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LABOR LAW - "CHANNELING" THE DUTY TO BARGAIN - EFFECT OF VIOLATION OF "NO-STRIKE" CLAUSE IN EXISTING AGREEMENT

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LABOR LAW — "CHANNELING" THE DUTY TO BARGAIN — EFFECT OF VIOLATION OF "NO-STRIKE" CLAUSE IN EXISTING AGREEMENT—Employer and union had an existing collective agreement which provided detailed procedures for adjusting grievances, including arbitration as the final step, and contained a no-strike clause. Disputes arose concerning action taken by the employer affecting working schedules, overtime work, and other conditions of employment without consulting the union; and disciplinary measures were taken against certain employees in pursuance of the new working rules. The union finally called a strike, without filing grievances according to the contract procedure on the disputes which were the immediate causes of the strike. The employer discontinued hearings on two pending grievances and refused to negotiate concerning the causes of the strike, offering, however, to consider them under the regular grievance procedure if the union would end the strike and file grievances on these questions. The union soon agreed to this proposal; but the NLRB had already started proceedings in which it held [1] that the employer was guilty of an unfair labor practice under section 8(5) of the NLRA [2] for refusing to bargain collectively with the union. On appeal, *held,* the employer has not been guilty of a refusal to bargain. *Timken Roller Bearing Co. v. NLRB,* (C.C.A. 6th, 1947) 161 F. (2d) 949.

An employer's duty to bargain collectively with the representative of his

[1] Timken Roller Bearing Co., 70 N.L.R.B. 500 (1946).

[2] 49 Stat. L. 453 (1935), 29 U.S.C. (1940) § 158(5).

employees was not defined or limited by the terms of the original NLRA.[3] Decisions of the NLRB and the courts supplied only a general test of good faith and sincere desire to reach agreement,[4] but seem to have suggested no limits to the duty except that it might be suspended when bona fide bargaining efforts reached an impasse.[5] It was often held that the duty to bargain was not terminated by the occurrence of a strike,[6] even when the strike was a violation of an existing collective agreement or of some state law.[7] Illegal acts of the employees in the course of the strike might justify the employer in discharging them, with no obligation to reinstate them; [8] then he would have no duty to bargain, as to these men, simply because they would no longer be "employees" within the definition of the act.[9] If he did not discharge them, however, his duty to bargain continued.[10] Moreover, the duty to bargain did not end when an agreement had been reached, for the employer had to stand ready to bargain concerning interpretation of or proposed changes in the contract.[11] So, in the principal case, the court does not say that the employer had no duty to bargain in this situation, or that the union had lost its bargaining rights by breach of the no-strike clause. Rather, it says that the employer had fulfilled its duty to bargain by offering to follow the grievance procedure provided by the existing agreement. Employer and union may agree upon the manner in which bargaining shall be done; indeed, an orderly grievance procedure is a proper subject for collective bargaining,[12] and the adjustment of grievances by that method

[3] 49 Stat. L. 449-457 (1935), 29 U.S.C. (1940) §§ 151-166. See generally Smith, "The Evolution of the 'Duty to Bargain' Concept in American Law," 39 MICH. L. REV. 1065 (1941), and Ward, "The Mechanics of Collective Bargaining," 53 HARV. L. REV. 754 (1940). See also the definition of "collective bargaining" in the Taft-Hartley Act amendments to the original NLRA, 61 Stat. L. 140 (1947), 29 U.S.C.A. (Supp. 1947) § 158(d).

[4] Atlantic Refining Co., 1 N.L.R.B. 359 at 368 (1936); Highland Park Mfg. Co., 12 N.L.R.B. 1238 at 1248 (1939); Globe Cotton Mills v. NLRB, (C.C.A. 5th, 1939) 103 F. (2d) 91 at 94; NLRB v. Boss Mfg. Co., (C.C.A. 7th, 1941) 118 F. (2d) 187 at 189.

[5] Jeffery-DeWitt Insulator Co. v. NLRB, (C.C.A. 4th, 1937) 91 F. (2d) 134.

[6] NLRB v. Mackay Radio & Telegraph Co., 304 U.S. 333 at 344, 58 S.Ct. 904 (1938); Rapid Roller Co. v. NLRB, (C.C.A. 7th, 1942) 126 F. (2d) 452; Cowell Portland Cement Co., 40 N.L.R.B. 652 at 689 (1942).

[7] NLRB v. Reed & Prince Mfg. Co., (C.C.A. 1st, 1941) 118 F. (2d) 874; Lancaster Foundry Corp., 75 N.L.R.B., No. 33, 21 L.R.R.M. 1023 (1947). But see Charles E. Reed & Co., 76 N.L.R.B., No. 86, 21 L.R.R.M. 1212 (1948), where the employer's unwillingness to negotiate while a strike continued in violation of the collective agreement was held not to constitute a refusal to bargain.

[8] NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240, 59 S.Ct. 490 (1939).

[9] 49 Stat. L.. 450 (1935). 29 U.S.C. (1940) § 152(3); Standard Lime & Stone Co. v. NLRB, (C.C.A. 4th, 1938) 97 F. (2d) 531 at 535.

[10] NLRB v. Reed & Prince Mfg. Co., (C.C.A. 1st, 1941) 118 F. (2d) 874.

[11] NLRB v. Sands Mfg. Co., 306 U.S. 332 at 342, 59 S.Ct. 508 (1939); NLRB v. Newark Morning Ledger Co., (C.C.A. 3d, 1941) 120 F. (2d) 262 at 267.

[12] Hughes Tool Co. v. NLRB, (C.C.A. 5th, 1945) 147 F. (2d) 69 at 73; Cities Service Oil Co., 25 N.L.R.B. 36 (1940).

is itself a bargaining process. Some sanctions should be attached to the collective agreement, for otherwise the supposed agreement is futile. The contract in this case had "channeled" the duty to bargain by providing a detailed procedure for negotiations, at least on the subject of grievances; and it was sufficient, the court says, for the employer to be willing to proceed accordingly. The majority of the NLRB had rejected this argument.[13] They thought that on some questions no individual employee would be disposed to present a grievance, though the employer policy involved might seriously affect employees in the bargaining unit generally. This position would be sound if "grievance" were taken to include only the claims of individuals or of small groups within the unit; and a few cases have seemed to make this narrow limitation.[14] When the "grievance" procedure permits negotiation of all disputes concerning interpretation and application of the collective agreement, however, there is no reason why it should be inadequate for any questions that may arise. It is interesting to compare the provisions of the Taft-Hartley Act placing conditions on the termination of the collective agreement,[15] limiting the duty to bargain with respect to matters covered by an existing agreement of fixed duration,[16] and giving federal district courts jurisdiction over suits for violation of contracts between employer and union.[17]

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[13] Timken Roller Bearing Co., 70 N.L.R.B. 500 at 502 (1946).

[14] Hughes Tool Co. v. NLRB, (C.C.A. 5th, 1945) 147 F. (2d) 69 at 72-73; Illinois Central R. Co. v. Moore, (C.C.A. 5th, 1940) 112 F. (2d) 959.

[15] 61 Stat. L. 140 (1947), 29 U.S.C.A. (Supp. 1947) § 158(d)(1)-(4).

[16] 61 Stat. L. 140 (1947), 29 U.S.C.A. (Supp. 1947) § 158(d).

[17] 61 Stat. L. 156 (1947), 29 U.S.C.A. (Supp. 1947) § 185.