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LABOR LAW — POWER OF THE NLRB TO ORDER EMPLOYER TO REIMBURSE EMPLOYEES FOR SUMS DEDUCTED FROM THEIR WAGES TO SUPPORT AN EMPLOYER-DOMINATED UNION — Defendant was engaged in a business affecting interstate commerce [1] and was found by the National Labor Relations Board to have dominated and interfered with the administration of an employees' association. The board ordered defendant to reimburse its employees for sums deducted from their wages for association dues and assessments since the effective date of the National Labor Relations Act.[2] The board petitioned to enforce the order. *Held*, a reimbursement of the money paid to the association by means of the checkoff was not authorized by the statute, and would violate the fundamental principles of equity. The dissenting judge contended that the order to reimburse for wrongful checkoffs was analogous to the order to reinstate an employee with back pay,[3] and that the order was justified as an "affirmative action" [4] by the board which would effectuate the policies of the act. *National Labor Relations Board v. West Kentucky Coal Co.*, (C. C. A. 6th, 1940) 116 F. (2d) 816.

Since the Supreme Court of the United States has not passed on the validity of an order of the board requiring an employer to refund dues checked off against employees' wages for the support of an employer-dominated association, the argument of the dissenting judge will be analyzed to determine whether such an order should be sustained by analogy to the authority of the board to reinstate an employee with back pay [5] as a permissible "affirmative action" of the

[1] 49 Stat. L. 453, § 10 (a) (1935), 29 U. S. C. (1934), § 160 (a): "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice . . . affecting commerce." See Donoho, "Jurisdiction of the National Labor Relations Board—The Developing Concept of Interstate Commerce," 6 GEO. WASH. L. REV. 436 at 440 (1938).

[2] The board relied upon 49 Stat. L. 454, § 10 (c) (1935), 29 U. S. C. (1934), § 160 (c). "If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act."

[3] Id.

[4] Id.

[5] Id.

board.[6] Any affirmative action taken by the board must be such as will effectuate the policy of the act [7] at the time the order is made.[8] This authority to order affirmative action is remedial and does not confer a punitive jurisdiction enabling the board to inflict a penalty upon the employer because he is engaged in unfair labor practices, even though the board believes the policy of the act would be effectuated by a punitive order.[9] It is the policy of the act, in part, "to secure and preserve for employees the right to bargain collectively without intimidation, coercion or other improper influence" from an employer,[10] and the courts look to the facts which the board has found to determine whether the action ordered by the board is an appropriate means of carrying out that policy.[11] The reimbursement order is said to become punitive when the employer-domination is terminated by a cease and desist order, since, at the most, the reimbursement order would only discourage the checkoff practice, which is merely incidental to the unfair labor practice sought to be terminated.[12] The reimbursement order is criticized as being, in effect, the assessment of damages for a "mass tort" with-

[6] Id.

[7] National Labor Relations Board v. Carlisle Lumber Co., (C. C. A. 9th, 1938) 99 F. (2d) 533 at 537, certiorari denied sub nom. Carlisle Lumber Co. v. National Labor Relations Board, 306 U. S. 646, 59 S. Ct. 586 (1939); Kharas, "Unfair Labor Practices: Domination, Support and Interference," 63 N. Y. ST. B. A. REP. 625 at 635 (1940) and authorities there cited.

[8] National Labor Relations Board v. Hearst, (C. C. A. 9th, 1939) 102 F. (2d) 658 at 664.

[9] Consolidated Edison Co. v. National Labor Relations Board, 305 U. S. 197 at 236, 59 S. Ct. 206 (1938); National Labor Relations Board v. Fansteel Metallurgical Corp., 306 U. S. 240 at 257, 59 S. Ct. 490 (1939); 22 CORN. L. Q. 568 at 572 (1937).

[10] Valley Mould & Iron Corp. v. National Labor Relations Board, (C. C. A. 7th, 1940) 116 F. (2d) 760 at 764; National Labor Relations Board v. Pennsylvania Greyhound Lines, 303 U. S. 261 at 265-266, 58 S. Ct. 571 (1938). The act declares: "It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." 49 Stat. L. 449, § 1 (1935), 29 U. S. C. (1934), § 151. The act specifically makes it an unfair labor practice for an employer to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it. 49 Stat. L. 452, § 8 (2) (1935), 29 U. S. C. (1934), § 158 (2).

[11] National Labor Relations Board v. Pennsylvania Greyhound Lines, 303 U. S. 261 at 265, 58 S. Ct. 571 (1938). Any board order must "be confined to restitution for the wrong done, however widely that should be conceived." National Labor Relations Board v. Leviton Mfg. Co., (C. C. A. 2d, 1940) 111 F. (2d) 619 at 621.

[12] National Labor Relations Board v. J. Greenebaum Tanning Co., (C. C. A. 7th, 1940) 110 F. (2d) 984 at 989, certiorari denied, sub nom. J. Greenebaum Tanning Co. v. National Labor Relations Board, (U. S. 1940) 61 S. Ct. 18. Cf. In the Matter of Lancaster Iron Works, 20 N. L. R. B., No. 73 (1940), where the checkoff was regarded as an integral part of the unfair labor practice.

