I have set forth herein some of the long and complex investigation and determination by the Board, the Courts, and the Congress, which led to the development of the principle at issue. That history is marked by frequent appraisals of the subtle but powerful pressures inherent in employer speeches on union organization given in a plant environment and on working time. Until we are certain that the Bonwit Teller doctrine has been rejected not only by the circuit courts but by the Supreme Court, or that the doctrine, itself, is unsuitable for the purpose for which it was designed, I submit that we are mistaken in abandonment of a rule so grounded in our particular and specialized knowledge and so vital in preserving employee rights to the choice of bargaining representatives free from employer interference. To do otherwise is to ignore the function the statute prescribes and to avoid the rights the statute protects.

For these reasons, accordingly, I cannot join in the action of my colleagues and would find that the Respondent Livingston, by its conduct prior to the election in this case, thereby violated Section 8 (a) (1) of the Act.

PEERLESS PLYWOOD COMPANY *and* UNITED FURNITURE WORKERS OF AMERICA, C.I.O., Petitioner. Case No. 11-RC-517. December 17, 1953

SUPPLEMENTAL DECISION, ORDER, AND SECOND DIRECTION OF ELECTION

Pursuant to a Decision and Direction of Election[1] issued herein on May 13, 1953, an election by secret ballot was conducted on May 26, 1953, under the direction and supervision of the Regional Director for the Eleventh Region, among employees in the unit found appropriate by the Board. Following the election, a tally of ballots was furnished the parties. The tally shows that of 50 votes cast in the election, 20 were for, and 29 were against, the Petitioner, with 1 ballot challenged.[2]

On May 28, 1953, the Petitioner filed objections to conduct affecting the results of the election. The Regional Director investigated the objections and, on August 19, 1953, issued and duly served upon the parties a "Report on Objections," in which he recommended that the election be set aside and a new election ordered. Within the proper time therefor, the Employer filed exceptions to the Regional Director's report.

Having duly considered the matter, the Board finds as follows:

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[1] Not reported in printed volumes of Board decisions.

[2] Local Union No. 2566, United Brotherhood of Carpenters and Joiners of America, AFL, also appeared on the ballot but received no votes.

The Petitioner objected to the election upon the ground, inter alia,[3] that employees were assembled on company time and property to listen to an antiunion speech and, although requested to do so, the Employer denied the Petitioner similar facilities for addressing employees. The facts relating to this objection are undisputed. They are as follows:

The Board issued its Decision and Direction of Election on May 13, 1953. Two days later, the Regional Director completed arrangements for holding the election during the morning of May 26, 1953. On May 20, 1953, the Petitioner wrote a letter to the Employer requesting equal time and facilities in the event that the Employer made a speech to the employees on employer time and property. The Employer denied the Petitioner's request on May 22, 1953, stating that it did not have a "no-solicitation" rule and that therefore the Board's ruling in the Bonwit Teller case[4] did not apply.

The election was held between 9:30 a.m. and 10:15 a.m. on May 26, 1953. On the afternoon of May 25, less than 24 hours before the election, the Employer assembled the employees on its property in order to have them listen to a prepared speech about the election delivered by the secretary-treasurer of the Employer. After the speech was read, mimeographed copies of it were distributed to the employees present. The speech was noncoercive in character.

The Regional Director recommended that the objections be sustained and the election set aside, because "it is now established Board policy that if the employer utilizes company time and property to campaign against the union he may not deny the union an opportunity to reply under the same circumstances." The Employer challenges the conclusion and recommendation of the Regional Director. It argues that the Petitioner held a meeting at its own hall on the evening of May 25, at which it had ample opportunity to present its side of the case to employees at the last available moment, and to answer the arguments put forth by the Employer at a meeting on the Employer's premises that afternoon. It also asserts that it has never had a "no-solicitation" rule and the opportunity afforded the Petitioner to present its side of the case to employees has been unrestricted.[5]

Under the Board's broad Bonwit Teller doctrine, this election would have been set aside because the Employer made a speech to his employees prior to an election and denied the Union an opportunity to use his premises to make

[3] The Petitioner also listed four other reasons for setting aside the election. The Regional Director found that these objections were without merit and recommended that they be overruled. As no exceptions have been filed to this recommendation, it is hereby adopted without comment.

