Michigan Law Review

Volume 52 | Issue 8

1954

LABOR LAW--LABOR-MANAGEMENT RELATIONS ACT--ENCOURAGEMENT OF UNION MEMBERSHIP AND EMPLOYER'S INTENT AS ELEMENTS OF UNLAWFUL DISCRIMINATION

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LABOR LAW—LABOR-MANAGEMENT RELATIONS ACT—ENCOURAGEMENT OF UNION MEMBERSHIP AND EMPLOYER'S INTENT AS ELEMENTS OF UNLAWFUL DISCRIMINATION—In the first of three cases involving employer encouragement of union membership the National Labor Relations Board held that a union had violated section 8(b)(2) of the amended National Labor Relations Act[1] by inducing an employer to refuse to hire a union member who had failed to comply with the union's rules as to job clearances. The Court of Appeals for

[1] Labor-Management Relations Act, 1947, 61 Stat L. 141, §8(b)(2) (1947), as amended, 29 U.S.C. (Supp. V, 1952) §158(b)(2). This section makes it an unfair labor practice for a labor organization "to cause or attempt to cause an employer to discriminate against an employee in violation of" §8(a)(3) [61 Stat. L. 140, §8(a)(3) (1947), 29 U.S.C. (Supp. V, 1952) §158(a)(3)], which provides that it shall be an unfair labor practice for an employer "by discrimination . . . to encourage or discourage membership in any labor organization."

the Second Circuit rejected the union's contention that the employer's action was not such as to encourage union membership and enforced the Board's order.[2] In the second case a union was found by the board to have violated section 8(b)(2) by causing an employer to refuse certain work assignments to a union member who was delinquent in paying union dues. The Court of Appeals for the Eighth Circuit refused to enforce the Board's order on the ground that it was not supported by substantial evidence that the discrimination had encouraged union membership.[3] In the third case an employer, in response to pressure by the union, which was the employees' exclusive bargaining agent, granted union members more favorable wage treatment than nonmembers. The Court of Appeals for the Second Circuit upheld the Board's decision that the employer had thereby violated section 8(a)(3), in spite of the fact that the union involved was a closed one, ordinarily admitting to membership only first-born sons of members, and even though the employer had not been motivated by any desire to encourage union membership.[4] On certiorari, *held*, first and third cases affirmed, second case reversed, with Justices Black and Douglas dissenting. Section 8(a)(3) forbids only such discrimination as encourages or discourages union membership, but the term "membership" encompasses any participation in union activities. No direct proof of encouragement or discouragement is necessary in cases in which such result may reasonably be inferred. The employer's motive is immaterial where encouragement or discouragement is a natural consequence of the discrimination.[5] *Radio Officers' Union v. NLRB, NLRB v. International Brotherhood of Teamsters, Gaynor News Co. v. NLRB,* 347 U.S. 17, 74 S.Ct. 323 (1954).

In upholding the decision of the NLRB in each of the three principal cases the Supreme Court has resolved two major issues involving the application of section 8(a)(3) to employer encouragement of union membership. The first of these problems stems from the fact that section 8(a)(3) does not in terms prohibit discrimination *simpliciter,* but only such discrimination as encourages or discourages union membership. As an original proposition it is rather difficult to understand how discrimination which is directed against an employee who is and remains a union member can be said to encourage union membership. The Supreme Court, however, disposed of the argument to this effect advanced by the unions in *Teamsters* and *Radio Officers* by construing the statutory language "membership in any labor organization" to include not only adhesion to membership but also participation in any union activities. As a result of this interpretation the Court was able to characterize as reasonable the Board's inference of encouragement in these two cases, since the discrimination involved was obviously calculated to encourage such union activities as prompt

[2] NLRB v. Radio Officers' Union, (2d Cir. 1952) 196 F. (2d) 960.
[3] NLRB v. International Brotherhood of Teamsters, (8th Cir. 1952) 196 F. (2d) 1.
[4] NLRB v. Gaynor News Co., (2d Cir. 1952) 197 F. (2d) 719.
[5] The Court also held that it was not improper for the Board to proceed against the union without joining the employer, and that a back pay order against the union was justified even in the absence of an order requiring that the employee be reinstated.

payment of dues and adherence to union rules regarding hiring practices. The Court then went on to hold that direct proof of encouragement or discouragement is unnecessary where such fact may reasonably be inferred.[6] The net result of these two holdings seems to be the elimination, for most if not all practical purposes, of the encouragement-discouragement requirement in cases in which discrimination based upon union activities is established.

The second major issue presented by the instant cases involved the contention, accepted by Justices Black and Douglas, that section 8(a)(3) is not violated unless the employer discriminates *in order to* encourage or discourage unionism. Thus the minority felt that no unlawful discrimination had occurred or been caused in any of the three principal cases because in each the employer had acted, not from any pro-union motivation, but only in response to union pressure. The majority, however, while emphasizing the importance of the employer's motivation, applied the common law rule of intent[7] and held that the employer must be presumed to have intended encouragement of union membership, since this was the natural and foreseeable consequence of his conduct. What the majority apparently meant is that an employer's actual purpose is significant only in determining the existence of discrimination based upon union activities;[8] and that therefore in cases such as the instant ones, where this type of discrimination is conceded, actual motivation is completely immaterial. As a matter of legislative history, at least, the Court seems to have come to the correct conclusion with respect to both of the main issues in these cases.[9] What is more, even if the Court had not been willing to give section 8(a)(3) such a broad construction, a finding of illegality might well have been reached by reference solely to sections 8(a)(1) and 8(b)(1)(A).[10] By striking down what could therefore be considered merely technical defenses the instant decision will make it possible for the Board and the courts of appeals to concentrate henceforth upon the real merits of alleged discrimination cases.

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[6] In upholding the Board's inference as applied to the Gaynor case the Court noted that union admission policies are not necessarily static, and stated that the act does not require that a "change in employees' 'quantum of desire' to join a union have immediate manifestations." Principal case at 51.

[7] For a discussion of the common law treatment of the intent problem see HOLMES, THE COMMON LAW 51 et seq. (1923).

[8] Here the employer's real motive is crucial because if the basis upon which he discriminates is not in any way related to organizational activities, there is no reason theoretically at least why union membership would be encouraged or discouraged.

[9] As to the meaning of "membership" see S. Rep. No. 573, 74th Cong., 1st sess., p. 11 (1935); H. Rep. No. 969, 74th Cong., 1st sess., p. 17 (1935). As to employer's intent see H. Conf. Rep. No. 510, 80th Cong., 1st sess., p. 44 (1947). Under the minority view regarding intent §8(b)(2) would obviously become almost a dead letter.

[10] These sections make it an unfair labor practice for either an employer or a union to restrain or coerce employees in the exercise of their organizational rights. Certainly no distinction is drawn by these sections between "membership" and other union activities. For a general discussion of the two sections see FORKOSCH, A TREATISE ON LABOR LAW §§267, 273 (1953).