Michigan Law Review

Volume 52 | Issue 2

1953

Labor Law - Labor - Management Relations Act - Attempt to Institute Consumer Boycott as Unfair Labor Practice

George B. Berridge S.Ed.
University of Michigan Law School

LABOR LAW — LABOR-MANAGEMENT RELATIONS ACT — ATTEMPT TO INSTITUTE CONSUMER BOYCOTT AS UNFAIR LABOR PRACTICE—In attempting to induce certain employees of defendant, a manufacturer of bakery products, to join a bakery workers' union, the union and several labor councils picketed

retail stores selling defendant's goods in Los Angeles. Placards carried by the pickets stated that defendant was non-union and on the "We-do-not-patronize" list of various labor organizations. A California state court granted defendant a preliminary injunction against the picketing.[1] Thereupon the National Labor Relations Board applied to federal district court for a preliminary injunction restraining defendant from invoking the injunction granted by the state court, claiming that since the unions' conduct was an unfair labor practice under section 8(b)(4)(A) of the amended National Labor Relations Act,[2] the state court was without jurisdiction. On appeal from an order of the district court granting the injunction requested by the NLRB,[3] *held*, affirmed. In their attempt to institute a consumer boycott of defendant by picketing its products at the retail level, the unions committed an unfair labor practice under section 8(b)(1)(A)[4] [rather than section 8(b)(4)(A)] of the amended NLRA. *Capital Service, Inc. v. NLRB*, (9th Cir. 1953) 204 F. (2d) 848.

A union's attempt by picketing or other means to induce the general public to boycott an employer is clearly not within the scope of section 8(b)(4)(A) since that section by its terms applies only where the union's efforts are directed toward "employees of an employer."[5] In deciding whether the unions' conduct violated section 8(b)(1)(A) the court reached the general conclusion that "under 8(b)(1) boycotts are not legal where, as here used to restrain or coerce employees."[6] No distinction was drawn between picketing defendant's own establishment and picketing retailers handling defendant's products, or between picketing and any other means of attempting to create a boycott. Nor was any question raised as to whether defendant threatened union standards by paying less than union wages or by maintaining substandard working conditions. These factors are significant under the various common law principles employed in judging a boycott's legality.[7] Was section 8(b)(1)(A) intended to sweep away all these considerations and outlaw the inducement of public boycotts for organizational purposes under any and all circumstances? The legislative history of the LMRA is inconclusive on this point.[8] Adhering to the decision

[1] Capital Service, Inc. v. Bakery Drivers Local Union No. 276, 21 CCH Lab. Cas. ¶66,865 (1952).

[2] Labor-Management Relations Act, 1947, 61 Stat. L. 141 (1947), 29 U.S.C. (Supp. V, 1952) §158(b)(4)(A). This section makes it an unfair labor practice for a labor organization "to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment . . ." to perform services, where such action is taken for certain unlawful objectives, one of which is "forcing . . . any employer . . . to cease doing business with any other person."

[3] NLRB v. Capital Service, Inc., (D.C. Cal. 1952) 21 CCH Lab. Cas. ¶67,010.

[4] 61 Stat. L. 141 (1947), 29 U.S.C. (Supp. V, 1952) §158(b)(1)(A). Sec. 8(b) provides: "It shall be an unfair labor practice for a labor organization or its agents—(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7. . . ." Sec. 7 gives employees the right, inter alia, to refrain from self-organization.

[5] See note 2 supra; Crowley's Milk Co., Inc. (Paterson Division), 102 N.L.R.B. No. 102 (1953).

[6] Principal case at 853.

[7] 1 TELLER, LABOR DISPUTES AND COLLECTIVE BARGAINING §149 (1940); 27 COL. L. REV. 190 (1927).

