The Sewell Doctrine: A Constitutional Dilemma

Kenneth R. Williams
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The National Labor Relations Act guarantees to employees the right to form labor unions through representatives of their own choosing. Provision is also made for the National Labor Relations Board (NLRB) to call elections whenever a legitimate question of representation exists. The prelude to these elections is customarily characterized by both employer and union campaigns calculated to apprise employees of the respective advantages and disadvantages of unionization. In the course of these campaigns, employees are usually subjected to numerous claims and counterclaims. To insure that employees are not unduly influenced by the more objectionable propaganda techniques, the NLRB is empowered to regulate employer and union speech.

Inherent in Board regulation affecting employer and union expression is the danger that such regulation will violate first amendment rights of free speech. The problem is to discern whether the particular expression is constitutionally protected, and if so, to determine whether it is being impaired. Particularly susceptible of abuse is the NLRB's practice of nullifying elections favorable to employers or unions who direct campaign appeals toward the racial prejudices of employees.

In the early days of its existence, the NLRB rigidly enforced a standard of "strict neutrality" against employers during the period preceding representation elections. Anti-union statements attributable to employers were deemed coercive per se and in violation of section 8(a)(1) of the Act, which provides that it shall be an unfair labor practice for an employer to interfere with employees in the exercise of their rights to organize.

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1. 29 U.S.C. § 157 (1970). "Employees shall have the right to self-organization, to form, 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 have the right to refrain from any or all of such activities . . . ."
4. It is well settled that participants in labor controversies are entitled to first amendment protections. See Thomas v. Collins, 323 U.S. 516 (1945); NLRB v. Virginia Elec. & Power Co., 314 U.S. 469 (1941); NLRB v. Yokell, 387 F.2d 751 (2d Cir. 1967).
violation was the setting aside of elections favorable to employers. With slight modification this policy continued until Congress enacted section 8(c) of the Act in 1947, which states that

the expressing of any views, argument, or opinion, or the dissemination thereof 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.

The adoption of section 8(c) was motivated by the Congressional desire to guarantee freedom of expression to employers, employees and unions.

In 1948 the Board, in General Shoe Corp., set down the rule that "an atmosphere which renders improbable free choice will sometimes warrant invalidating an election, even though that conduct may not constitute an unfair labor practice." Although under section 8(c) non-coercive speech could not constitute a section 8(a)(1) violation, such speech occurring in the course of a pre-election campaign would permit the NLRB to set aside an election which did not reflect the impartial judgments of employees.

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9. See Note, 38 Va. L. Rev. 1037, 1040 (1952): "The Board and the Seventh Circuit acknowledged the Virginia Electric & Power Co. case to the extent that they no longer based their decisions upon isolated speeches. In the very same cases, however, they reiterated the doctrine that employers must maintain strict neutrality during organizational periods." See also American Oil Co., 41 N.L.R.B. 1105 (1942); Sunbeam Elec. Mfg. Co., 41 N.L.R.B. 469 (1942), modified, 133 F.2d 856 (7th Cir. 1943).
11. See Christensen, Free Speech, Propaganda and the National Labor Relations Act, 38 N.Y.U. L. Rev. 242 (1963); Koretz, Employer Interference with Union Organization Versus Employer Free Speech, 29 Geo. Wash. L. Rev. 399 (1960). It has never been definitely established that the protection afforded by section 8(c) is co-extensive with the guarantees of the first amendment, though several appellate decisions have assumed that it and the first amendment provide the same safeguards. See NLRB v. Gisell, 395 U.S. 575 (1969); Pittsburgh S.S. Co. v. NLRB, 180 F.2d 731 (6th Cir. 1950); NLRB v. LaSalle Steel Co., 178 F.2d 829, 835 (7th Cir. 1949); NLRB v. Kropp Forge Co., 178 F.2d 822, 828 (7th Cir. 1949); Dal-Tex Optical Co., 137 N.L.R.B. 1782, 1786 (1962).
12. 77 N.L.R.B. 124 (1948). See also Bausch & Lamb Inc. v. NLRB, 451 F.2d 873 (2d Cir. 1971).
The Sewell Doctrine