[4] Bonwit Teller, Inc., 96 NLRB 608, remanded 197 F. 2d 640 (C. A. 2), employer's petition for certiorari denied 345 U. S. 905.

[5] See Bonwit Teller Inc. v. N. L R. B., 197 F. 2d 640 (C A. 2), cert. denied 345 U. S. 905; N L. R. B. v. American Tube Bending Company, 205 F. 2d 45 (C A. 2).

a speech in reply. This would have been done regardless of the timing of the Employer's speech, so long as it was pre-election, and regardless of whether or not the Employer had a broad no-solicitation rule.

In our decision in the Livingston Shirt case, 107 NLRB No. 109, the majority of the Board reverses the broad Bonwit Teller decision. In that case we hold that, in the absence of either a privileged or an unlawful broad no-solicitation rule, an employer does not commit an unfair labor practice if he makes a noncoercive speech to his employees and denies the union an opportunity to reply on company premises.

We are now called upon to decide what our rule shall be in an election case in the light of our Livingston Shirt decision. We have abandoned the Bonwit Teller doctrine in complaint cases. But this does not, however, dispose of the problem as it affects the conduct of an election. It is our considered view, based on experience with conducting representation elections, that last-minute speeches by either employers or unions delivered to massed assemblies of employees on company time have an unwholesome and unsettling effect and tend to interfere with that sober and thoughtful choice which a free election is designed to reflect. We believe that the real vice is in the last-minute character of the speech coupled with the fact that it is made on company time whether delivered by the employer or the union or both. Such a speech, because of its timing, tends to create a mass psychology which overrides arguments made through other campaign media and gives an unfair advantage to the party, whether employer or union, who in this manner obtains the last most telling word.

When viewed in this light, it is plain that the situation is aggravated rather than equalized by an attempted application of the Bonwit Teller doctrine to elections. In an attempt to achieve equality, the effect of Bonwit Teller was to create a further imbalance by giving an advantage to the party who, by virtue of making a speech on company time only a few hours before the election, thereby was accorded the last most effective word.

Accordingly, we now establish an election rule which will be applied in all election cases. This rule shall be that employers and unions alike will be prohibited from making election speeches on company time to massed assemblies of employees within 24 hours before the scheduled time for conducting an election. Violation of this rule will cause the election to be set aside whenever valid objections are filed.

We institute this rule pursuant to our statutory authority and obligation to conduct elections in circumstances and under conditions which will insure employees a free and untrammeled choice. Implicit in this rule is our view that the combined circumstances of (1) the use of company time for preelection speeches and (2) the delivery of such speeches

on the eve of the election tend to destroy freedom of choice and establish an atmosphere in which a free election cannot be held. Also implicit in the rule is our judgment that non-coercive speeches made prior to the proscribed period will not interfere with a free election, inasmuch as our rule will allow time for their effect to be neutralized by the impact of other media of employee persuasion.

This rule is closely akin to, and no more than an extension of, our long-standing rule prohibiting electioneering by either party at or near the polling place. We have previously prescribed space limitations, now we prescribe time limitations as well. This rule arises from the same concept and has the same purpose of keeping our elections free. It is this same purpose which has led us recently to prohibit the use of sound trucks for the purpose of projecting voice propaganda into the polling place although the trucks are physically located outside the proscribed polling area.[6] Likewise, it is this same purpose which caused us in another recent decision to set aside an election because an atmosphere of terror was created by individual employees, although their conduct could not be attributed either to the union or the employer.[7]

We believe that the application of this same concept of fair and free elections to speeches on company time on the very eve of an election will have a salutary effect, will not give undue advantage to any party, and will afford employees an opportunity to exercise their franchise in an atmosphere more truly conducive to freedom of choice.

