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Labor Law - National Labor Relations Act - Power of NLRB to Order Employer to Withhold Recognition from Assisted Union Until Union is Certified

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LABOR LAW—NATIONAL LABOR RELATIONS ACT—POWER OF NLRB TO ORDER EMPLOYER TO WITHHOLD RECOGNITION FROM ASSISTED UNION UNTIL UNION IS CERTIFIED—The National Labor Relations Board found on complaint of a rival union that Bowman Transportation, Inc. had committed an unfair labor practice under section 8(a)(2) of the National Labor Relations Act as amended,[1] by assisting District 50 of the United Mine Workers (UMW). The Board thereupon ordered Bowman to cease recognizing District 50 until such time as District 50 had been certified by NLRB as the employees' bargaining representative, and to post notices accordingly. District 50 had not complied with the filing requirements of section 9(f, g and h) of the act, and consequently under the provisions of those sections could not expect to attain certification by the NLRB until compliance. The District of Columbia Circuit[2] modified the order to provide an alternative[3] to certification as a prerequisite to recognition. On certiorari to the United States Supreme Court, *held,* vacated and remanded to the NLRB. While the Board improperly required certification of the union on these facts, the court of appeals had no power to add an alternative to the order since this was in the discretion of NLRB. *NLRB v. District 50, United Mine Workers of America and Bowman Transportation, Inc.,* 355 U.S. 453 (1958).

Under section 10(c) of the act, the NLRB has the power to order remedies for unfair labor practices; the Board's discretion is broad[4] but not unlimited, and a remedy must be appropriate[5] and suited to the particular

1 49 Stat. 452 (1935), 29 U.S.C. (1952) §158(a)(2), as amended by the Labor-Management Relations Act, 1947, 61 Stat. 141, Title I. These two acts will be referred to simply as the "act" throughout, and section numbers will be used as they are amended by the later act, even when referring to the act prior to the 1947 amendments. Section 8(a)(2) 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. . . ."

2 (D.C. Cir. 1956) 237 F. (2d) 585, noted in 70 HARV. L. REV. 1306 (1957) and 41 MINN. L. REV. 825 (1957).

3 The court of appeals ordered that the union could also be recognized if it were freely chosen as the employees' representative after all effects of the assistance had been eliminated. Principal case at 457.

4 Principal case at 458, citing NLRB v. Link-Belt Co., 311 U.S. 584 (1941).

5 Principal case at 458, citing NLRB v. Bradford Dyeing Assn., 310 U.S. 318 (1940).

situation.[6] Until 1947, it was the practice of the Board pursuant to this authorization to order an employer who had violated section 8(a)(2) to cease and desist and to disestablish completely the unaffiliated union supported.[7] In the case of a union affiliated with a national or international union, however, the Board would merely order the company to cease recognition of the union involved until such time as the Board certified it as the bargaining representative under section 9(c).[8] The Supreme Court consistently upheld disestablishment, when used, as an appropriate remedy within the Board's discretion,[9] following a decision[10] under the Railway Labor Act.[11] The Court never *required* disestablishment, however, and it was generally understood that resolution of the question whether disestablishment or some lesser remedy was appropriate where the record indicated substantial evidence of an 8(a)(2) violation was within NLRB's discretion.[12]

In 1947 section 10(c) of the act was amended to require the NLRB to treat affiliated and unaffiliated unions in the same manner with respect to remedies for 8(a)(1) and 8(a)(2) violations.[13] In the same year the Board recognized that disestablishment was too severe a remedy in some cases under section 8(a)(2),[14] so in early 1948 the Board formulated a new remedy policy under which it reserved disestablishment as a remedy for

[6] Principal case at 458, citing NLRB v. Seven-Up Bottling Co., 344 U.S. 344 (1953).

[7] In the Matter of Detroit Edison Company and the Utility Workers Union of America, CIO, Local 223, 74 N.L.R.B. 267 at 277 (1947).

[8] The NLRB would do this by having charges against affiliated unions brought under §8(a)(1) which makes it an unfair labor practice to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7" among which is an employee's right to organize. In the Matter of Carpenter Steel Co. and United Steelworkers of America, CIO, 76 N.L.R.B. 670 at 671 (1948).

[9] NLRB v. Pennsylvania Greyhound Lines, Inc., 303 U.S. 261 (1938); NLRB v. Bradford Dyeing Assn., note 5 supra; NLRB v. Link-Belt Co., note 4 supra; H. J. Heinz Co. v. NLRB, 311 U.S. 514 (1941).

[10] Texas and New Orleans Railroad Co. v. Brotherhood of Railway and Steamship Clerks, 281 U.S. 548 (1930).

[11] 44 Stat. 577 (1926), 45 U.S.C. (1952) §§151-163.