The Board position concerning non-coercive inflammatory appeals to racial prejudice was clearly expressed in Sewell Manufacturing Co.,14 wherein an election was invalidated due to the employer's appeal to the racial prejudices of his white employees. Two weeks before the election, the employer mailed to employees a picture of a white man dancing with a black woman, with a caption suggesting that the white man was connected with the union which was attempting to organize in the plant. Employees were exposed to photographs, letters, newspapers and other publications which tended to establish an alliance between the union and civil rights organizations, and linked the union to racial integration, socialistic legislation and communism. In addition, employers were told that past contributions to civil rights organizations had been paid out of union dues.

In Sewell, the Board did not purport to condemn all racial appeals. It recognized that the communication of truthful statements pertaining to a union's position on racial issues is relevant and must be permitted.15 However, the purveyor of racial messages must meet the burden of proving beyond reasonable doubt that they were truthful and germane;16 a party must not "deliberately seek to overstate and exacerbate racial feelings by irrelevant and inflammatory appeals."17 It should be reiterated that in Sewell the employer's expression was not coercive and therefore not an unfair labor practice. Rather, the NLRB concluded that the extreme appeals to racial prejudice "create conditions which make impossible a sober, informed exercise of the franchise."18 The Board, in setting aside the election, was merely fulfilling its function "to provide a laboratory in which an experiment may be conducted under conditions as nearly perfect as possible, to determine the uninhibited desires of the employees."19

Employer racial propaganda has been held to constitute grounds for both a section 8(a)(1) violation (i.e., an unfair labor practice) and for setting aside an election under the principles of Sewell.20 In

15. Id. at 71: "We would be less than realistic if we did not recognize that such statements, even when moderate and truthful, do in fact cater to racial prejudice. Yet we believe that they must be tolerated because they are true and because they pertain to a subject concerning which employees are entitled to have knowledge—the union's position on racial matters."
16. Id. at 72.
17. Id.
18. Id. at 71.
Durant Sportswear and Amalgamated Clothing Workers, involving only an unfair labor practice charge, Sewell was cited for the proposition that an employer has the right to inform his employees of the organizing union’s racial policies, so long as the statements are truthful and made without undue appeal to racial prejudice. It seems that the NLRB incorrectly applied Sewell, which concerned a situation not involving an unfair labor practice. Truth is not an issue in the determination of what is an unfair labor practice. Perfectly truthful statements may constitute threats under section 8(a)(1), while non-coercive misrepresentations may not.

Subsequent to Sewell, there have been few cases in which elections were set aside due to employer or union racial propaganda not constituting an unfair labor practice. However, in Universal Manufacturing Corp. of Mississippi, the Board set aside an election as a result of the employer’s activities which rendered impossible “the rational, uncoerced selection of a bargaining representative.” The Board strictly adhered to the standards of Sewell, holding that a handbill and cartoon sponsored by the employer went beyond the bounds of permissible campaigning. Included in the propaganda was formed black employees that the union discriminated against blacks. Another employee was told that management would not prevent the replacement of black workers with whites, which the employer predicted would occur if the union won the election. The employer was held to have violated section 8(a)1 by threatening that in the event of union victory, the company would yield to the predicted demands that the black work force be replaced. See also Ladish Co., 180 N.L.R.B. 982 (1970); Bush Hog, Inc., 161 N.L.R.B. 1575 (1966).

