

1938

## LABOR LAW-POWER OF NATIONAL LABOR RELATIONS BOARD TO ORDER DISESTABLISHMENT OF COMPANY UNION

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### Recommended Citation

Wayne E. Babler, *LABOR LAW-POWER OF NATIONAL LABOR RELATIONS BOARD TO ORDER DISESTABLISHMENT OF COMPANY UNION*, 36 MICH. L. REV. 1131 (1938).

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### COMMENTS

LABOR LAW — POWER OF NATIONAL LABOR RELATIONS BOARD TO ORDER DISESTABLISHMENT OF COMPANY UNION — In the National Labor Relations Act (Wagner Act)<sup>1</sup> the National Labor Relations Board is given, among others, the following powers:

By section 10 (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. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order."<sup>2</sup>

<sup>1</sup> 49 Stat. L. 449 (1935), 29 U. S. C. (Supp. 1937), §§ 151-166.

<sup>2</sup> This is followed by: "If upon all the testimony taken the Board shall be of the

By section 10 (e): "The Board shall have power to petition any circuit court of appeals . . . wherein the unfair labor practice in question occurred . . . for the enforcement of such order."<sup>3</sup>

In two recent Supreme Court cases, *National Labor Relations Board v. Pennsylvania Greyhound Lines, Inc.*,<sup>4</sup> and *National Labor Relations Board v. Pacific Greyhound Lines, Inc.*,<sup>5</sup> it was held that the Board had the power under section 10 (c) to order an employer, who had created, fostered and dominated a labor organization of its employees, to withdraw recognition from such organization of its employees, to withdraw recognition from such organization as representative of the employees and to post notices that it was "so disestablished." In so doing the Court reversed the respective circuit courts which had held the Board was without such authority in the absence of notice to said union, and opportunity for a hearing, and without an election by the employees to choose a labor organization to represent them. The alleged basis of the power was the clause: "and to take such affirmative action . . . as will effectuate the policies of this Act." It is proposed to discuss herein certain problems arising out of section 10 (c).

### I.

While the procedural provisions of the National Labor Relations Act are based upon the Federal Trade Commission Act, its substance is a heritage from a series of railway labor acts, supplemented by the National Industrial Recovery Act. The history of these statutes provides the background and setting for the interpretation of the National Labor Relations Act.<sup>6</sup>

In 1888 Congress passed a statute providing for arbitration of differences or controversies between interstate carriers and their em-

opinion that no 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 an order dismissing the said complaint." 49 Stat. L. 449, § 10 (c) (1935), 29 U. S. C., (Supp. 1937), § 160 (c). See also section 10 (a) of the act, 29 U. S. C. (Supp. 1937), § 160 (a).

<sup>3</sup> 49 Stat. L. 449 (1935), 29 U. S. C. (Supp. 1937), § 160 (e).

<sup>4</sup> (U. S. 1938) 58 S. Ct. 571, reversing (C. C. A. 3d, 1937) 91 F. (2d) 178, and affirming 1 N. L. R. B. 1 (1935).

<sup>5</sup> (U. S. 1938) 58 S. Ct. 577, reversing (C. C. A. 9th, 1937) 91 F. (2d) 458, and affirming 2 N. L. R. B. 431 (1936).

<sup>6</sup> 38 Stat. L. 717 (1914), 15 U. S. C. (1935), §§ 41-51. See Byrer, "The Railway Labor Act and the National Labor Relations Act—A Comparison," 44 W. Va. L. Q. 1 (1937).

ployers.<sup>7</sup> Ten years later this statute was repealed by an act providing for arbitration boards for the settlement of controversies concerning wages, hours of labor, or conditions of employment.<sup>8</sup> The only sanctions involved were those resulting from the stipulations in the submission by the employer and the employees that they would be bound by the award and that it could be enforced in a court of equity.<sup>9</sup> This statute was followed by the New Lands Act in 1913, which provided for the Board of Mediation and Conciliation, to which either party in a controversy concerning wages, hours of labor, or conditions of employment could appeal in order to obtain a settlement.<sup>10</sup> None of these acts made compulsory a submission to arbitration or mediation.

In the Transportation Act of 1920, whereby provision was made for the surrender of the wartime governmental operation of the railroads to their private owners, the first permanent Railroad Labor Board was created.<sup>11</sup> This board had jurisdiction to hear and to decide disputes over working conditions and to decide who might represent the employees in conferences with the employers. However, it was held in *Pennsylvania Railroad Co. v. United States Railroad Labor Board* that there was nothing compulsory in the provisions of the statute as against either the employer or the employees.<sup>12</sup> And in *Pennsylvania Railroad System v. Pennsylvania Railroad Co.*,<sup>13</sup> it was held that the employer was within his strict legal rights in doing everything other-

<sup>7</sup> 25 Stat. L. 501 (1888).

<sup>8</sup> 30 Stat. L. 424 (1898).

