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LABOR LAW - APPROPRIATE BARGAINING UNIT - APPROPRIATENESS OF MULTIPLE-PLANT UNIT WHERE MAJORITY IN ONE PLANT OPPOSE SUCH UNIT

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LABOR LAW — APPROPRIATE BARGAINING UNIT — APPROPRIATENESS OF MULTIPLE-PLANT UNIT WHERE MAJORITY IN ONE PLANT OPPOSE SUCH UNIT — The Pittsburgh Plate Glass Co., a Pennsylvania corporation, had six plants in its plate glass division located in five scattered states. In 1938 a C. I. O. affiliate filed a charge with the National Labor Relations Board that the company had violated the National Labor Relations Act by dominating and interfering with a company union at the Missouri plant. The company union was not a party to the proceeding. The company consented to a stipulation and consent decree directing it to cease and desist from dominating or recognizing the company union.[1] Shortly thereafter in certification proceedings, the board held that the entire six plants constituted an appropriate unit for collective bargaining, despite the fact that a majority of the employees at the Missouri plant opposed such a unit.[2] The company union was a party to the latter proceeding, but was denied the right to introduce evidence as to its representation of the employees in the Missouri plant, due to the prior consent decree holding it to be a company-dominated union. The company refused to recognize the right of the C. I. O. affiliate to bargain collectively for the Missouri plant, whereupon the board brought an unfair labor practice complaint against the company and, upon reaffirming its prior determination as to the appropriate unit, found the company guilty.[3] The circuit court of appeals subsequently affirmed the board's decision.[4] On certiorari to that court, *held*, that the company union

[1] Matter of Pittsburgh Plate Glass Co., 8 N. L. R. B. 1210 (1938), enforced in N. L. R. B. v. Pittsburgh Plate Glass Co., (C. C. A. 8th, 1939) 102 F. (2d) 1004.

[2] Matter of Pittsburgh Plate Glass Co., 10 N. L. R. B. 1111 (1939).

[3] Matter of Pittsburgh Plate Glass Co., 15 N. L. R. B. 515 (1939). Board member Leiserson wrote a strong dissent, in the course of which he said (pp. 530, 533): "I do not think the Board is vested with authority by the Act to extend to employees in unorganized plants the representatives chosen by organized workers in other plants. . . . Even if the employer misbehaved, that does not justify the Board in taking away from his employees the right guaranteed by the Act to have a representative of their own choosing. . . . I do not believe that the Act authorizes the Board to establish any bargaining units that suit the fancy of its members."

[4] Pittsburgh Plate Glass Co. v. N. L. R. B., (C. C. A. 8th, 1940) 113 F. (2d) 698.

had a sufficient hearing and the evidence excluded would not have materially affected the issue, and that the evidence was sufficient to establish the appropriateness of the employer-wide unit. *Pittsburgh Plate Glass Co. v. National Labor Relations Board*, (U. S. 1941) 61 S. Ct. 908.[5]

This is the first case wherein the United States Supreme Court has had occasion to consider the board's power to determine the appropriate bargaining unit. The Court had held previously that there could be no review of a board certification of a union as the representative in an appropriate unit until the board issued an order relative to an unfair labor practice.[6] It had already been held by lower federal courts that only the board could determine the appropriate unit,[7] and that the board's determination would not be reversed unless arbitrary.[8] The only standard laid down in the act is that the board shall decide the appropriate unit "to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this chapter." [9] The board, therefore, has a very broad discretion and the facts of each case are largely determinative,[10] but it has indicated that among the factors considered are the history of collective bargaining in the unit suggested, the type of labor organization which had previously prevailed, the integration of the business, the similarity of skill, wages, working conditions, and work of the employees, and the geographical location of the plants.[11] In the instant case, the idea that there had been any history of employer-wide bargaining by the C. I. O. affiliate is dispelled by an analysis of the evidence made in the dissent by Mr.