22. Id. at 917.
23. Under section 8(c) expression 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.” 29 U.S.C. § 158(c) (1970). Thus a statement which amounts to a prescribed threat may give grounds for an unfair labor practice charge notwithstanding its truthfulness.
24. Unless made in connection with or in furtherance of a threat of reprisal or force or promise of benefit, misrepresentations do not form the basis for an unfair labor practice. However, they may constitute grounds for rescinding an election where the deviation from the truth is so substantial as to significantly affect the outcome of the election and the misrepresentation is made at a time when the opposing party has no adequate opportunity to reply. See Hollywood Ceramics Co., 140 N.L.R.B. 221, 224 (1962).
25. 156 N.L.R.B. 1459 (1966). For a recent case in which the Board overturned an election partly on the ground that the employer had interfered with an election by telling employees that union shops did not have Spanish-speaking foremen, see Media Mailers, Inc., 191 N.L.R.B. 50 (1971). The Board held that section 8(c)’s protections did not apply because only the validity of a representation election was at issue.
reference to a gift allegedly made by Teamsters president James Hoffa to Dr. Martin Luther King. While noting that Hoffa may have made the gift, the Board held that such fact was irrelevant to the union's campaign; failing to educate or inform the employees about germane issues, the disclosure did not meet the standards of Sewell.

The United States Fourth Circuit Court of Appeals in *NLRB v. Schapiro & Whitehouse, Inc.*, 27 expressly approved the Sewell doctrine in denying enforcement of an NLRB order directing an employer to bargain with a newly organized union, thus invalidating the election which the Board had upheld. Over a five-week period union leaflets informed the predominately black work force that they had been "held down" and told them to "LET US HELP YOU TO GET UP."28 Other leaflets adverted to racial disturbances that had recently taken place at nearby Cambridge, Maryland. The court stated:

[Equality of race in privilege or economic opportunity was not presently an issue. That a majority of the employees were Negroes did not make it so. For the union to call upon racial pride or prejudice in the contest could have no purpose except to inflame the racial feelings of voters in the election.]29

As in *Universal Manufacturing*, the court's decision rested upon a finding that the union activity was highly inflammatory and utterly irrelevant in violation of the Sewell standards.

Typical of the cases in which employer resort to racially-oriented statements did not invalidate elections is *Allen-Morrison Sign Co.*, 30 decided the same day as *Sewell*. In that case, the employees received letters from their employer suggesting that they would be faced with a choice between segregation and integration in the upcoming election. The letter stated that the national union actively promoted a policy of integration and alleged that the union used membership dues to further integration. The Board held that the letter was temperate in tone and advised the employees as to material matters. Although the Board made no mention of the employer's burden of truthfulness, it must be assumed that he sustained it.

Union injection of racial propaganda into an election campaign may also result in the setting aside of an election. However, in the

27. 356 F.2d 675 (4th Cir. 1966).
28. *Id.* at 679.
29. *Id.*
majority of cases, the NLRB and courts have rejected employer allegations that such elections were tainted with infirmity. In *Archer Laundry Co.* \(^\text{31}\) the employer charged that union appeals to prejudices of black employees created "an atmosphere . . . which prevented a free and fair expression of employee free choice." \(^\text{32}\) Leaflets distributed among employees stated that a "yes vote for the union is a yes vote for freedom" and pictured blacks being abused by policemen and police dogs. Anti-management statements attributed to a civil rights leader were also contained in the leaflets. Employees were urged to be "a free person not a handkerchief-head Uncle Tom." The Board recognized that both the *Archer* and *Sewell* factual situations were characterized by strong racial appeals but perceived a vital difference in the themes of the two campaigns. The two cases were distinguished on the ground that the literature used in *Archer* was calculated to engender racial consciousness on the part of the employees, while in *Sewell* the appeal was directed at the racial animosities of the employees. The Board interpreted the leaflets as conveying to employees the belief that a vote for the union was a vote for better working conditions. Stress was placed upon the fact that the literature in *Archer* was relevant to the employee's intelligent exercise of the franchise, which it said was not the case in *Sewell*. It seems that the Board differentiation of the two cases on the basis of relevancy is somewhat questionable. Working conditions, which included intermingling with blacks on an equal basis, were also of great concern to Sewell's employees. \(^\text{33}\)