<sup>9</sup> "At the outset it may be remarked, in response to certain suggestions made at the argument, that the proceeding has its inception in and rests solely upon the agreement of arbitration entered into between the parties; that it is by the terms of that instrument, when properly construed, that not only the rights of the parties thereto, but the extent of the powers of the arbitrators thereunder, are to be limited and determined. In re Southern Pac. Co., (C. C. Cal. 1907) 155 F. 1001 at 1006. A provision making it a penal offense for an employer unjustly to discriminate against any employee because of his membership in a labor organization was held to be unconstitutional as repugnant to the Fifth Amendment. *Adair v. United States*, 208 U. S. 161, 28 S. Ct. 277 (1907).

<sup>10</sup> 38 Stat. L. 103 (1913). The arbitration mechanism was based upon the parties, similarly to that of the repealed statute. See In re Georgia & F. Ry., (D. C. Ga. 1914) 215 F. 195, affd. *Georgia & F. Ry. v. Brotherhood*, (C. C. A. 5th, 1914) 217 F. 755.

<sup>11</sup> Title III of the Transportation Act of 1920, 41 Stat. L. 469 (1920). Prior to this act, the Adamson Law, 39 Stat. L. 721, Comp. Stat. §§ 8680 (a)-8680 (d) (1916), provided for an eight hour day and standard which resulted in raising wages of the employees. It was upheld in *Wilson v. New*, 243 U. S. 332, 37 S. Ct. 298 (1916).

<sup>12</sup> "The only sanction of its decision is to be the force of public opinion invoked by the fairness of a full hearing, the intrinsic justice of the conclusion strengthened by the official prestige of the Board, and the full publication of the violation of such decision by any party to the proceeding." 261 U. S. 72 at 79, 43 S. Ct. 278 (1923). Sections 310 and 311 provide for judicial compulsion in the securing of evidence.

<sup>13</sup> 267 U. S. 203, 45 S. Ct. 307 (1925).

wise legally permissible to defeat the action of the board and to prevent a contest before the board.

The resulting disrespect for the board and general dissatisfaction with the statute culminated in the passage of the Railway Labor Act of 1926,<sup>14</sup> which repealed the two preceding acts. Voluntary arbitration was retained, but means of enforcing the award were provided.<sup>15</sup> The duty was imposed to settle disputes by conference of representatives, and there was a recognition of the right to designate representatives "without interference, influence or coercion exercised by either party over . . . the other."<sup>16</sup> As in the earlier statutes the authority of the boards was based upon the agreement to arbitrate.<sup>17</sup> In an amendment in 1934 criminal penalties were imposed upon the carrier.<sup>18</sup> The amendment also provided for suit, in a federal district court, by a person for whose benefit an order of the Adjustment Board was made, against a carrier which refused to comply with such order.<sup>19</sup>

<sup>14</sup> 44 Stat. L. 577 (1926), 45 U. S. C. (1935), §§ 151-164.

<sup>15</sup> 44 Stat. L. 577, § 9 (1926). The award was to be filed in the district court designated in the agreement to arbitrate, and unless a petition to impeach it (on one or more of three specified grounds) was taken within ten days, the court was to enter judgment, which judgment was to be final and conclusive on the parties as to the merits and facts.

<sup>16</sup> 44 Stat. L. 577, § 2, Second (1926). This was made more emphatic by the 1934 amendment. "Representatives, for the purposes of this Act, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier." 48 Stat. L. 1185, § 2, Third (1934), 45 U. S. C. (1935), § 152, Third. Two boards were created by the 1934 amendment. The principal duty of the National Adjustment Board is to interpret and apply written agreements between the carriers and employees. It may make decisions and orders which are enforceable in the federal courts. 48 Stat. L. 1185, § 3 (1934), 45 U. S. C. (1935), § 153. The National Mediation Board is a non-judicial body with no power to interpret agreements. Its duties are to mediate in disputes over wages, hours and working conditions, which are not adjusted in conference, and in any other dispute not referable to the Adjustment Board. 48 Stat. L. 1185, § 5 (1934), 45 U. S. C. (1935), § 155.

<sup>17</sup> 44 Stat. L. 577, § 8 (1926), 45 U. S. C. (1935), § 158.

<sup>18</sup> By section 2, Tenth, it was made a misdemeanor punishable by fine, or imprisonment, or both, for a carrier wilfully to fail or refuse to comply with section 2, Third (interference with the selection of representatives), section 2, Fourth and Fifth (right of employees to join a union and bargain collectively), section 2, Seventh (change of pay, rules or working conditions without conference and thirty days notice), and section 2, Eighth (employer should post notices that all disputes will be settled in accordance with the act). 45 U. S. C. (1935), § 152, Tenth.

<sup>19</sup> 48 Stat. L. 1185 (1934), § 3 (p), 45 U. S. C. (1935), § 153 (p).