out any requirement of proof of either injury or damage to the employees, some of whom may have willingly consented to the checkoff; such a remedy, it is said, was not intended to be created by the act.[13] However, in the most recent case arising under the act to come before the Supreme Court, it is held that the orders of the board are subject only to a limited judicial review since the relation of remedy to policy is peculiarly a matter for administrative competence, and since the Congress has given this administrative discretion to the board.[14] Courts must now guard against the danger of sliding from the narrow confines of the law into the broader domain of policy which is the area of the board's discretion, and the board must merely "give clear indication that it has exercised the discretion with which Congress has empowered it."[15] Little reason was given by the board in the instant case for the reimbursement order save that the same pressures by the defendant which compelled its employees to abandon their free choice of representatives enforced their acquiesence in the checkoff, and that therefore it was necessary to make the employees whole by restoration of the status quo.[16] Perhaps better reasons have been given by the board for similar action in other cases.[17] Notwithstanding the recent freedom given to the board in the exercise of its discretion, it is submitted that the Supreme Court may find that the basis of the board's order in the instant case was punitive action and may sustain the circuit court. The board found that the association had conducted sickness and death benefit plans and had engaged in recreational and safety-first ventures, yet it did not allow a corresponding reduction of the total checkoff funds which were ordered to be returned to the

[13] Western Union Telegraph Co. v. National Labor Relations Board, (C. C. A. 2d, 1940) 113 F. (2d) 992 at 997, noted in 41 COL. L. REV. 747 (1941). By refunding the fees collected no reasonable method of calculation of damages is utilized, since the advantage to the company of an employer-dominated union is too imponderable to be set off against the fees collected by checkoff. Id. at 997. Cf. In the Matter of Heller Bros. Co. of Newcomerstown, 7 N. L. R. B. 646 at 656 (1938), where it was said: "authorization by an employee for the check-off of dues . . . cannot be considered as having been voluntarily given. . . ."

[14] Phelps Dodge Corp. v. National Labor Relations Board, (U. S. 1941) 61 S. Ct. 845, noted supra, p. 1431.

[15] Id. at 854.

[16] In the Matter of West Kentucky Coal Co., 10 N. L. R. B. 88 at 128 (1938). See also In the Matter of Heller Bros. Co. of Newcomerstown, 7 N. L. R. B. 646 at 656 (1938).

[17] Not to allow the reimbursement of funds wrongfully checked off would prevent the order "to cease and desist from unfair labor practices" from being fully effective. In the Matter of Heller Bros. Co. of Newcomerstown, 7 N. L. R. B. 646 at 655 (1938); In the Matter of Williams Coal Co., 11 N. L. R. B. 579 at 666 (1939); In the Matter of Lancaster Iron Works, 20 N. L. R., No. 73 (1940). To allow the checkoff to continue would perpetuate the coercive pressures which have deprived employees of the rights guaranteed them by the act. In the Matter of Lancaster Iron Works, supra; In the Matter of Alabama Power Co., 18 N. L. R. B. 652 (1939). "The policies of the act will be effectuated." In the Matter of Williams Coal Co., 11 N. L. R. B. 579 at 666 (1939); In the Matter of J. Greenebaum Tanning Co., 11 N. L. R. B. 300 at 317 (1939).

employees.[18] Although ordering the employer to withdraw all recognition of the association for collective bargaining purposes, the board provided that the association might continue its benefit activities; [19] the net result will be that the employees get back the amount of their dues without diminishing the financial resources of the association's treasury, and this would appear to be punitive relief.[20] Either the board should provide that the employer may utilize the funds in the association treasury to partly offset the reimbursement order, or it should use the ways normally available to effectively destroy the employer-domination.[21]

[18] In the Matter of West Kentucky Coal Co., 10 N. L. R. B. 88 at 128 (1938). Compare the treatment of the employer in In the Matter of U. S. Truck Co., 11 N. L. R. B. 706 at 721 (1939), where the board found under similar facts: ". . . respondent, by means of a check-off system, collected the dues for the Benefit Union. Although the amount so collected was $2 per month, only 57 cents thereof was paid into the union treasury, the remainder being used as group-insurance premiums." The board ordered the employer to make the employees whole only to the extent of the sum deducted and paid into the treasury, thereby assuaging the loss to the employer by the amount of the employee's gain.

[19] In the Matter of West Kentucky Coal Co., 10 N. L. R. B. 88 at 128 (1938).

[20] National Labor Relations Board v. J. Greenebaum Tanning Co., (C. C. A. 7th, 1940) 110 F. (2d) 984 at 988, cert. den. sub nom. J. Greenebaum Tanning Co. v. National Labor Relations Board, (U. S. 1940) 61 S. Ct. 18.

[21] The board under existing powers can order the employer to cease interference with a labor organization, can compel the employer to post a notice that he will comply with the cease and desist order, can order disestablishment of the company-dominated organizations, can force the employer to renounce all his rights to enforce contracts which he has made with a company union, and can nullify the advantage the employer may have secured by using unfair labor practices to negotiate individual contracts with his employees. Kharas, "Unfair Labor Practices: Domination, Support and Interference," 63 N. Y. ST. B. A. REP. 625 at 635 et seq. (1940), and authorities there cited. Affirmatively the employer can be directed to recognize an organization which is found to be the duly chosen bargaining-representative of his employees. Republic Steel Corp. v. National Labor Relations Board, 311 U. S. 7 at 12, 61 S. Ct. 77 at 80 (1940), noted in 39 MICH. L. REV. 328 (1940). ". . . the Board is not necessarily restricted in any case to an order which compels cessation only of the particular and limited activity found to have taken place." National Labor Relations Board v. Swift & Co., (C. C. A. 7th, 1940) 108 F. (2d) 988 at 990. The board may prohibit the "checkoff" of union dues by the employer for the company-tainted union; the employer may be ordered to cease and desist from discouraging membership in an outside union, and may be forced to withdraw recognition of the company union as the bargaining agent of the employees. 26 CAL. L. REV. 611 at 614 (1938).