[12] Independent Employees Assn. of the Neptune Meter Co. v. NLRB, (2d Cir. 1946) 158 F. (2d) 448, cert. den. 333 U.S. 826 (1948); NLRB v. Link-Belt Co., note 4 supra; NLRB v. West Kentucky Coal Co., (6th Cir. 1940) 116 F. (2d) 816; NLRB v. Dow Chemical Co., (6th Cir. 1941) 117 F. (2d) 455; NLRB v. Moench Tanning Co., (2d Cir. 1941) 121 F. (2d) 951; Roebling Employees Assn. v. NLRB, (3d Cir. 1941) 120 F. (2d) 289; Wilson & Co. v. NLRB, (10th Cir. 1946) 156 F. (2d) 577, cert. den. 329 U.S. 789 (1946). See In the Matter of Detroit Edison Company and the Utility Workers Union of America, CIO, Local 223, note 7 supra, at 279. The writer has found only two cases prior to 1947 in which courts refused to allow a disestablishment remedy of the Board while supporting the Board's determination of a §8(a)(2) violation. One of these cases, NLRB v. Automotive Maintenance Machinery Co., (9th Cir. 1942) 116 F. (2d) 350, was reversed per curiam by 315 U.S. 282 (1942). The other case refused the remedy on the grounds that the union involved had had neither notice nor an opportunity to be heard, NLRB v. Sterling Electric Motors, Inc., (9th Cir. 1940) 112 F. (2d) 63, and 114 F. (2d) 738 (1940), cert. dismissed 311 U.S. 722 (1940).

[13] 49 Stat. 453 (1935), 29 U.S.C. (1952) §160(c) as amended.

[14] In the Matter of Detroit Edison Co. and Utility Workers Union of America, CIO, Local 223, note 7 supra.

an employer-*dominated* union (affiliated or unaffiliated), while in the case of a union merely *assisted* by the employer, the Board only ordered the employer to cease contact with and recognition of, the union until such time as the Board certified the union to be the bargaining representative.[15] Subsequent court cases upheld the Board's policy[16] and reaffirmed the Board's discretion to order complete disestablishment.[17] In 1954, however, a lower court refused to enforce disestablishment, instead ordering non-recognition until certification, on the grounds that the evidence was not substantial that the union involved was dominated, but showed rather that it was only assisted.[18] Thus a court imposed a limitation on the Board's remedy discretion, i.e., that disestablishment is inappropriate for unions merely assisted, which until that time had been self-imposed by the Board. In the same year another court held the same way in a case involving a union not in compliance with section 9(f, g and h), although the court paid no attention to the effect of non-compliance.[19]

The principal case was decided by the District of Columbia Circuit in 1956, only four months after a related case was decided in the Fourth Circuit.[20] Both courts held that it was beyond the discretion of NLRB to require certification before re-recognition of an assisted but non-complying union, and the Supreme Court affirmed this holding on appeal of the principal case. This holding refuses to allow the NLRB to order a remedy which in effect is no greater than disestablishment. Consequently it can now be argued that the Court has sanctioned a limitation on the Board's remedial discretion in the section 8(a)(2) situation.[21] While this limitation can be supported by the policy of the act to give employees a free choice

[15] In the Matter of Carpenter Steel Co. and United Steelworkers of America, CIO, note 8 supra. See 9 STAN. L. REV. 351 at 354 (1957); 6 A.L.R. (2d) 426 (1949).

[16] Aerovox Corp. v. NLRB, (D.C. Cir. 1954) 211 F. (2d) 640, cert. den. 347 U.S. 968 (1954); NLRB v. Parker Bros. and Co., (5th Cir. 1954) 209 F. (2d) 278.

[17] NLRB v. Red Arrow Freight Lines, (5th Cir. 1950) 180 F. (2d) 585, cert. den. 340 U.S. 823 (1950). The court notes at 586 that it "cannot usurp the functions of the Board as to the means whereby to purge or prevent unfair labor practices found by the Board under substantial evidence to exist." See NLRB v. Seven-Up Bottling Co., note 6 supra.

[18] NLRB v. Braswell Motor Freight Lines, (5th Cir. 1954) 209 F. (2d) 622, rehearing 220 F. (2d) 362 (1955). This is the earliest case found by the writer subsequent to 1946 in which a court refuses to enforce a disestablishment order while nevertheless upholding the Board's finding that §8(a)(2) had been violated. NLRB v. Jack Smith Beverages, (6th Cir. 1953) 202 F. (2d) 100, cert. den. 345 U.S. 995 (1953), reduces a disestablishment order from three plants to one, but on grounds that §8(a)(2) had not been violated at the other two plants. Another 1953 case refused a non-recognition order while finding substantial evidence of a §8(a)(2) violation, arguing that in the situation voiding an employer-union contract was too harsh, NLRB v. Gaynor News Co., (2d Cir. 1952) 197 F. (2d) 719, affirmed by 347 U.S. 17 (1953) which, however, discusses another point not in issue here.

[19] NLRB v. Wemyss, (9th Cir. 1954) 212 F. (2d) 465.

[20] District 50, UMW v. NLRB, (4th Cir. 1956) 234 F. (2d) 565, noted by the court of appeals decision in the principal case.