On June 16, 1933 (the National Industrial Recovery Act became effective. By section 7 (a), each code of fair competition promulgated thereunder had to contain provisions to the effect that employees should have the right to bargain collectively, free from employer influence, and that no employee should, as a condition of employment, be compelled to join any company union or to refrain from joining a labor organization of his own choosing.<sup>20</sup> On June 19, 1934, the "old" National Labor Relations Board was created by the President pursuant to a joint resolution of Congress.<sup>21</sup> The board was authorized and directed to investigate activities of employers and employees in any controversies arising under section 7 (a) and to conduct an election by secret ballot of the employees to determine their representative for collective bargaining as defined in section 7 (a). If the orders of the board were violated, the case might be sent to the attorney general for prosecution or to the Compliance Division of the N.I.R.A., which could direct the removal of the employer's Blue Eagle.<sup>22</sup>

Upon such a background of experience the National Labor Relations Act was passed, July 5, 1935.<sup>23</sup> While the board does not have plenary power to intervene, of its own volition, in a labor controversy, or to take jurisdiction of a violation of the act,<sup>24</sup> its power is not dependent upon mere agreements to arbitrate, and it may assume jurisdiction in any case within its constitutional authority if complaint is made to it.<sup>25</sup> The filing of charges with the board by an employee against his employer is the operative fact which authorizes the board

<sup>20</sup> 48 Stat. L. 195 (1933).

<sup>21</sup> 48 Stat. L. 1183 (1834).

<sup>22</sup> 48 Stat. L. 196, 197, 199, 200 (1933).

<sup>23</sup> 49 Stat. L. 449 (1935), 29 U. S. C. (Supp. 1937), §§ 151-166.

<sup>24</sup> The scope of the Board's authority is limited to disputes or controversies "affecting commerce," which is defined to include interstate commerce in the traditional sense. See *National Labor Relations Board v. Jones & Laughlin Steel Co.*, 301 U. S. 1, 57 S. Ct. 615 (1937); *National Labor Relations Board v. Fruehauf Trailer Co.*, 301 U. S. 49, 57 S. Ct. 642 (1937); *National Labor Relations Board v. Friedman-Harry Marks Clothing Co.*, 301 U. S. 58, 57 S. Ct. 645 (1937). Section 10 (b) provides: "Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board . . . shall have power to issue and cause to be served upon such person a complaint. . . ." 29 U. S. C. (Supp. 1937), § 160 (b). It thus would seem that a "charge" is a prerequisite to action by the board. Cf. section 10 (a) and section 11. 29 U. S. C. (Supp. 1937), §§ 160 (a), 161. In the *Pennsylvania Greyhound* case, the charge was made by the union, as a union, and not by the employees, as individuals. 1 N. L. R. B. 1 at 45 (1935).

<sup>25</sup> See section 10 of the Wagner Act. Up until the 1934 Amendment of the *Railway Labor Act* all the arbitration statutes dealt with both parties—employer and employees—indiscriminately. While the purpose of the Wagner Act is to expedite interstate commerce by settling and preventing labor disputes, the act seems designed primarily to police employers. See *National Labor Relations Board v. Jones*

to exercise its statutory powers.<sup>26</sup> Thus the source of the board's power is essentially different from that of the predecessor boards.

Thus the Wagner Act is the product of experience, and the foregoing history shows a development from practically powerless boards to one having very broad statutory authority. This development should be taken into account by the courts in deciding questions concerning the extent of the board's powers,<sup>27</sup> the limits of which, because of the general language of the statute, will, in many instances, have to be fixed by judicial decision.

## 2.

While the language of the statute, "to take such affirmative action . . . as will effectuate the policies of this act," may be the assigned basis of many of the orders, there have been few orders which necessarily derive their effect from this clause. For instance, in practically every order there is a provision to cease and desist from the specified unfair labor practices.<sup>28</sup> Since the difference between a prohibition and a mandate is often a mere matter of words, the object of a number of the "affirmative action" decrees could be attained by the use of the authority to issue cease and desist orders.

Frequently the employer is required to reinstate employees who

& Laughlin Steel Corp., 301 U. S. 1 at 46, 57 S. Ct. 615 (1937). For liability of employees for damage caused during a strike, see *United Electric Coal Co. v. Rice*, (D. C. Ill. 1938) 22 F. Supp. 221.

<sup>26</sup> See note 24, and section 10 of the Act, in general.

<sup>27</sup> *Virginia Ry. v. System Federation*, 300 U. S. 515, 57 S. Ct. 592 (1936); *Brotherhood v. Nashville, C. & St. L. Ry.*, (C. C. A. 6th, 1937), 94 F. (2d) 97.

<sup>28</sup> The policy of the United States, by the act, is to encourage "the practice and procedure of collective bargaining," and to protect "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." Section 1. "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection." Section 7. By section 8, "It shall be an unfair labor practice for an employer—(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7. (2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it . . . (3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . (4) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act. (5) To refuse to bargain collectively with the representatives of his employees. . . ." 49 Stat. L. 449 (1935), 29 U. S. C. (Supp. 1937), §§ 151, 157, 158.

have been discharged contrary to the provisions of the act.<sup>29</sup> This is affirmative, but the power so to order is expressly given.<sup>30</sup> However, in connection therewith, the board has used originality in effectuating the reinstatement. Substituted employees have been ordered discharged.<sup>31</sup> Seniority lists giving the wrongfully discharged employees a preference upon later hiring have been set up.<sup>32</sup> The power so to provide might be found in the "affirmative action" clause, or it might be said to be incidental to the power to order reinstatement.<sup>33</sup>

Orders regarding collective bargaining and "yellow dog" contracts are usually positive restatements of the negative obligation to cease and desist. Instead of, or in addition to, requiring that the employer cease and desist from the unfair labor practice of refusing to bargain collectively with the employees,<sup>34</sup> there may be an order to the employer to bargain collectively with them.<sup>35</sup> Supplementing the order to cease enforcing "yellow dog" contracts, it may be required that the employer personally inform each employee party to such a contract that it is no longer valid and binding.<sup>36</sup> One type of order which is often made, but for which the authority is also expressly given, is very effective. By it the employer must give notice to the board, at the expiration of a specified number of days, of what the employer has done in compliance with the order.<sup>37</sup> The board should find this type of self-prosecution valuable in preventing disregard of the more minor details of the order.