[5] Justice Stone wrote a vigorous dissenting opinion, concurred in by Justices Hughes and Roberts, holding that the board had failed to grant the company union an appropriate hearing and had failed to decide the unfair labor issue on the evidence.

[6] American Federation of Labor v. N. L. R. B., 308 U. S. 401, 60 S. Ct. 300 (1940); N. L. R. B. v. International Brotherhood of Electrical Workers, 308 U. S. 413, 60 S. Ct. 306 (1940). The legislative history of the act verifies the Court's holding. See S. REP. 573, 74th Cong., 1st sess. (1935), p. 14 (Committee on Education and Labor); also H. REP. 1147, 74th Cong., 1st sess. (1935), p. 23 (Committee on Labor).

[7] Fur Workers Union, Local No. 720 v. Fur Workers Union, No. 21238, (App. D. C. 1939) 105 F. (2d) 1.

[8] Bussman Mfg. Co. v. N. L. R. B., (C. C. A. 8th, 1940) 111 F. (2d) 783, where the Court affirmed the board's designation of a craft unit consisting of 13 tool and die workers in the company's two plants in St. Louis; International Assn. of Machinists v. N. L. R. B., (App. D. C. 1939) 110 F. (2d) 29 at 46, note 36; N. L. R. B. v. Carlisle Lumber Co., (C. C. A. 9th, 1937) 94 F (2d) 138, where the court affirmed the board's exclusion of 56 employees (including 30 Japanese) from an employer unit by merely saying that such action was not arbitrary even though it had the effect of giving the union a majority it otherwise would not have had; N. L. R. B. v. Sunshine Mining Co., (C. C. A. 9th, 1940) 110 F. (2d) 780, where clerical workers were excluded.

[9] 49 Stat. L. 453, § 9 (1935), 29 U. S. C. (Supp. 1939), § 159 (b).

[10] Matter of Bendix Products Corp., 3 N. L. R. B. 682 (1937); N. L. R. B., FIFTH ANNUAL REPORT 63-64 (1940); 2 TELLER, LABOR DISPUTES AND COLLECTIVE BARGAINING, § 339 (1940).

[11] N. L. R. B., FOURTH ANNUAL REPORT 89-90 (1939).

Leiserson.[12] On this test, then, the Missouri plant should not have been included in the unit and the Court's acceptance of the conclusion of the majority of the board seems questionable. As to integration of the business, there was never any interchange of employees between the plants nor other contacts facilitating their exchange of view, and hence the evidence on this point seems rather neutral. Although there seems to be similarity of working conditions, it would seem reasonable to use that factor as a test only to the extent of requiring its presence before holding an employer-wide unit appropriate. In previous cases the board had held the geographical factor important, refusing to put plants widely scattered in the same unit.[13] Here over 600 miles separated this plant from any of the others, and there was no history of collective bargaining or organization including this plant to overcome this factor. In several cases the board had held before that cooperation or non-cooperation in strikes was a factor.[14] Here the Missouri plant had refused to participate in a strike by the other five plants of the company. In many previous cases the board had held that it would include plants in one unit to the extent only of the organization by the union requesting such inclusion.[15] Yet here the C. I. O. affiliate's organization did not extend to the Missouri plant, and at least 1500 of the 1800 employees there belonged to the company union and opposed an employer-wide unit. Hence the designation by the board seems to have been contrary to its own holdings in other cases,

[12] Matter of Pittsburgh Plate Glass Co., 15 N. L. R. B. 515 at 530-533 (1939), where Mr. Leiserson pointed out that although a contract the union had with the company for 3 years prior to 1937 did not exclude specifically the Missouri plant, nevertheless the rates, etc., did not apply to that plant and it was never dealt with as though covered by that contract. Furthermore, the 1937 contract existing when this case arose specifically excluded the Missouri plant.

