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ADMINISTRATIVE LAW - NATIONAL LABOR RELATIONS BOARD - PERMISSIBLE SCOPE OF CEASE AND DESIST ORDERS

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RECENT DECISIONS

ADMINISTRATIVE LAW — NATIONAL LABOR RELATIONS BOARD — PERMISSIBLE SCOPE OF CEASE AND DESIST ORDERS — The National Labor Relations Board found that the Express Publishing Company had refused to bargain collectively. Thereupon the board issued an order requiring the company: (1) to cease and desist refusing to bargain collectively; and (2) to cease and desist in any manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form, join, or assist labor organizations of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid and protection as guaranteed in section 7 of the National Labor Relations Act. The circuit court of appeals refused to enforce the latter part of the order, and on writ of certiorari to the United States Supreme Court, *held* that only the portion of the board's order directing the company to bargain collectively could be enforced. *National Labor Relations Board v. Express Publishing Co.*, (U. S. 1941) 61 S. Ct. 693, modifying (C. C. A. 5th, 1940) 111 F. (2d) 588.

The Supreme Court has consistently ruled that the Labor Board can issue only those orders required to effectuate the policy of the National Labor Relations Act and permitted by fair inferences from the act's language.¹ The present decision can hardly rest on the broad policy of the act. The statute is preventive and it could therefore be argued that it would be wise to permit the board to issue restraining orders covering acts not actually found to be committed.² Although the circuit court of appeals might experience some difficulty in enforcing such orders in contempt proceedings, precedent for them could be found in the cases where extremely general and indefinite injunctions have issued against labor unions.³ Satisfactory administration of the law demands, however, that the board, technically trained for the duty, should be the first to determine whether any particular acts constitute an unfair labor practice. In the principal case, the board's order, if upheld, would have forced the court to ascertain originally in summary contempt proceedings whether or not particular practices were unfair. Since the board is not an equity court, and Congress may consti-

¹ The board was upheld in *H. J. Heinz Co. v. N. L. R. B.*, (U. S. 1941) 61 S. Ct. 320, but was restricted in *Consolidated Edison Co. v. N. L. R. B.*, 305 U. S. 197, 59 S. Ct. 206 (1938); *N. L. R. B. v. Fansteel Metallurgical Corp.*, 306 U. S. 240, 59 S. Ct. 490 (1939); *N. L. R. B. v. Sands Mfg. Co.*, 306 U. S. 332, 59 S. Ct. 508 (1939); and *Republic Steel Corp. v. N. L. R. B.*, 311 U. S. 7, 61 S. Ct. 77 (1940).

² See 53 HARV. L. REV. 472 (1940). The circuit court ordered the enforcement of a broad order in *N. L. R. B. v. National Motor Bearing Co.*, (C. C. A. 9th, 1939) 105 F. (2d) 652, and in *N. L. R. B. v. Pure Oil Co.*, (C. C. A. 5th, 1939) 103 F. (2d) 497. An opposite result was reached in *Globe Cotton Mills v. N. L. R. B.*, (C. C. A. 5th, 1939) 103 F. (2d) 91, and in *N. L. R. B. v. Swift & Co.*, (C. C. A. 7th, 1940) 108 F. (2d) 988.

³ A conviction for contempt under such an injunction was upheld in *Schwartz v. United States*, (C. C. A. 4th, 1914) 217 F. 866. See WITTE, *THE GOVERNMENT IN LABOR DISPUTES* (1932).