<sup>29</sup> In re Canvas Glove Co., 1 N. L. R. B. 519 (1936).

<sup>30</sup> See § 10 (c), quoted at the beginning of this comment.

<sup>31</sup> Black Diamond Steamship Corp. v. National Labor Relations Board, (C. C. A. 2d, 1938) 94 F. (2d) 875. In re Columbian Enameling & Stamping Co., 1 N. L. R. B. 181 (1936). Cf. In re Rollway Bearing Co., 1 N. L. R. B. 651 (1936).

<sup>32</sup> In re Segall-Maigen, Inc., 1 N. L. R. B. 749 (1936); In re Birge & Sons Co., 1 N. L. R. B. 731 (1936).

<sup>33</sup> In connection with reinstatement the employer is frequently required to give the employee back pay. Agwilines, Inc. v. National Labor Relations Board, (C. C. A. 5th, 1936) 87 F. (2d) 146. The board is expressly given this power in section 10(c), quoted at the beginning of this comment. Under this authority the board has ordered the employer to pay to the reinstated employees the tips that they would have earned if not discharged, computed by averaging the tips received the three months prior to discharge. In re Club Troika, Inc., 2 N. L. R. B. 90 (1936). In the Club Troika case, an employee who left in protest over the discharge of others was also ordered reinstated, but without back pay.

<sup>34</sup> In re Delaware-N. J. Ferry Co., 1 N. L. R. B. 85 (1935).

<sup>35</sup> In re Cox Printer, Inc., 1 N. L. R. B. 594 (1936); Agwilines, Inc. v. National Labor Relations Board, (C. C. A. 5th, 1936) 87 F. (2d) 146.

<sup>36</sup> In re Atlas Bag & Burlap Co., 1 N. L. R. B. 292 (1936); In re Carlisle Lumber Co., 2 N. L. R. B. 248 (1936).

<sup>37</sup> In re J. Freezer & Sons, Inc., 3 N. L. R. B. No. 12 (1937); section 10 (c), quoted at the beginning of this comment.



Next to the reinstatement of wrongfully discharged employees, what is probably the most frequent mandate under the "affirmative action" clause is that of the *Greyhound* cases, ordering the employer to disestablish a union which became the representative of the employees at the time the employer was guilty of unfair labor practices.<sup>38</sup> The artificiality of any distinction between affirmative and negative language is shown by the typical order, which requires that the employer cease and desist from recognizing the specified union and that the employer disestablish the said union as the representative of the employees.<sup>39</sup> Whether the "disestablish" clause requires anything beyond withdrawal of recognition will be discussed subsequently. Either this order, or another one getting the same results, might also be based upon another section of the act. In section 9 the board is given the power in any controversy between an employer and its employees to certify the representatives of the employees. In determining the representative, the board is to hold a hearing and it may conduct a secret ballot.<sup>40</sup> The power to order the withdrawal of recognition from a previously recognized representative could be held to be incidental to the power to certify the present representative. However, as a prerequisite to such an incidental order it would seem that there ought to be a determination of the new representative; while if section 10 (c) is regarded as the source of the authority to order the withdrawal of the recognition, the order would not be incidental to any other act of the board and nothing would require such a prior determination.

Thus the orders which the board has issued requiring affirmative action are those directing the discharge of employees to make room for reinstatement, the establishment of seniority lists, the personal informing of an employee that his "yellow dog" contract is nugatory, and the disestablishment of a particular union. The objects of all but the last of such orders could have been accomplished without the aid of the authority "to take such affirmative action . . . as will effectuate the policies of this Act." Assuming that such authority is not redundant, and considering that the results of all but one type of order which the board has so far deemed necessary might have been realized without its use, it would seem that the board has unusually broad powers.<sup>41</sup> This should be relevant in determining whether the authority to issue a particular affirmative order exists.

<sup>38</sup> See, for example, *In re Hill Bus Co.*, 2 N. L. R. B. 781 (1937); *In re Atlanta Woolen Mills*, 1 N. L. R. B. 316 at 334 (1936); *In re American Potash & Chemical Corp.*, 3 N. L. R. B., No. 14 (1937).

<sup>39</sup> *In re Clinton Cotton Mills*, 1 N. L. R. B. 97 (1935), is typical.

<sup>40</sup> 49 Stat. L. 449 (1935), 29 U. S. C. (Supp. 1937), § 159.