This rule will not interfere with the rights of unions or employers to circulate campaign literature on or off the premises at any time prior to an election, nor will it prohibit the use of any other legitimate campaign propaganda or media. It does not, of course, sanction coercive speeches or other conduct prior to the 24-hour period, nor does it prohibit an employer from making (without granting the union an opportunity to reply) campaign speeches on company time prior to the 24-hour period, provided, of course, such speeches are not otherwise violative of Section 8 (a) (1). Moreover, the rule does not prohibit employers or unions from making campaign speeches on or off company premises during the 24-hour period if employee attendance is voluntary and on the employees' own time.

In this case, as the Employer delivered its speech to employees on company time less than 24 hours in advance of the election, we find that a free and untrammeled expression of employees desires was thereby prevented. We see no unfairness in applying our rule here, since the Employer's conduct would have been a violation of the Bonwit Teller rule which was in effect when this election was held. We shall accordingly set aside the results of the May 26 election and

[6] Higgins, Inc., 106 NLRB 845.
[7] Diamond State Poultry Company, Inc , 107 NLRB No. 19.

direct a new one to be conducted in accordance with our new rule.

[The Board set aside the election held on May 26, 1953.]

[Text of Second Direction of Election omitted from publication.]

Member Murdock, dissenting in part and concurring in part:

While I agree that the election held in this proceeding on May 26, 1953, should be set aside and a new election held, I strongly dissent from the basis on which the majority reaches this result. The majority opinion, in my considered judgment, errs in substituting the new 24-hour rule announced herein for the Board's established doctrines concerning employer preelection speeches. In accord with my dissenting opinion in the Livingston Shirt case,[8] I would herein reaffirm those principles set forth in Bonwit Teller[9] and succeeding decisions which have, this day, been overruled by my colleagues, but which in my view are the only proper basis for setting this election aside.

In my dissenting opinion in the Livingston Shirt case, I have set forth in some detail the history and reasoning behind the Bonwit Teller doctrine which shows why it should be retained. That doctrine, of course, holds that if an employer chooses to use company time and property for antiunion speeches, the Act is violated by the employer's subsequent denial to the union of an equal opportunity for expression of contrary views. The same conduct by an employer, as an interference with the employees' freedom of choice, constitutes grounds for setting aside a representation election as in this case.

The majority opinion in Livingston Shirt specifically overrules the Bonwit Teller decisions, and the doctrine expressed therein, in complaint cases. In my dissent in Livingston I pointed out the contradictory position of the majority--in one breath scuttling the Bonwit Teller doctrine on the ground that the right of free speech cannot be "qualified by grafting on it conditions which are tantamount to negation," yet in the next breath extinguishing the employer's freedom of speech for a stated period prior to the election as a substitute method of dealing with the interfering effect of employer speeches on company time and property.

On the assumption that it is only "last-minute" speeches made on company time that have "an unwholesome and unsettling effect" requiring remedial action, my colleagues announce that they will hereafter invalidate any election where an employer (or union) speaks on company time during

[8] Livingston Shirt Corporation, et al., 107 NLRB No. 109.

[9] Bonwit Teller, Inc., 96 NLRB 608, 197 F. 2d 640 (C. A. 2), cert. den. 345 U. S. 905.

the final 24 hours preceding the election. I submit that this rule is both untenable in theory and inadequate in operation.

As noted, the majority opinion finds that it is the timing of an employer antiunion speech delivered on company time which basically determines whether or not that speech has the essential elements of interference. While I do not deny that the timing of such speeches just before an election may aggravate the degree of interference, it is clear that timing is but one facet of the general problem and not the whole evil. It is this preoccupation with the "last word" which, I believe, has led my colleagues into a misunderstanding and misconstruction of the Bonwit Teller doctrine as applied to representation elections. Contrary to the unsupported majority assertion that it created a "further imbalance by giving an advantage to the party who . . . thereby was accorded the last most effective word," that doctrine merely assured that employees heard both sides under circumstances of approximate equality. Needless to say, neither party, under Bonwit Teller, was awarded or guaranteed the last word nor was either party assisted thereby in jockeying for any advantage of that type.[10]