[8] 20 UNIV. CHI. L. REV. 109 (1952).

in *Perry Norvell Co.*[9] that section 8(b)(1)(A) was aimed primarily at coercive conduct accompanying a strike, not at the strike itself, the NLRB has upheld the legality of peaceful stranger picketing for organizational purposes.[10] However, subsequent cases indicate some relaxation by the Board of this restrictive interpretation.[11] The court in the principal case rested its decision almost entirely on the proposition that section 8(b)(1) should be given the same scope as its counterpart, section 8(a)(1), which forbids employer restraint or coercion of employees. But a court might well require a more specific indication of legislative intent to deprive unions of such important means of safeguarding satisfactory working conditions and increasing union membership. This is especially so in view of the more limited prohibitions of section 8(b)(4)(C),[12] and the fact that organizational methods like those involved in the instant case have been accepted by some courts as legitimate.[13] In focusing its attention on section 8(b)(1), the court in this case did not consider two important points: the constitutional question inherent in its restriction upon picketing and free speech, and the protection given the expression of opinion by section 8(c).[14] Whether peaceful organizational picketing may be an exercise of the constitutional right of free speech is not entirely settled. Recent Supreme Court cases[15] suggest the possibility that, with respect to section 8(b)(1), the inquiry would be whether Congress had some rational basis for outlawing this type of picketing, if it did intend to do so.[16] In construing section 8(c), the NLRB has indicated that it does not protect picketing which falls outside the sphere of constitutionally secured free speech,[17] and that it does not protect any

[9] 80 N.L.R.B. 225 (1948).

[10] United Brotherhood of Carpenters and Joiners, 80 N.L.R.B. 533 (1948).

[11] Clara-Val Packing Co., 87 N.L.R.B. 703 (1949); Pinkerton's National Detective Agency, 90 N.L.R.B. 205 (1950). In Jarka Corp. of Philadelphia, 94 N.L.R.B. 320 (1951), the Board found unfair labor practices under §§8(b)(2) and 8(b)(1)(A), but the court of appeals reversed as to the latter, declining to consider the section's applicability. NLRB v. Jarka Corp. of Philadelphia, (3d Cir. 1952) 198 F. (2d) 618.

[12] Does not this section, by specifically outlawing certain types of secondary action to secure recognition when a rival union has been certified, suggest that Congress did not intend to prohibit milder forms of recognition and organizational activities? See Perry Norvell Co., note 9 supra, at 239.

[13] See, e.g., Goldfinger v. Feintuch, 276 N.Y. 281, 11 N.E. (2d) 910 (1937); C. S. Smith Metropolitan Market Co. v. Lyons, 16 Cal. (2d) 389, 106 P. (2d) 414 (1940).

[14] "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit." 61 Stat. L. 142 (1947), 29 U.S.C. (Supp. V, 1952) §158(c).

[15] Building Service Employees International Union, Local 262 v. Gazzam, 339 U.S. 532, 70 S.Ct. 784 (1950); International Brotherhood of Teamsters, Local 309 v. Hanke, and Automobile Drivers & Demonstrators Local Union No. 882 v. Cline, 339 U.S. 470, 70 S.Ct. 773 (1950).

[16] As expressed in the Hanke case, note 15 supra, at 479, the question is whether Congress "has struck a balance so inconsistent with rooted traditions of a free people that it must be found an unconstitutional choice." There would appear to be very little doubt that the courts would sustain Congress' choice in this instance.

[17] Denver Building Trade and Construction Trades Council (Henry Shore), 90 N.L.R.B. 1768 (1950).

form of speech whereby the union is successful in causing an employer to discriminate against an employee in violation of section 8(a)(3).[18] This suggests that section 8(c)'s applicability to cases like the present one should probably depend upon whether it is picketing or some other means that is used in creating the boycott, and, possibly, upon the degree of success of the boycott. In the principal case the court disapproved not only of picketing but of any means of promoting a public boycott, e.g., by using newspaper advertisements. Furthermore, the opinion gives no indication of whether the boycott proved at all successful. The court thus appears to have overlooked some highly significant factors. Perhaps the rather indirect manner in which the question of section 8(b)(1)(A)'s applicability arose explains why the court did not give full consideration to all the issues involved. Had it done so it might well have reached the opposite result.

George B. Berridge, S.Ed.

[18] Sec. 8(b)(2) makes it an unfair labor practice for a union "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3)...." 61 Stat. L. 141 (1947), 29 U.S.C. (Supp. V, 1952) §158(b)(2). Sec. 8(a)(3) forbids employer discrimination to encourage or discourage union membership. See Sub Grade Engineering Co., 93 N.L.R.B. 406 (1951).