**Constitutional Status of Sewell**

In *NLRB v. Virginia Electric and Power Co.* \(^\text{34}\) the United States Supreme Court initially considered possible first amendment limitations upon the scope of Board regulation of employer speech. The NLRB had determined that by posting a bulletin which emphasized the amicable relationship enjoyed by the company with its employees since previous rejection of unionization, the employer had violated

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31. 150 N.L.R.B. 1427 (1965). *See* Aristocrat Linen, 150 N.L.R.B. 1448 (1965); Baltimore Luggage v. NLRB, 387 F.2d 744 (4th Cir. 1968). The court affirmed a Board decision that racially-oriented letters and speeches addressed to the economic and social self-interest of black employees provided no basis for invalidating the election. It approved *Sewell* but noted that blacks made up an identifiable economic bloc with special problems.


33. As the Board has held, employees are entitled to know the union position on racial matters. *See* note 15 *supra*.

34. 314 U.S. 469 (1941).
section 8(a)(1) of the Act. The Court cautioned that this activity alone could not, within constitutional bounds, be made the foundation of a section 8(a)(1) violation. In *Thomas v. Collins*, the Supreme Court, in striking down a state statute requiring that union organizers register before soliciting memberships, held that the Constitution guarantees freedom of speech to both employers and employees. Thus, the amendment’s operation is not to be restricted by the fact that the controversy occurs in a labor setting.

Although the Sewell doctrine was established in 1962, the Supreme Court has not decided its constitutionality. However, in *Linn v. United Plant Guard Workers of America*, the Court acknowledged that section 8(c) “manifests a congressional intent to encourage free debate on issues dividing labor and management.” Quoting *N. Y. Times v. Sullivan*, the Court stated

> cases involving speech are to be considered against the background of a profound commitment to the principle that debate . . . should be uninhibited, robust and wide open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks.

The Court unequivocally endorsed, in a labor setting, the principle that “the most repulsive speech enjoys immunity provided it falls short of a deliberate or reckless untruth . . . .” Though the *Linn* case involved neither racially-oriented statements nor the validity of a representation election, its broad language casts doubt upon the constitutional soundness of the Sewell doctrine which requires relevancy and temperateness in addition to the truthfulness of the expression.

Also relevant to the constitutional status of the Sewell doctrine is *NLRB v. Corning Glass Works*, a First Circuit Court of Appeals case where the court said that “the First Amendment . . . protects . . . an employer with respect to the oral expression of his views on labor matters provided his expressions fall short of restraint or coercion.” Since non-coercive expression is constitutionally protected, it

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35. 323 U.S. 516 (1945). *See also NLRB v. Yokell, 387 F.2d 751 (2d Cir. 1967).*
37. *Id.* at 62.
39. *Id.*
40. *Id.* at 63.
41. 204 F.2d 422 (1st Cir. 1953).
42. *Id.* at 427.
should provide no basis for setting aside a representation election.\footnote{Pertinent is the court's admonition that, "It is not for the Board or this Court to alter or curtail an employer's constitutional or statutory rights." \textit{Id.} at 428.} 

The Sewell standard was intended to insulate employees from irrelevant, inflammatory statements and half-truths which tend to divert them from the "real" issues surrounding representation elections. It has been suggested, however, that the proper antidote for such statements is "more speech, not enforced silence."\footnote{Whitney v. California, 274 U.S. 357, 376 (1927) (concurring opinion of Mr. Justice Brandeis). \textit{See also} Comment, 17 \textit{Stan. L. Rev.} 373, 404 (1965).} Similarly the Supreme Court, in \textit{Wood v. Georgia},\footnote{370 U.S. 375 (1962).} concluded that errors in judgment and unsubstantiated opinion should be met with counter-argument and education rather than abridgment of the rights of free expression.

