Wall Street Journal
April 16, 2015

Ambushing Employers' Speech Rights

By Thomas M. Johnson Jr.

A popular narrative since the Supreme Court's Citizens United decision in 2010 posits that corporations have displaced political and religious minorities as the principal beneficiaries of First Amendment rights. There supposedly has been a "corporate takeover" of the First Amendment, as Harvard Law School's John C. Coates IV put it in a February paper.

This theory is flawed for many reasons, but one deserves special mention. For many companies, the most important place to exercise speech rights is in the workplace, where management and employees communicate about the terms and conditions of employment. And in this area, organized labor has succeeded for decades in restricting a company's ability to speak freely to address employee concerns.

The current administration in particular has sacrificed the speech rights of employers and employees to advance a pro-union agenda. Last month, for example, the president vetoed an effort by Congress to overturn the National Labor Relations Board's controversial "ambush election" rule. This rule, which took effect on Tuesday, reduces the time that employers have to present information to employees in advance of a union election, thus making it easier for unions to campaign without meaningful opposition. Court challenges to the rule are currently pending.

Meanwhile, the board is championing labor efforts to organize small groups of pro-union employees into "micro unions"—say, a men's shoes department in a retail store. This strategy essentially enables unions to gerrymander a workplace, organizing union supporters while carving out employees who might oppose unionization. The president has also voiced support for "card check" legislation that would effectively replace secret-ballot union elections with signature drives backed by union officials.

This hostility toward speech opposing unionization differs markedly from the NLRB's treatment of speech that is adverse to employers. For example, the board's social-media guidelines, issued in memoranda released in 2011 and 2012, aim to shield employees from discipline for posting Facebook FB 2.35 % comments that disparage their employers, regardless of whether those comments are rude, profane or amount to harassment.

These new initiatives dilute the influence of the significant majority of unrepresented employees who would prefer a nonunionized workplace. Not coincidentally, this offensive comes at a time when union influence and participation in the private sector is at an all-time low. Only 6.6% of private-sector employees were unionized last year, compared with 23.4% in 1974, according to analysis of government data.

Indeed, the NLRB has cited the declining popularity of unions as justification for more intrusive regulation of employer speech. In 2011, claiming that workers were insufficiently apprised of their own self-interest, the board enacted a rule that would compel employers to post a notice reminding employees of their rights to unionize, strike, picket and even wear "union hats, buttons, T-shirts, and pins in the workplace."

The court of appeals for the D.C. Circuit held that the board was prohibited from conscripting employers into delivering this one-sided message. But a later decision by the same court called into question whether even this modest reprieve for free speech will survive.

It is past time for courts to take a fresh look at the law on speech in the workplace, which benefits unions at the expense of employers and employees alike. Since the New Deal, courts have largely deferred to the NLRB's judgment of how best to

promote free and fair union elections. Too often, though, the board has abused this authority by restricting speech that it determined could unduly influence an employee's vote.

In the 1947 Taft-Hartley Act, Congress attempted to limit the NLRB's ability to police workplace speech. But in the decades that followed, the Supreme Court repeatedly ruled that federal interests in "industrial peace," or reducing perceived inequalities in bargaining power, could trump the constitutional and statutory mandates of free speech. Many of these pro-union decisions are still enshrined in law.

Thus, employers today can be held liable for announcing raises during a union campaign, despite the obvious benefit to employees. Employers must also be careful when predicting the potential costs associated with unions, lest those statements be treated as implied threats to punish employees if they unionize. As a result, employees are less informed about their choices, and unions have a convenient cudgel to use at the bargaining table: They can threaten legal action based on perceived threats or incentives from employers.

The Constitution does not give unions such special protections from the marketplace of ideas. And those concerned with a "corporate takeover" of the First Amendment should recall that Citizens United protected the speech of unions and corporations alike. The same cannot be said for the NLRB, where companies are uniquely disfavored and unions are singled out for special treatment—to the detriment of the employees they purport to represent.

Mr. Johnson is an attorney in Washington, D.C., where he practices labor and employment and appellate law.