<sup>41</sup> One limitation upon the power of the board with respect to orders has been established by judicial decision. In the Circuit Court of Appeals decision of *National*

## 3.

In the *Pennsylvania Greyhound* case<sup>42</sup> the order of the board provided: "(c) Withdraw all recognition from the Employees Association [company union] . . . as representative of their employees. . . . (d) Post notices in conspicuous places . . . stating that said Association is so disestablished and that respondents will refrain from any such recognition thereof."<sup>43</sup> Provisions (c) and (d) of the *Pacific Greyhound* case<sup>44</sup> were similar.<sup>45</sup> Both circuit courts of appeal refused to enforce (c) and (d), but the Supreme Court held this to be error.

The question arises of the meaning of "disestablish." A dictionary definition is "to deprive of fixed or established state or character; specifically, to withdraw state patronage, support, or exclusive recognition from; as to disestablish the church."<sup>46</sup> It might mean that the employer should merely withdraw his sponsorship, but so interpreted little would be added to the cease and desist provision. The term has been used in some orders in such a way that it could be interpreted to require complete dissolution of the union.<sup>47</sup> In the *Greyhound* cases the "so disestablished" seems to refer back to "withdraw all recogni-

Labor Relations Board v. Remington Rand, Inc., (C. C. A. 2d, 1938) 94 F. (2d) 862, it was stated that the powers granted the board are only remedial, and that it cannot impose a penalty upon the employer. The employer had moved one of its plants to another city during a labor controversy. The board's order that the employer furnish transportation to the new location was held to be a "punishment" and unauthorized by the act. While it is arguable that such order was necessary as a *cy pres* method of putting the employees in the position they would have been in if the wrong had not been committed, the court was of the opinion that the order had crossed the line from a valid affirmative requirement, effectuating the policies of the act, to an imposition of a penalty. Query: Is this any more of a penalty than requiring that back pay be given to reinstated employees? See also National Labor Relations Board v. Bell Oil & Gas Co., (C. C. A. 5th, 1937) 91 F. (2d) 509. Compare with the limitation of the powers of the Federal Trade Commission in Federal Trade Commission v. Eastman Kodak Co., 274 U. S. 619, 47 S. Ct. 688 (1927).

<sup>42</sup> See note 4, supra.

<sup>43</sup> National Labor Relations Board v. Pennsylvania Greyhound Lines, Inc., (C. C. A. 3d, 1937) 91 F. (2d) 178 at 179.

<sup>44</sup> See note 5, supra.

<sup>45</sup> National Labor Relations Board v. Pacific Greyhound Lines, Inc., (C. C. A. 9th, 1937) 91 F. (2d) 458 at 461.

<sup>46</sup> FUNK AND WAGNALL, NEW STANDARD DICTIONARY OF THE ENGLISH LANGUAGE 725 (1935).

<sup>47</sup> In *In re Atlanta Woolen Mills*, 1 N. L. R. B. 316 at 332 (1936), in concluding that the Club (company dominated union) should be disestablished, the board said: "If we were right in concluding on the evidence that the Club was feeble and insignificant as an organization representing the employees before the respondent gave it life, we feel that we are justified in requiring such action as will render the Club as ineffective as it had previously been." The Board has ordered a dissolution in at least one case. *Atlas Bag & Burlap Co.*, 1 N. L. R. B. 292 at 307 (1936).

tion," and thus should be interpreted as meaning that the company should no longer recognize the Association as the collective bargaining unit. In this respect the *Greyhound* cases are typical of most of the "disestablish" cases, and throughout the remainder of this comment the order to "disestablish" will be considered as meaning to "withdraw all recognition."<sup>48</sup>

On the basis of *Texas & New Orleans R. R. v. Brotherhood of Railway Clerks*,<sup>49</sup> the constitutionality of a disestablishment order is no longer seriously questioned. The federal district court,<sup>50</sup> in a contempt proceeding for the violation of an injunction restraining the railroad from interfering with the employees' selection of a representative, ordered the railroad to disestablish the Association of Clerical Employees [company union], pursuant to the Railway Labor Act of 1926. It was contended that the order violated the rights of the employer under the First and Fifth Amendments. The court stated that the statute did not interfere with the normal exercise of the right of the carrier to select or to discharge its employees. It continued:

"The statute is not aimed at this right of the employers but at the interference with the right of the employees to have representatives of their own choosing. As the carriers subject to the Act have no constitutional right to interfere with the freedom of the employees in making their selections, they cannot complain of the statute on constitutional grounds."<sup>51</sup>

There has been much opposition to the company union. Some of this may be due to the fact that the company unions compete with the national craft and industrial unions, which are better able to influence public opinion. The differences in the employee-benefits for which the inside and outside unions bargain may also account for some of the opposition. For example, the company unions often work primarily for better conditions, while the trade and industrial unions strike at low wages and long hours. The workers prefer attacks on the latter.

<sup>48</sup> Such was the meaning ascribed to the term in *National Labor Relations Board v. Remington Rand, Inc.*, (C. C. A. 2d, 1938) 94 F. (2d) 862 at 870. "Section II (a) requires the respondent to withdraw all recognition from the Ilion and Middleton company unions. . . . The section concludes, however, with the words: 'and completely disestablish those associations as such representatives.' . . . we cannot see that it adds anything to what precedes. . . . It appears to us not only redundant, but to carry a charge of disapproval which the act does not warrant."