tionally give it the right to issue orders that could not properly be made by an equity court, it would appear logical to interpret the Supreme Court's decision as a construction of the statute outlining the board's power.⁴ Section 7 briefly states the rights given labor.⁵ Section 8 specifically designates certain actions as unfair practices.⁶ Section 10 (a)⁷ permits the board to prevent any person from engaging in "any unfair labor practice" listed in section 8. Section 10 (b)⁸ provides that if anyone is charged with engaging in any "such" practice, a complaint may issue and a hearing be held. If the board finds anyone engaging in any such practice, it can order the person to "cease and desist from such" performance. The language indicates that the board is to restrain the specific acts which it finds were unlawfully committed. Only a strained construction permits the inference that the board may find that one act has been committed, and thereupon restrain an unrelated act. Perhaps, however, under section 10 (e)⁹ a court has the power to enforce either the whole order, including a general restraining clause, or in its discretion, to enforce the order as reasonably modified to fit the circumstances.¹⁰ Justice Douglas' dissent ably argues the necessity of giving the board sufficiently broad powers so that an employer cannot circumvent the purposes of the act by continued, difficult-to-prosecute deviations from a narrow order. But this position is well met by the majority's warning, through Justice Stone, that an order cannot be evaded by "indirections or formal observances which in fact defy it."¹¹ On the basis of this decision, an order may

⁴ Judge Haney stated the position, "Thus it is clear that the Board may order an employer to cease and desist from 'such' labor practice. By use of the word 'such' the unfair labor practice is the one previously described, that is the unfair labor practice in which 'any person in the complaint *has engaged in or is engaging in.*'" Dissent in *N. L. R. B. v. National Motor Bearing Co.*, (C. C. A. 9th, 1939) 105 F. (2d) 652 at 663.

⁵ 49 Stat. L. 452 (1935), 29 U. S. C. (Supp. 1939), § 157.

⁶ 49 Stat. L. 452 (1935), 29 U. S. C. (Supp. 1939), § 158.

⁷ 49 Stat. L. 453 (1935), 29 U. S. C. (Supp. 1939), § 160 (a).

⁸ 49 Stat. L. 453-454 (1935), 29 U. S. C. (Supp. 1939), § 160 (b).

⁹ 49 Stat. L. 454 (1935), 29 U. S. C. (Supp. 1939), § 160 (e): "the court . . . shall have power . . . to make . . . a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board."

¹⁰ This theory might explain those cases where the Supreme Court permitted the general orders to be enforced without comment. *N. L. R. B. v. Fruehauf Trailer Co.*, 301 U. S. 49, 57 S. Ct. 642 (1937); *Associated Press v. N. L. R. B.*, 301 U. S. 103, 57 S. Ct. 650 (1937); *N. L. R. B. v. Mackay Radio & Telegraph Co.*, 304 U. S. 333, 58 S. Ct. 904 (1938); *Edison Co. v. N. L. R. B.*, 305 U. S. 197, 59 S. Ct. 206 (1938); *N. L. R. B. v. Fansteel Metallurgical Corp.*, 306 U. S. 240, 59 S. Ct. 490 (1939).

¹¹ *N. L. R. B. v. Express Publishing Co.*, (U. S. 1941) 61 S. Ct. 693 at 700: "The breadth of the order, like the injunction of a court, must depend upon the circumstances of each case, the purpose being to prevent violations, the threat of which in the future is indicated because of their similarity or relation to those unlawful acts which the Board has found to have been committed by the employer in the past. . . . it is appropriate to add that an order of the Board, like the injunction of a court, is not to be evaded by indirections or formal observances which in fact defy it. After an order to bargain collectively in good faith, for example, discriminatory discharge of

reach out, not only to the unlawful acts actually committed, but to all acts which are similar to or bear some relation to those unlawful acts.¹² The decision forces the board itself to determine originally whether an unfair practice took place and permits the courts to restrict their enforcing decrees to specific acts, already designated as unfair, which are more easily charged and proved in contempt proceedings. However, the courts can properly give full effect to Justice Stone's belief that orders should be broad enough to restrain any attempted technical evasions.

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union members may so affect the bargaining process as to establish a violation of the order.”

¹² *N. L. R. B. v. Remington Rand*, (C. C. A. 2d, 1938) 94 F. (2d) 862, is an excellent example.