Such concentration on who speaks last in an organizational campaign, however, misses the essential problem completely. The mass psychology which my colleagues agree is created by employer speeches of this type, is not solely dependent upon the last-minute character of the employer's speech but comes, in fact, as a result of the employer's exclusive use of a forum as highly charged with significance and pressure for employees as is the place where they work. This, the crux of the interference with a free election caused by such employer speeches, is not alleviated in any manner by the last-minute moratorium proposed by the majority. As a result, the rule now announced will inevitably handicap rather than assist this Agency in handling the critical problem we all agree exists.

Even a cursory examination of the new 24-hour rule reveals its inherent defects and the fallacious reasoning behind its establishment. On what logical basis, I ask, does the majority now determine that an employer speech on company time and property has no harmful effect upon employees' freedom of choice when delivered $24\frac{1}{2}$ hours before an election while the identical speech made one-half hour later - 24 hours before the election - would have such an effect and warrant setting aside the election. Thus, under the new rule, where an election is scheduled for 10 a.m. Tuesday, the employer need only schedule a 30-minute speech for 9:30 a.m. on Monday, and stop talking by 10 a.m. In such a case the election will stand. If, however, he is so misguided as to begin his speech

[10] See Foreman & Clark, Inc., 101 NLRB 40; and Snively Groves, Inc., 102 NLRB 1617, where the Board specifically rejected any approach of that nature. For an extended discussion of this contention, see also my dissenting opinion in Livingston Shirt

30 minutes later, the Board will set aside the election because it was made during the 24-hour period prior to the election. Yet can anyone reasonably believe that there could be any real and substantial difference in the effect of the two speeches upon the employees? In line with this theory, if an employer commences his speech 24½ hours before an election and, either by design or through an excess of oratory, continues past the fatal 24-hour mark, we must assume that his words, with the striking of the clock, are immediately laden with a portent which they lacked 60 seconds before. I submit that such a rule as this, based upon the stopwatch and the minute hand rather than on any basic comprehension of industrial reality, is without perceptible merit.

If other examples of the lack of logic and practicality in the new 24-hour moratorium are necessary, they are readily available. The majority flatly assumes that, in all cases, a union will require precisely 1,440 minutes prior to an election--but no more to counteract the effects of the mass psychology admittedly created by this type of employer speech. This somewhat startling and certainly unsubstantiated conclusion is based on the finding that other campaign media available to a union are adequate to the task given that precise length of time. But are these media so phenomenally efficient under any and all circumstances? Such a conclusion demands belief in the obvious fantasy that 10,000 employees in one plant may be contacted in the same time as 25 workers in another; that communication problems in a rural community are precisely the same as those existing in a city or a large metropolis. This is demonstrably untrue and, as I have pointed out at more length in my dissenting opinion in Livingston Shirt, the experience of this Board over the past 18 years and the conclusion of independent observers is that communication media available to a union are woefully inadequate to correct the imbalance existing after an employer antiunion speech delivered on company time and property. That experience and those conclusions point unmistakably to the fact that a mass psychology created through exclusive use of company time and property by an employer against a union can be dissipated only by assuring a minimum of equality to both sides in the use of that forum.

As I have noted previously, the majority opinion further makes the apparent but unexplained conclusion that it is only employer antiunion speeches on company time which require the Board's remedial authority. The rule does not prohibit employer speeches on company property within the 24-hour period if not made on paid time. The majority's implicit conclusion that antiunion speeches delivered on the plant premises are harmless so long as they are not given during that portion of the day for which the employees are paid is not explicated. The experience of the Board certainly affords no basis for such a distinction and the known realities of industrial life point unmistakably in the opposite direction.