<sup>49</sup> 281 U. S. 548, 50 S. Ct. 427 (1929). "The railroad can complain only of the infringement of its own constitutional immunity, not that of its employees." *Virginia Ry. v. System Federation*, 300 U. S. 515 at 558, 57 S. Ct. 592 (1936).

<sup>50</sup> *Brotherhood v. Texas & New Orleans R. R.*, (D. C. Tex. 1928) 24 F. (2d) 426.

<sup>51</sup> 281 U. S. 548 at 571, 50 S. Ct. 427 (1929).

However, the real reasons for the opposition go much deeper. In even a bona fide company union (i.e., a union not formed merely for the purpose of obstructing unionism from the outside) the promulgation by, and the support of, the management result in a curbing of the union's power, because of the employer's tendency to protect itself just as a matter of good business sense. To this must be added the effect of abuse. There are numerous instances of an employer using his various powers over the employees to build up a strong company union, the organization mechanics of which assure the employer either control or an effective veto, and then using these mechanics to defeat any reforms not considered to be in the best interests of the employer.<sup>52</sup> The union's strength, in such instances, lies in the employees' fear of discharge and in their recognition of the necessity of cooperation with the management if advancements are to be expected.

Both the National Labor Relations Act and the Railway Labor Act recognize the company union as a potential evil, and the National Labor Relations Board is continually being petitioned in regard to an employer's alleged sponsorship of an inside union. In the policy clause of the National Labor Relations Act, section 1, and in the clause stating the rights of employees, section 7, there is a statement that the employees shall have representatives of their own choosing. In the next section, section 8, it is made an unfair labor practice for an employer to coerce employees in the exercise of their right to choose their representatives.<sup>53</sup> Recognizing that there can be unions called "company unions" which are free from any employer influence, there is no condemnation of "company unions" as such.<sup>54</sup> The act hits at the root of the trouble and operates in terms of employer influence and coercion and employee-chosen representatives. Clearly it is a policy of the act that employees should have as representative an organization of their own choosing and that the board should have the power to disestablish a particular union if such is necessary for collective bargaining by employee-chosen representatives. One can scarcely say that a representative was chosen by the employees when at the time of the choice there was such undue influence on the part of the employer as to necessitate a cease and desist order. The question of necessity depends upon the facts of each case. In the principal cases the Court held that this question is for the board, and not for the courts to decide, save

<sup>52</sup> See the Board's findings in the Greyhound cases, notes 4 and 5, *supra*. In *re Hill Bus Co.*, 2 N. L. R. B. 781 (1937); In *re Lion Shoe Co.*, 2 N. L. R. B. 819 (1937); In *re Shell Oil Co.*, 2 N. L. R. B. 835 (1937); In *re Wheeling Steel Corp.*, 1 N. L. R. B. 699 (1936).

<sup>53</sup> 49 Stat. L. 449 (1935), 29 U. S. C. (Supp. 1937), §§ 151, 157, 158.

<sup>54</sup> See 79 CONG. REC. 7570 (1935).

as to whether there is sufficient evidence to support the board's decision.<sup>55</sup>

As a matter of precedent, *Texas & New Orleans R. R. v. Brotherhood of Railway Clerks*, while distinguishable, is significant authority for the board's disestablishment order in the *Greyhound* cases. The Brotherhood had been recognized by the Railroad as the employee's representative for collective bargaining. When the Brotherhood's request for a wage increase was refused, it applied to the Board of Mediation. The Railroad then endeavored to organize a company association. Upon application of the Brotherhood, the district court granted a temporary injunction restraining the Railroad from interfering, influencing, or coercing the employees in their designation of a representative. This was violated. The Brotherhood instituted proceedings to punish the Railroad for contempt. The injunction was made permanent, and in order to purge itself from contempt the Railroad was required to "completely disestablish the Association as the representative of the employees, and to reinstate and reestablish the Brotherhood" until such time as the employees by ballot should choose another representative. The Supreme Court affirmed the orders of the district judge. Since the punishment in a civil contempt proceeding is remedial and for the benefit of the complainant, and is molded so as to compel the performance of some duty<sup>56</sup> and since the only benefit enuring to the Brotherhood and the only duty on the part of the Railroad arose from the Railway Labor Act, the decision of the district court is a determination that the "disestablish" order was necessary to effectuate a provision of the Railway Labor Act. A unanimous Supreme Court thought the decree did not go "beyond the proper enforcement of the provision of the Railway Labor Act."<sup>57</sup> The reference is to the provision that employees have the right to have representatives of their own choosing. Such is one of the policies of the National Labor Relations Act, and the case is thus authority to the effect that the use of such a sanction is necessary to carry out the policies of the act.<sup>58</sup>

<sup>55</sup> 58 S. Ct. 571 at 576 (1938).

<sup>56</sup> *In re Chiles*, 22 Wall. (89 U. S.) 157, 22 L. Ed. 819 (1874); *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418 at 441, 31 S. Ct. 492 (1910).

<sup>57</sup> 281 U. S. 548 at 571, 50 S. Ct. 427 (1929). Mr. Justice McReynolds took no part in the decision of the case.

