

operation would not have a sufficiently substantial impact on interstate commerce to justify assertion of jurisdiction by the Board. We shall dismiss the petition.

### Order

IT IS HEREBY ORDERED that the petition filed herein be, and it hereby is, dismissed.

MEMBER HOUSTON took no part in the consideration of the above Decision and Order.

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BILTMORE MANUFACTURING COMPANY *and* JACQUELINE WRIGHT, ROMER CONNER, AND NELLIE HUDSON, PETITIONERS *and* THE UNITED TEXTILE WORKERS OF AMERICA, AFL. *Case No. 34-RD-25. December 29, 1951*

### Supplemental Decision and Order

Pursuant to a Decision and Direction of Election, an election by secret ballot was conducted on November 14, 1950, under the direction and supervision of the Regional Director for the Region in which this case was heard, among the employees of the Employer in the unit found to be appropriate. At the close of the election, the parties were furnished a tally of ballots. The tally showed the following results:

Approximate number of eligible voters.....	143
Void ballots.....	1
Votes cast for the Union.....	62
Votes cast against the Union.....	68
Valid votes counted.....	130
Challenged ballots.....	0

The Union duly filed objections to the conduct of the election and to conduct affecting the results of the election. On April 13, 1951, the Regional Director issued his report on objections in which he found the objections without merit and recommended that they be overruled. Thereafter the Union duly filed exceptions to the Regional Director's report.

The Union contends that the Employer interfered with the election by making a speech to the employees on company property and time just before the election, without affording the Union an equal opportunity to address the employees. An investigation by the Regional Director disclosed the following facts: Shortly after 10 a. m. on the morning of November 14, 1950, about 2 hours before the polls opened, J. M. Lane, the plant manager, requested on the plant public address system that all employees report to the lunchroom. The employees were not instructed to punch out on the time clock and did not do so.

Hence they were paid for the time spent in the lunchroom. While there, they were addressed by Lane. In his speech Lane denied certain accusations of the Union and made accusations of his own against the Union. He asked for unity, requested that all employees vote, and stated that they could vote freely without fear of reprisals. We find that in calling the employees together and addressing them in the manner described, the Employer exercised a privilege protected by Section 8 (c) of the Act, and did not thereby unlawfully interfere with the election.<sup>1</sup>

However, the Employer went further than this. At the beginning of his speech to the assembled employees, Lane made an announcement to the effect that no one would be permitted to answer anything he said about the Union, and that if anybody had anything to say he could come to his office and say it to him personally. At the conclusion of his speech, an employee, apparently the president of the local union, rose to speak, but Lane did not accord her recognition and the employees left without hearing her. By the actions of its plant manager, therefore, the Employer effectively denied to the Union the opportunity to engage in solicitation on company property and time at the very time when the Employer itself was occupied in such activity. The Union alleges that this act of denial interfered with a free choice in the subsequent election.

The Board has recently dealt with this question in *Bonwit Teller, Inc.*<sup>2</sup> The Board there found that when the employer chose to deliver a speech to its employees, it could not lawfully deny the union's reasonable request for an opportunity to reply under similar circumstances. We affirm that holding here. The factual setting of this case is essentially the same in its operative facts as the situation existing in *Bonwit Teller*. Indeed, in several respects the instant case is an even stronger one for applying the rule of *Bonwit Teller*. Here, the Employer's speech to the assembled employees was made on the very day of the election, just 2 hours before it opened. Thus there was no opportunity for the union adherents to reply other than in the manner it requested. Also, in this case the union representative who sought to answer the Employer was actually an *employee*, rather than an outside union representative. It is true, as pointed out by our dissenting colleague, that the record in this case does not disclose the existence of a general no-solicitation rule and its discriminatory application as was found in the *Bonwit Teller* case. It does reveal, however, that at the very time the Employer addressed the employees on company time and property, it denied union spokesmen a similar opportunity. Certainly, the same legal consequences should flow from

<sup>1</sup> *Babcock & Wilcox*, 77 NLRB 577.

<sup>2</sup> 96 NLRB 608.

this conduct as would flow from the discriminatory application of an established rule against solicitation. For, in either case, the Employer is discriminating in favor of antiunion adherents to the serious detriment of union adherents.

But entirely aside from the existence or effect of a no-solicitation rule, this matter is clearly controlled by the *Bonwit Teller* case. In that decision the Board explicitly stated the rule applicable here when it said, "There is, in addition, an even more fundamental consideration—wholly apart from the Respondent's disparate use of the no-solicitation rule—which justifies the result we reach. We believe that the right of employees, guaranteed by Section 7 of the Act, freely to select or reject representation by a labor organization, necessarily encompasses the right to hear both sides of the story under circumstances which reasonably approximate equality." In the light of this guiding principle, we do not agree with our dissenting colleague that this case is an "unwarranted extension" of the *Bonwit Teller* doctrine. In both cases the employer dedicated company property and time to a campaign against the union, while refusing to accord to the union an opportunity to reply under equal circumstances.<sup>3</sup> Discrimination being present, it is immaterial that it occurred in a factory rather than in a retail sales establishment. The election having been interfered with, we will not refuse to set it aside, as urged by our dissenting colleague, because the interference may not have been committed against a background of unfair labor practices.

Accordingly, for the reasons stated above and more fully set out in the *Bonwit Teller* decision, we find that the Employer interfered with the employees' freedom of choice in the selection of a bargaining representative, and we shall order that the election of November 14, 1950, be set aside.<sup>4</sup> We shall direct the Regional Director to conduct a new election at such time as he deems appropriate.

