B. v. Reed & Prince Mfg. Co. (C. C. A. 1, 1941) 118 F. (2d) 874.

1. One judge dissented.

2. (Mo. App. 1941) 153 S. W. (2d) 556.

3. Hunter v. First National Bank of Morrilton (1930) 181 Ark. 907, 28 S. W. (2d) 712; Skala v. Lehon (1930) 258 Ill. App. 252, aff'd (1931) 343 Ill. 602, 175 N. E. 832; Hughes v. Western Union Tel. Co. (1931) 211 Iowa 1391, 236 N. W. 8; Funk v. Fulton Iron Works Co. (1925) 311 Mo. 77, 277