Such language hardly seems compatible with the Sewell requirement that racially-oriented statements be temperate. The difficulty in ascertaining the crucial distinction between inflammatory expression and that which is temperate is evidenced by the contrary results reached in \textit{Archer} and \textit{Schapiro & Whitehouse}. The rhetoric involved in the former case seemed far more inflammatory than the racial campaign in the latter case. Yet in \textit{Schapiro & Whitehouse} the election was nullified while in \textit{Archer} the union victory was affirmed. The Sewell standard seems "susceptible of the sweeping and improper application" of which the Court warned in \textit{N.A.A.C.P. v. Button}.\footnote{371 U.S. 415, 433 (1963).} In that case, the Court emphasized that government may regulate in the area of the first amendment only with narrow specificity in order to give first amendment freedoms breathing space to survive.\footnote{New York Times v. Sullivan, 376 U.S. 254, 271 (1964).}

Particularly suspect is the Board's policy of placing the burden of justifying his speech upon the purveyor of racial statements. The Supreme Court, referring to freedom of speech, has said that protections don't "turn on the truth, popularity, or social utility of the ideas and beliefs . . . offered"; there is no exception for any test of truth and "especially not one that puts the burden of proving truth on the speaker."\footnote{See Comment, 17 \textit{Stan. L. Rev.} 373, 404-05 (1965) and the discussion of \textit{Speiser v. Randall}, 357 U.S. 513 (1958) therein.} Under the Sewell standard, speech, though entitled to first amendment protection, may nevertheless be stifled where for any reason the speaker cannot meet his considerable burden.\footnote{See Comment, 17 \textit{Stan. L. Rev.} 373, 404-05 (1965) and the discussion of \textit{Speiser v. Randall}, 357 U.S. 513 (1958) therein.} The constitutional difficulty of Sewell is compounded by the rule that any
doubts as to the propriety of the statements will be decided against the speaker. Since in the Linn case, the Supreme Court made the defamation standards of New York Times applicable to cases involving defamation in labor disputes, it seems reasonable that these constitutional standards should be applied to all first amendment controversies concerning labor disputes.

Any conclusion that the Sewell doctrine is unconstitutional must be premised upon the assumption that the setting aside of a representation election constitutes sufficient restraint of expression to invoke the safeguards of the first amendment. The Supreme Court has in a variety of contexts held that certain governmental action amounted to an impermissible impairment of expression. In Grosjean v. American Press, a tax imposed upon certain publications was held to have unduly burdened free speech rights of the press. In another instance, a defendant's conviction for disorderly conduct stemming from his participation in a demonstration was set aside because the jury's verdict may have been founded upon his communication of constitutionally protected ideas. The potential for curtailment of unfettered political discussion inherent in threats of, or actual imposition of pecuniary liability for alleged defamation was recognized in Greenbelt Cooperative Publishing Association v. Bresler. Certainly the amendment protects citizens against varied forms of governmental infringement. The fact that the NLRB did not label Sewell's expression as violative of the Act should not take the action of invalidating the election outside the operation of the first amendment. The practice of nullifying elections favorable to the "offending" employers or union not only deprives them of victory, but forces them to incur the effort and expense of a second election, thereby restraining their free speech.

Permissible Regulation

The Board could probably take sanctions against employers or

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50. 297 U.S. 233 (1936).
53. See Bates v. City of Little Rock, 361 U.S. 516, 523 (1960): "Freedoms such as these [referring to first amendment freedoms] are protected against heavy-handed frontal attack, but also from being stifled by more subtle governmental influence." See also Bok, The Regulation of Campaign Tactics in Representation Elections Under the NLRA, 38 Harv. L. Rev. 38, 67-74 (1964), where Professor Bok notes that by subjecting the employer to another election the Board is clearly attempting to restrain this type of speech.
54. Invalidating an election is, however, also a remedy for a section 8(a)1 violation. See cases cited at note 8 supra.
unions who make false statements with reckless disregard for their truth or falsity.\textsuperscript{55} Clearly it could likewise act against those who use statements or expressions involving threats excluded from constitutional protection.\textsuperscript{56} The NLRB could perhaps limit the use of speech which tends only to inflict personal abuse upon a person or group of persons.\textsuperscript{57} In \textit{Beauharnais v. Illinois},\textsuperscript{58} the Supreme Court approved a group libel statute which curtailed "malicious defamation of racial and religious groups . . . calculated to have a powerful and emotional impact on those to whom it was presented."\textsuperscript{59} However, the Court, in \textit{Terminiello v. Chicago},\textsuperscript{60} noted that even provocative speech which induces unrest and "stirs people to anger" serves a vital function under our system of government.\textsuperscript{61}