When, as pointed out by a recent analysis, "Field studies indicate how deeprooted is the feeling among workers that their future welfare depends upon 'not crossing the boss,' there can be no demonstrable difference in the impact of an employer antiunion speech upon employees made on company time and the same speech made during the lunch hour or when employees are invited to remain after work to hear the employer's views when both are delivered in the very situs of the employer's economic authority over his employees. [11] Beaming a speech at employees on their lunch hour or utilizing the sizeable readily captured "voluntary" audience which can be expected to respond to a command invitation to hear their employer's views on their own time immediately after the 5 o'clock whistle has blown, are techniques which can be expected to avoid even the limited effectiveness of a 24-hour rule.

I would also point out that the rigid unqualified 24-hour restriction on speech promulgated by the majority is hardly compatible with what should be our determination to see that employees have the broadest possible basis of discussion and information upon which to make their decision. The new rule is pointed toward less speech and hence less information, whereas Bonwit Teller was pointed toward more speech and hence more information. It was Justice Holmes who wisely observed that the underlying America tradition is that ". . . the ultimate good desired is better reached by free trade in ideas--that the best test of truth is the power of the thought to get itself accepted in the competition of the market place." [12] The Bonwit Teller approach insured such free competition of employer and union argument; the new approach will generally operate to stifle such competition of ideas in favor of employer arguments, so long as the employer is smart enough to time his speech just prior to the 24-hour period preceding the election. Yet there will be some instances where the new rule will operate to stifle competition of ideas to the employer's disadvantage as well as to the opportunity of employees to hear both sides. A union may distribute pamphlets to employees the night before the election containing false statements about the employer or his employment plans and practices--campaign propaganda which the Board does not condone but has never undertaken to police. Obviously the employer will not have time to prepare, have printed, and distribute a reply to the union's statement before the next morning's election. His only opportunity to answer the false charges of the union would be by a speech to the employees the morning of election day. Under the Bonwit Teller doctrine, so long as he was prepared to accord the union the opportunity to present its side in the same forum,

[11] 14 University of Chicago Law Review 104 at 106 citing Gardner, Human Relations in Industry, (1935).

[12] Abrams v. United States, 250 U. S 616, 624.

the employer would be free to make his speech and it would be left to the good sense of the voters (as it is in our political elections) to sift the true from the false. This precise situation was so determined by the Board under Bonwit Teller.[13] But under the new gag rule announced by the majority the employer would be effectively barred from answering such false propaganda and the employees would be denied the opportunity to know the truth because of the 24-hour iron curtain which the majority has pulled down on speeches on company time and premises.

In closing I would note that even if the Bonwit Teller doctrine is abandoned as a basis for finding unfair labor practices as the majority has done in the Livingston Shirt decision, it does not necessarily follow that the doctrine must or should be abandoned as a basis for setting elections aside. If this Board has the power, as the majority believes, to tell the employer that he cannot make a speech at all on company time and premises within 24 hours of an election, under pain of having the election set aside, then certainly it could not be argued that the Board does not have the power to tell the employer that if he elects to make such a speech at any time during the period preceding the election and does not grant the union's request for an opportunity to speak under similar circumstances, the Board will set aside the election. As I read the majority opinion they do not contend that the Bonwit Teller doctrine must be abandoned in representation cases, but to the contrary recognize that this is not so. They say: "We have abandoned the Bonwit-Teller doctrine in complaint cases. But this does not, however, dispose of the problem as it affects the conduct of an election" (emphasis supplied). Our only difference of opinion then is on the question whether the new 24-hour rule or the Bonwit Teller doctrine is better adapted to remedy the element of interference with free elections which is present in employer speeches on company time and property. As I have earlier pointed out, the 24-hour rule not only does not reach the basic problem, but gives rise to other objectionable features.

Accordingly, adhering to the Bonwit Teller doctrine in representation cases, as the Employer herein delivered an antiunion speech to its employees on company time and property and thereafter denied an equal opportunity to the Petitioner to express its views, I would find that the Employer interfered with the free choice of its employees. On that basis alone I agree with the result reached in the majority opinion in setting aside the election and directing a new election.

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[13] Snively Groves, Inc., supra.