[13] Matter of Industrial Rayon Corp., 7 N. L. R. B. 878 (1938); Matter of Atlantic Refining Co., 1 N. L. R. B. 359 (1936). In both of these cases the plants were more than 100 miles apart. Cf., however, N. L. R. B. v. Remington-Rand, (C. C. A. 2d, 1938) 94 F. (2d) 862, where the company's six plants scattered through three states were put in one unit, without any discussion of the appropriateness of the unit by the court.

[14] Matter of Ohio Foundry Co., 3 N. L. R. B. 701 (1937); Matter of Rossie Velvet Co., 3 N. L. R. B. 804 (1938); Matter of Fairbanks, Morse & Co., 7 N. L. R. B. 229 (1938).

[15] Matter of National Distillers Products Corp., 20 N. L. R. B., No. 49 (1940); Matter of Middle West Corp., 10 N. L. R. B. 618 (1938); Matter of Colorado Builders' Supply Co., 18 N. L. R. B. 29 (1939).

In N. L. R. B., FOURTH ANNUAL REPORT 90 (1939), the board stated that "whenever some union requests an employer-wide unit and has *organized to that extent*, the Board may then designate the wider unit." (Italics added.) The report then cites the instant case and says: "The Board established the division-wide unit since the only bona fide union had organized the employees throughout the division." But the board had admitted in a preceding statement that the majority of the employees at the Missouri plant opposed such a unit, and its own findings in the case, as reported in 15 N. L. R. B. 515 (1939), showed that at least 1500 of the 1800 in that plant belonged to the local company union. In Matter of Libbey-Owens-Ford Glass Co., 10 N. L. R. B. 1470 (1939), the board designated a seven-plant unit despite the will of the majority in one of the plants, but reversed itself shortly before the Supreme Court opinion in the instant case.

and in fact the board reverted to its original principles in two recent cases shortly before the Court issued its decision in the instant case.[16] The board and the Court seem to place some reliance on the fact that the company during the course of a strike had transferred some of its business to the Missouri plant until the strike ended, but this consideration hardly prevents the board's decision from being arbitrary. Even if the plant is included within the unit, the employees there may not choose to cooperate in a strike with the other plants in the future any more than in the past, and furthermore the Court has held previously that an employer has a right to replace strikers for the duration of a strike in order to keep his business operating.[17] Even more surprising is the Court's affirmance of the board's power to deny to the company union the right to introduce evidence as to whether it was dominated and whether it represented the desires of the workers in the Missouri plant, on the theory that it was foreclosed by the prior consent decree finding the company guilty of domination in a proceeding to which the company union was not a party. The board is probably sound in holding that the desire of a company-dominated union has no weight in determining the proper unit,[18] but the union should at least have a chance to present evidence as to the issue of domination. The well-reasoned dissent by three members of the Court seems fundamentally sound in insisting that an exercise of administrative discretion, to accord with due process, requires first a hearing of all the relevant evidence, and that the right of the company union to introduce such evidence could not constitutionally be denied because of a consent decree in a proceeding of which it had no notice and to which it was not a party. But aside from that issue, it is highly questionable whether the Court should have affirmed an order which denied to workers in a plant widely separated from the others the right to select freely their own labor organization or none at all.

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[16] Matter of Libbey-Owens-Ford Glass Co., N. L. R. B. No. C-1771, decided April 23, 1941, 9 U. S. L. W. 2326 (1941), where the board reversed its own ruling in 10 N. L. R. B. 1470 (1939) and allowed one plant to become a separate unit from the other six; Matter of Atlas Underwear Co., 30 N. L. R. B., No. 89 (1941), where two plants 48 miles apart were held to be separate units contrary to the wishes of the petitioning union, since the union had never succeeded in bargaining on an employer-wide basis.

[17] N. L. R. B. v. Mackay Radio & Telegraph Co., 304 U. S. 333, 58 S. Ct. 904 (1938).

[18] See numerous board decisions to this effect cited in N. L. R. B., FOURTH ANNUAL REPORT 83, note 46 (1939).