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Workshop Session 3(D) – The Classroom as Shop Floor
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A key tenet in the study of the union organizing drive is the nature of the employer's response, including its first amendment right of free speech embodied in Section 8(c) of the Labor Management Relations Act (LMRA).[1] An employer responding to an organizing effort often requires its employees to attend a so-called "captive audience speech," where various themes are utilized to state the employer's opposition to the union, including the effect of unionization on existing terms and conditions of employment; the economic impact of unionization on the company's business operations generally; the union as an "outsider;" the perils of collective bargaining and the related risks and costs of striking; loyalty to the enterprise; and status in the workplace.

In real world terms, such speeches can be delivered at various times during the union election campaign, but often are delivered shortly after the employer discovers the nascent union organizing drive and before the employer has sought the advice of legal counsel. The labor law class during which the speech is delivered occurs in the context of studying the Supreme Court's seminal decision in *NLRB v. Gissel Packing Company*,[2] where the Court defined the extent of and limits to employer speech during a union organizing

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[1] Section 8(c) provides that "[t]he expressing of any views, argument or opinion, or the dissemination thereof, whether in written, printed, graphic labor practice under or visual form, shall not constitute or be evidence of an unfair 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) (1988).
[2] 395 U.S. 575 (1969).

campaign.[3] An important doctrinal objective of the class is to expose students to these limitations on employer speech and to have them evaluate the lawfulness of statements made by their employer.

However, there are other and perhaps equally important goals: One is to replicate an employer's control over its workers and the feeling of powerlessness that accompanies being ordered out of familiar surroundings and routines in the workplace. The class examines the impact that this dynamic, including the disruption in normal work patterns, has on recollection and the gathering of facts. Indeed, the exercise is not primarily about labor law. Rather, it seeks to demonstrate where "evidence" comes from; how the perception of the listener and her ability to recall and communicate influences the "facts;" how being placed in an unexpected environment to hear a message or witness an event which was unanticipated may impact on the ability to recall accurately what was said; and, the role of a lawyer in "creating" the facts. Given these objectives, the exercise is not limited for use in a labor law class, but can be equally effective in evidence (where I have successfully utilized it) or in a first year lawyering seminar.

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[3] In *Gissel*, the Supreme Court approved the National Labor Relations Board's imposition of bargaining order as a remedy for serious employer unfair labor practices during an organizing drive. However, the Court also addressed the limits to an employer's free speech rights under Section 8(c). In fashioning its standard, the Court noted that the "precise scope of employer expression" must be assessed "in the context of its labor relations setting," and that "an employer's rights cannot outweigh the equal rights of the employees to associate freely…" *Id*. at 617. The Court explained that "any balancing of those rights 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.*

In order to assist in understanding the statements contained in the speech, and to put participants in this workshop more or less on equal footing with second and third year law students studying labor law (save for those already well-versed in the subject), set out below is a summary of the legal standard governing employer speech under the LMRA:

> "[A]n employer is free to communicate to its employees any of its general views about unionism or any of its specific views about a particular union, so long as the communications do not contain a threat of reprisal or force or promise of benefit. *Id* at 616. [An employer] may even make a prediction as to the precise effects it believes unionization will have on the company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences of unionization beyond its control…in order to invoke the protection of the First Amendment." *Id.* at 618.

> "If there is any implication that an employer may or may not take action solely on its own initiative for reasons unrelated to economic necessities…the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment." *Id.*

While familiarity with the law may be an advantage for students and law professors alike, it is an advantage that workers ordinarily do not enjoy. This, too, may have an effect on recall and affect the creation of a story, told by workers, woven from the words of their employer. I hope that you will enjoy this interactive exercise in learning.