A possible constitutional basis for the \textit{Sewell} doctrine might be found through a superficial reading of \textit{NLRB v. Gissel},\textsuperscript{62} decided in 1969. The Supreme Court made statements which would suggest that an employer's first amendment rights may be limited to the extent that they conflict with his employee's right to organize.\textsuperscript{63} The Court said

any assessment of the precise scope of employer expression, of course, must be made in the context of its labor relations setting.


\textsuperscript{57} \textit{Chaplinsky v. New Hampshire}, 315 U.S. 568, 571-72 (1942): "There are certain well-defined and narrowly limited classes of speech, the prevention of which have never been thought to raise any Constitutional problems. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—these which by their very utterance inflict injury or tend to incite an immediate breach of the peace." In \textit{Cantwell v. Connecticut}, 310 U.S. 296, 309-10 (1940), the court stated: "Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument." \textit{See also} \textit{Chafee, Free Speech in the United States} 149 (1941).

\textsuperscript{58} 343 U.S. 250 (1952).

\textsuperscript{59} \textit{Id.} at 261.

\textsuperscript{60} 337 U.S. 1 (1949).

\textsuperscript{61} \textit{Id.} at 4.


\textsuperscript{63} The Supreme Court has recognized that employees have a constitutional right to organize. \textit{See Brotherhood of R.R. Trainmen v. Virginia}, 377 U.S. 1 (1964). \textit{See also} \textit{Thomas v. Collins}, 323 U.S. 516, 532 (1945): "The right to discuss and inform people concerning the advantages and disadvantages of unions and joining them is protected not only as a part of speech but as a part of free assembly."
Thus, an employer's rights cannot outweigh the equal rights of the employees to associate, as those rights are embodied in section 7 and protected by 8(a)1 and the proviso to 8(c).  

When considered in its context, it seems that those statements have reference only to the Court's conception of the difference between a prediction and a threat—a difference material only to a finding of an unfair labor practice.  

Furthermore, first amendment rights—including, of course, the right to organize—are not protected against private infringement and thus not against employer or union interference.

**Conclusion**

The Sewell doctrine provides that one who makes use of racial messages is charged with the burden of proving that they are truthful and germane, with any doubts resolved against the speaker. Irrelevant, inflammatory racial appeals are not permitted, regardless of their truthfulness. Precariously co-existing with the Sewell doctrine is the principle that all participants in labor controversies are entitled to the same first amendment protections as other citizens. In non-labor settings the courts have constructed elaborate safeguards for the protection of unpopular, poorly reasoned and even untrue expression. Although the Supreme Court has declared that the first amendment does not sanction coercive expression, under the Sewell standard, non-coercive speech may be curtailed. In view of these considerations, it seems implausible to assert that citizens involved in labor controversies have the same first amendment rights as others as long as the Sewell doctrine remains operative.

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65. Thus, in balancing the co-equal rights of employers and employees, the Board 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." Id. at 617.

66. See Public Util. Comm'n v. Pollak, 343 U.S. 451 (1952). But see Farm Workers v. Mel Finerman Co., 84 L.R.R.M. 2081 (D. Colo. 1973). There it was held that a union was entitled to access to a migrant labor camp for the purpose of attempting to persuade workers to unionize. The union, however, had to exercise their first amendment rights subject to certain restrictions in deference to the camp owner's right to exercise dominion over his property. The court deemed that there had to be a fair adjustment between the competing constitutional rights of the owner and the union and implicitly recognized that first amendment rights are protected against absolute exercise of the owner's property rights.