[21] There is language in the opinion of the principal case which can be used to support this proposition. Principal case at 460, 461.

of bargaining representative,[22] disestablishment always restricts the choice of employees to a certain extent, and has been upheld by the courts as a means to greater freedom of choice in the long run. The question is not whether the NLRB is to be prevented from ordering remedies that restrict employees' choice of representative, but whether to leave the decision of applying disestablishment or some lesser remedy to the Board's discretion. If this question is not left to the Board, then the courts would seem to take upon themselves the task of distinguishing between dominated or merely assisted unions, a task handled solely by NLRB administrative expertise prior to 1954. Although this judicial inroad into an area heretofore reserved to NLRB[23] may be influenced by the Administrative Procedure Act of 1946[24] and Congress's amendment of section 10(c) of the Labor Relations Act in 1947,[25] it would seem that NLRB is more suited for the determination of this type of question which turns on facts and experience[26] and skirts close to the realm of administrative policy.[27]

In the principal case arguments for NLRB discretion over remedies yielded to competing considerations concerning the legislative intent of section 9(f, g and h).[28] Under these sections, added in 1947, unions that do not comply with certain filing and reporting requirements are not eligible for certification under section 9, or for redress from unfair labor

22 Section 7 of the Labor-Management Relations Act, 1947, 61 Stat. 141, Title I, 29 U.S.C. (1952) §157, amending the National Labor Relations Act, 1935, 49 Stat. 452. See 70 HARV. L. REV. 1306 at 1308 (1957).

23 See Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941), especially at 194 where the Court states that Congress intended to leave remedies to the "empiric process of administration." See also note 12 supra.

24 60 Stat. 237 (1946), 5 U.S.C. (1952) §1001 et seq. See especially §10(e) which requires a review of the record as a whole when determining the existence of substantial evidence of an agency finding. In Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951), Justice Frankfurter indicates for the Court the influence of this act on review of NLRB decisions.

25 49 Stat. 453 (1935), 29 U.S.C. (1952) §160(c) as amended.

26 See COOPER, ADMINISTRATIVE AGENCIES AND THE COURTS 348, 377, 379 (1951), and Phelps Dodge Corp. v. NLRB, note 23 supra. The principal case partly recognizes this proposition by remanding to NLRB instead of modifying the order as did the court of appeals. This was the procedure followed in the Fourth Circuit decision of District 50, UMW v. NLRB, note 20 supra, and was also suggested by two law review notes on the principal case at the court of appeals level. See 70 HARV. L. REV. 1306 at 1309 (1957), 41 MINN. L. REV. 825 at 830, note 20 (1957). Courts of appeals have modified orders in cases cited in note 18 supra.

27 The 1947 shift in NLRB remedies for §8(a)(2) violations indicates the policy nature of this type of ruling. The NLRB based its shift in remedies partly on the fact that "This is 1947, not 1935; in the interim employees have learned much about protecting their own rights and making their own choices with the full facts before them." In the Matter of Detroit Edison Company and the Utility Workers Union of America, CIO, Local 223, note 7 supra, at 279. See also Williams Motor Co. v. NLRB, (8th Cir. 1942) 128 F. (2d) 960 at 965, where the court classified NLRB remedies as a matter of "fact" related to "policy," which courts must accept unless "unsupported by evidence."

28 Labor-Management Relations Act, 1947, 61 Stat. 141, 29 U.S.C. (1952) §159(f, g, h).

practices by complaint under section 10. The Court has held that non-compliance with section 9(f, g and h) operates only to deny the union the privileges enumerated in these sections, and not to prevent the union from claiming other benefits from the act.[29] In the principal case the certification requirement would operate to disestablish an assisted union or coerce it and its parent to comply with section 9(f, g and h). Since the Court felt non-complying unions should be treated as complying unions except as the act specifies otherwise, it held the remedy as applied here to be outside the discretion of the Board. In so holding the Court stressed that its principal objection was the "inappropriateness" or "inflexibility"[30] of the Board's remedy in a situation where other remedies can be framed to effect the purposes of the act. In a sense it might be said that the Court's objection was not to an abuse of discretion but to a lack of exercise of discretion. In this respect, limited to the non-complying assisted union circumstance, the decision is a valuable reminder to the Board that it cannot "pigeonhole" its remedies, applying them without consideration of the particular facts. On the other hand, if the broader generalization of the Court's holding, supported by some of the language in the opinion,[31] is taken to restrict generally the Board's discretion over remedies in the section 8(a)(2) situation as discussed above, the courts face the greater difficulties of remote and inexpert second-guessing of administrative decisions in the complex labor field.[32]

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[29] NLRB v. Dant, 344 U.S. 375 (1953), United Mine Workers v. Arkansas Oak Flooring Co., 351 U.S. 62 (1956). In the former case, the Court analyzed the legislative history of the act and concluded that it was so uncertain that the plain meaning of the words (as construed by the Court) would be considered congressional intent. In so holding, the Court followed the interpretation of the NLRB.

[30] Principal case at 463.

[31] See note 21 supra.

[32] See COOPER, ADMINISTRATIVE AGENCIES AND THE COURTS 379 (1951).