<sup>58</sup> See *National Labor Relations Board v. Jones & Laughlin Steel Co.*, 301 U. S. 1 at 47, 57 S. Ct. 615 (1937). In considering a provision of the decree in the *Texas & New Orleans R. R. Co. v. Railway Clerks*, *supra*, a similar order for restoration to service was made by the court in contempt proceedings for the violation of an injunction issued by the court to restrain an interference with the right of employees as guaranteed by the Railway Labor Act of 1926. The requirement of restoration to service, of employees discharged in violation of the provisions of that Act, was thus

Since it can no longer be assumed that employers do not plan their labor strategies,<sup>59</sup> a disestablishment order seems to be necessary to prevent complete evasion of the act. Considerable time usually elapses between the unfair labor practices charged and the order of the board.<sup>60</sup> If in the interim the employer presses its plans and sets up and recognizes a company union it may effectively circumvent the act.<sup>61</sup> Recognition is one of the fundamental goals of any union. While it is usually difficult to get men to change from one union to another, it is even more difficult to get them to change from a recognized union to one that hopes to be recognized.<sup>62</sup> Although a union which was originally sponsored by the employer and which later continues to exist free from such sponsorship may be as adequate for representing the employees as any other, the fact nevertheless remains that the employees are not negotiating through a representative of their own uncoerced and uninfluenced choice.<sup>63</sup> In this connection, the rapid increase in the number of company unions since section 7 (a) of the N.I.R.A. was enacted is significant. While this rise in the number of company unions may have been partly due to a new realization of it as an effective employer weapon, similar to labor's realization of the effectiveness of the sit-

a sanction imposed in the enforcement of a judicial decree. We do not doubt that Congress could impose a like sanction for the enforcement of its valid regulation. The fact that in the one case it was a judicial sanction, and in the other a legislative one, is not an essential difference in determining its propriety."

<sup>59</sup> See BROOKS, *WHEN LABOR ORGANIZES* 133-164 (1937); UNITED STATES NATIONAL LABOR RELATIONS BOARD, *GOVERNMENTAL PROTECTION OF LABOR'S RIGHT TO ORGANIZE* 12-16 (1936).

<sup>60</sup> In the Pennsylvania Greyhound case, the management decided to establish the Association shortly after the enactment of the N.I.R.A., [48 Stat. L. 195, 15 U. S. C. (1935) § 701], June 16, 1933. (R. 21; Bd. Ex. 73.) On Oct. 1, 1935, charges were filed with the board. (1 N. L. R. B. 1.) The board's decision was made December 7, 1935. The board petitioned the Circuit Court of Appeals for enforcement of the order on or about December 10, 1935. The court's decision was handed down on June 15, 1937. Certiorari to the Supreme Court was granted on November 8, 1937. The argument was on February 4, 1938, and the present decision was made on February 28, 1938. "Petitions filed under this Act shall be heard expeditiously, and if possible within ten days after they have been docketed." Section 10 (i) of the Wagner Act, 29 U. S. C. (Supp. 1937), § 160 (i).

<sup>61</sup> There are no penal provisions in the Act subjecting the employer to fine or imprisonment for past acts which constituted unfair labor practices. Cf. *The Railway Labor Act*, supra, note 18.

<sup>62</sup> CATLIN, *THE LABOR PROBLEM*, rev. ed., 431 (1935). Other leading references are cited in footnote 2 of the Court's decision in *National Labor Relations Board v. Pennsylvania Greyhound Lines, Inc.*, (U. S. 1938) 58 S. Ct. 571 at 574.

<sup>63</sup> "Even though he would not have freely chosen the Council (company union) as an initial proposition, the employee, once having chosen, may by force of a timorous habit, be held firmly to his choice. The employee must be released from these unlawful compulsions." In re *Wheeling Steel Corp.*, 1 N. L. R. B. 699 at 710 (1936). Cf. 34 COL. L. REV. 1529 at 1537 (1934).

down strike, undoubtedly many of them were organized in order to negate the act.<sup>64</sup>

Another consideration pointing to the existence of the power to order the disestablishment of a particular union is that the act in no way negatives the existence of such a power. The Wagner Act was passed in 1935. Prior thereto the old National Labor Relations Board issued numerous orders requiring employers to withdraw recognition from a union which had been chosen as representative by the employees at a time when the union was fostered or supported by the employer.<sup>65</sup> Instead of negating the power thus assumed,<sup>66</sup> the act merely gives a general grant of power. It thus may be said to affirm the existence of such a power.<sup>67</sup>

In the respective circuit courts of appeal in the *Greyhound* cases it was held that a determination of a new representative should be a prerequisite to a disestablishment order.<sup>68</sup> This might well follow if the source of the authority to make the order was only section 9, the theory then being that the power so to order is incidental to the authority therein given to the board to certify the representative of the employees.<sup>69</sup> However, if section 10 (c) is the basis of the power, there is

<sup>64</sup> See note 54, *supra*.

<sup>65</sup> *Ely & Walker Dry Goods Co.*, 1 (old) N. L. R. B. 94, 98 (1934); *Matter of Proctor & Gamble Mfg. Co.*, 2 (old) N. L. R. B. 192 at 197 (1935) ("withdraw any recognition"); *Matter of National Battery Co.*, 2 (old) N. L. R. B. 484 at 490 (1935).