### Order

IT IS HEREBY ORDERED that the election of November 14, 1950, among the employees of the Employer be, and it hereby is, set aside; and

IT IS FURTHER ORDERED that this proceeding be remanded to the Regional Director for the Region in which this case was heard for the purpose of conducting a new election at such time as he deems the circumstances permit a free choice of a bargaining representative.

<sup>3</sup> We note again that this was the conduct held unlawful by the Court of Appeals for the Second Circuit in affirming the Board's decision in the *Clark Brothers* case (163 F. 2d 373) after enactment of the amended Act.

<sup>4</sup> In view of this disposition, we find it unnecessary to consider other objections to the election raised by the Union.

MEMBER REYNOLDS, dissenting:

In determining that the Employer interfered with the free choice of a bargaining representative by denying the Union an opportunity to address the employees on company property and time, the Board relies on the *Bonwit Teller* case. Although I disagreed with the decision in that case, I would not note a further dissent were I of the opinion that that case was dispositive of the issue presented in the instant case. In my opinion, however, this case is bereft of the factors upon which the *Bonwit Teller* decision rests. I therefore regard the decision herein as an unwarranted extension of the unfortunate doctrine of the *Bonwit Teller* case.

In the *Bonwit Teller* case, the Board laid down the rule that "an employer who chooses to use his premises to assemble his employees and speak against a union may not deny that union's reasonable request for the same opportunity to present its case, *where the circumstances are such* that only by granting such request will the employees have a reasonable opportunity to hear both sides." (Emphasis supplied.) The principal circumstance which the Board held gave rise to *Bonwit Teller's* obligation to grant such request is not present here because the Union's right to solicit was not circumscribed by a no-solicitation rule. Moreover, even if such a rule were in effect at the Employer's plant, it could not curtail the Union's right to solicit on nonworking time, as the Employer is a manufacturing enterprise rather than a retail sales establishment.<sup>5</sup> Accordingly, the Union in this case, unlike its counterpart in the *Bonwit Teller* case, was not deprived "of the most effective means of contact with employees—namely, solicitation of employees while they were" on company premises.

In the *Bonwit Teller* case, the Board also relied on the fact that the Employer's speech was made against a background of unfair labor practices. There is no evidence of such unlawful conduct in this case. For this reason and because of the afore-mentioned absence of a no-solicitation rule, it is erroneous to characterize the factual settings of the two cases as "essentially the same."

By applying the rule of the *Bonwit Teller* case to this factually different case, the inroads already made upon an employer's statutory right to address its employees in the course of an election campaign are so broadened that the right is now all but meaningless. It appears quite clearly from this decision that that right, unencumbered by statute, has by decisional process of the Board acquired as a necessary concomitant in all instances the obligation of the employer to provide a forum of debate for unions. Among other things, therefore, unions,

<sup>5</sup> The permissible variation in the scope of no-solicitation rules depending upon the enterprise involved is fully set forth in the *Bonwit Teller* decision.

if they so desire, must now be accorded the privilege of having the last word in an election campaign.

Accordingly, for reasons stated in my dissenting opinion in the *Bonwit Teller* case, which reasons apply even more forcefully here, I would find that the Employer did not unlawfully deny the Union's request to address the employees on company time and premises, and consequently would not set aside the election of November 14, 1950.

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LUNTZ IRON & STEEL COMPANY and UNITED STEELWORKERS OF AMERICA,  
CIO, PETITIONER. *Case No. 8-RC-1308. December 29, 1951*

### Supplemental Decision and Order

On November 20, 1951, the Board issued a Decision and Certification of Representatives,<sup>1</sup> in which it overruled the Employer's objections to the election, and adopted the Regional Director's recommendation that, in accord with the Petitioner's third objection, a ballot marked with a red pencil in the "NO" box be held invalid and not counted. It thus appeared that the Petitioner had received a majority of the valid ballots cast, and the Board accordingly certified the Petitioner as the bargaining representative of the employees in the stipulated unit.<sup>2</sup> On December 3, 1951, the Employer filed a motion for reconsideration in which it urged that the Board reexamine its previous decision sustaining the Petitioner's objection No. 3 and find that the red-pencilled ballot is valid. On December 10, 1951, the Petitioner filed a memorandum in opposition to the Employer's motion.

Upon the entire record in this case,<sup>3</sup> the Board makes the following supplemental findings:

The Employer's motion for reconsideration is grounded upon the premise that the use, by its observer, of a red pencil in marking his own ballot, rather than a conventional black pencil, could not, *per se*, serve to identify the voter and thereby violate the secrecy of the ballot. Upon careful reexamination of our decision, we are now persuaded that the Employer's contention is meritorious and that the red-pencilled ballot is valid. We have personally examined a facsimile of the ballot in question and we perceive no evidence that the red "X" marking is of such a character as to inherently disclose the identity of the voter. Moreover, we do not believe that the use of the red pencil

<sup>1</sup> 97 NLRB 72.

<sup>2</sup> The Board overruled the Petitioner's second objection. But, in view of its finding as to the Petitioner's objection No. 3, the Board deemed it unnecessary to pass upon the Regional Director's recommendation that a hearing be directed on the Petitioner's first objection.

<sup>3</sup> The request of the Employer for oral argument is denied because the record, the Employer's motion, and the Petitioner's memorandum in opposition thereto, in our opinion, adequately present the issues and the positions of the parties.