<sup>66</sup> In the Senate Committee Report, S. REP. 573, 74th Cong., 1st sess. (1935), there was a reference to the case of *Texas & New Orleans R. R. v. Brotherhood*, 281 U. S. 548, 50 S. Ct. 427 (1929), which is the case in which the Supreme Court upheld a "disestablishment order" under the Railway Labor Act of 1926.

<sup>67</sup> *Republic Ins. Co. v. Poole*, (Tex. Civ. App. 1923) 257 S. W. 624; *State ex rel. Chealander v. Morgan*, 131 Wash. 145, 229 P. 309 (1924); *Harter v. Commissioners*, 186 Ind. 301, 116 N. E. 304 (1917). It should be noted, however, that this somewhat artificial argument is weakened by the fact that there is a specific grant of the power to order reinstatement of employees with back pay. This, too, had been ordered on numerous occasions by the old board without express authority. *Matter of Davis Tailoring Co.*, 2 (old) N. L. R. B. 427 at 429 (1935); *Matter of Freundlich, Inc.*, *ibid.*, 147 at 148 (1935); *Matter of Philadelphia Cleaners & Dyers, Inc.*, *ibid.*, 223 at 225 (1935); *Matter of Irving Trust Co.*, *ibid.*, 321 at 326 (1935). Cf. *Matter of Hill & Co.*, 1 (old) N. L. R. B. 208 (1934).

<sup>68</sup> *National Labor Relations Board v. Pacific Greyhound Lines*, (C. C. A. 9th, 1937) 91 F. (2d) 458 at 460; *National Labor Relations Board v. Pennsylvania Greyhound Lines, Inc.*, (C. C. A. 3d, 1937) 91 F. (2d) 178 at 179. In the latter emphasis was given to the fact that the union ordered to be disestablished had not been given a hearing.

<sup>69</sup> 49 Stat. L. 449 (1935), 29 U. S. C. (Supp. 1937), § 159.

nothing which requires such a prior determination, and it is submitted that the foregoing substantiates a holding that the board can order a disestablishment of an employer-dominated union under the "affirmative acts" sanction of section 10 (c).

## 4.

The result of the *Greyhound* decisions is to further establish the National Labor Relations Board as a moderator or supervisor of the employer-employee relationship. This follows from the fact that the Association (the "disestablished" union) was not considered as a party necessary to the action, and from the fact that the petitioners were a small minority of the employees.<sup>70</sup> The consideration is not of the rights of parties or of individuals, but of the justice of the employer-employee relationship, which includes certain rights of the employees as a group, and of the public, and particular duties of the employer to the group, and to the public.<sup>71</sup> The board surveys the situation and, upon deciding that the existing contract is tainted with employer influence, takes steps to restore the status that existed before the contract came into existence. This is in harmony with the general philosophy of the act.<sup>72</sup>

Theoretically a company union may be a useful tool in the promotion of genuine employer-employee cooperation. As has been pointed out the Wagner Act only outlaws employer-sponsored and dominated unions. However, as a practical matter, it may often be much more expedient for the employer, rather than the employees, to promulgate any cooperative plan, and considering the broadness of the language of the act<sup>73</sup> and the fact that charges can be brought by any outside union which obtains the support of a very small minority of the employees,<sup>74</sup> any employer setting up such a plan takes an undue risk

<sup>70</sup> See the board's decision in 1 N. L. R. B. 1 at 16 (1935).

<sup>71</sup> *Agwilines Inc. v. National Labor Relations Board*, (C. C. A. 5th, 1936) 87 F. (2d) 146.

<sup>72</sup> For example, when "it is charged" that an employer has violated the act, by the procedure of section 10, the board, and not the one making the charge, conducts and presses the hearing. The board usually, if not always, is the one which brings an action in the federal courts to enforce the order. However, the act does provide in section 10 (e), that any aggrieved person may obtain a review. 29 U. S. C. (Supp. 1937), § 160.

<sup>73</sup> See note 28, *supra*. In particular, note section 8 (2) of the act: "It shall be an unfair labor practice for an employer . . . To . . . interfere with the . . . administration of any labor organization. . . ." 29 U. S. C. (Supp. 1937), § 158 (2).

<sup>74</sup> In the *Pennsylvania Greyhound* case, the charge was made by the union and not by any of the employees, as employees. 1 N. L. R. B. 1 at 45 (1935). However, the union had a membership of fifty or sixty of the approximately ninety men employed by the particular unit involved. 1 N. L. R. B. at 5 and 16.



of being summoned before the board to answer charges of unfair labor practices. As a result of the *Greyhound* decisions, the entire plan of the employer may easily be set at nought. Such a hindrance to employer-employee cooperation is undesirable. A partial remedy may well be the carefulness with which the board utilizes its discretion in ordering disestablishments. Unfortunately, such remedy will not be complete, because of the inability of an employer contemplating a cooperative company union plan to predict the decision of the board. It is not suggested, however, that the facts of the *Greyhound* cases did not justify the "disestablishment" orders issued therein.

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