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NLRB v. Strong: The Board Versus the Courts and the Arbitration

Ira D. Einsohn

viding definite guidelines to be followed.[31] Now that Texas is leading this new trend, its courts should continue to protect the unwary home buyer and even the innocent neighbor from the defective work of a careless builder-vendor who has been able to hide behind the outdated doctrine of *caveat emptor* too long.

Clyde R. White

NLRB v. Strong: The Board Versus the Courts and Arbitration

Respondent sought to withdraw from a multi-employer bargaining association five days after the effective date of an agreement negotiated on his behalf.[1] He refused repeated demands from the union that he sign the contract. The National Labor Relations Board found that his refusal to sign the contract was an unfair labor practice in violation of sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act.[2] The Board ordered respondent to sign the contract, cease and desist from unfair labor practices, post notices, and pay any back fringe benefits provided for in the contract.[3] The court of appeals[4] refused to enforce that part of the Board's order requiring payment of back fringe benefits.[5] *Held, reversed*: When an employer repudiates a contract negotiated by his bargaining association, the NLRB's remedies may include an order to pay back fringe benefits due under the contract. *NLRB v. Strong*, 393 U.S. 357 (1969).

I. Language vs. Legislative History

Confusion exists in determining the NLRB's power to provide a complete remedy for an unfair labor practice when the remedy requires the enforcement by the Board of collective bargaining contract provisions. The statutory language grants the Board broad powers to provide relief, while

[31] *See* Bearman, *Caveat Emptor in Sales of Realty—Recent Assaults Upon the Rule*, 14 VAND. L. REV. 541, 576-78 (1961).

[1] Respondent Strong was a regular member of the Roofing Contractors Association of Southern California. The Association's bylaws provided: "Any . . . labor contract negotiated . . . shall be binding upon the regular members of this Association separately and collectively." On August 14, 1963, the Association and the Union (Roofers Local 36, United Slate, Tile and Composition Roofers, Damp and Waterproof Workers Association) agreed on a new four-year contract, to be effective August 15, 1963.

On August 20, 1963, Strong wrote to a grievance board composed of contractor and Union representatives, requesting termination of the contract and the refund of his security deposit. In September 1963, Strong asked the Association to change his status to that of an associate contractor not covered by the Association's collective bargaining agreement. He continued, however, to pay regular member's dues until December 1963, and also paid fringe benefits in September and October of 1963.

[2] 29 U.S.C. §§ 158(a)(1), (5) (1964). "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 157 of this title; . . . .

(5) to refuse to bargain collectively with the representatives of his employees . . . ."

[3] *In re* Strong, 152 N.L.R.B. 14 (1965).

[4] NLRB v. Strong, 386 F.2d 929 (9th Cir. 1967).

[5] That part of the order, the court said, "is an order to respondent to carry out provisions of the contract and is beyond the power of the Board." *Id.* at 933.

the legislative history of the statute indicates congressional intent to limit such power. The NLRB's authority to fashion remedies for unfair labor practices rests on section 10(c) of the National Labor Relations Act,[6] which empowers the Board, upon finding an unfair labor practice, to order the guilty party "to take such affirmative action including reinstatement of employees with or without back pay as will effectuate the policies of this subchapter."[7] The NLRA also states that the Board's authority is not "affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise . . . ."[8] The United States Supreme Court has repeatedly emphasized the breadth of the Board's power to fashion remedies.[9] In addition, the Court has said that the Board's remedy should put the parties where they would have been "but for" the unfair labor practice.[10] In light of these considerations the Board has acted in many cases to remedy unfair labor practices which were also breaches of contract. Often it has provided for the compensation reserved by the contract.[11] Of course, the Act specifically provides for back pay as a Board remedy, but the Board has defined "back pay" rather broadly.[12]

Despite the breadth of the Board's power under 10(c),[13] legislative intent and several Supreme Court decisions indicate that the jurisdiction of the Board does not displace that of arbitrators and the courts in interpreting and enforcing collective bargaining agreements. The legislative history

[6] 29 U.S.C. § 160(c) (1964).

[7] *Id.*

[8] National Labor Relations Act § 10(a), 29 U.S.C. § 160(a) (1964). However, clear limitations on the Board's power to adjudicate unfair labor practices have developed: The action must be remedial rather than punitive. Consolidated Edison v. NLRB, 305 U.S. 197 (1938). *See also* Republic Steel Corp. v. NLRB, 311 U.S. 7 (1940). Also, the action must be appropriate to the particular situation confronting the Board at the time. *See* NLRB v. Bradford Dyeing Ass'n, 310 U.S. 318 (1940).

[9] *See* Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 216 (1964) (employer ordered to resume maintenance work "contracted out" without bargaining with the union, and to reinstate affected employees with back pay); International Ladies' Garment Workers' Union v. NLRB, 366 U.S. 731 (1961) (employer ordered to withdraw recognition from union that lacked majority when originally recognized, and to cease giving effect to collective bargaining agreement executed with that union after it had secured majority); Frank Bros. v. NLRB, 321 U.S. 702 (1944) (employer ordered to bargain with union, notwithstanding its loss of majority, where such loss was attributable to employer's unfair labor practices); Virginia Elec. & Power Co. v. NLRB, 319 U.S. 533 (1943) (dues paid to employer-dominated union reimbursed to employees from whose wages they had been withheld under closed-shop, checkoff arrangements); National Licorice Co. v. NLRB, 309 U.S. 350 (1940) (employer ordered to cease giving effect to individual contracts secured through unfair labor practices, and to notify employees they were released from obligations imposed by those contracts); NLRB v. Newport News Shipbuilding & Dry Dock Co., 308 U.S. 241 (1939) (disestablishment ordered of labor organization in whose formation employer had unlawfully interfered).

[10] Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194 (1941).

[11] *See* NLRB v. Great Dane Trailers, Inc., 388 U.S. 26 (1967); Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956); Wallace Corp. v. NLRB, 323 U.S. 248 (1944).

[12] In NLRB v. Great Dane Trailers, Inc., 388 U.S. 26 (1967) the Board included vacation benefits in its definition of "back pay." The Board has also included in its orders to reinstate with back pay: tips (Club Troika, Inc., 2 N.L.R.B. 90 (1936)); Christmas gifts (Moss Planning Mill Co., 110 N.L.R.B. 933 (1954), *enforcement denied on other grounds*, NLRB v. Moss Planning Mill Co., 224 F.2d 702 (4th Cir. 1955)); shift differentials (Brown & Root, Inc., 132 N.L.R.B. 486 (1961), *enforced*, NLRB v. Brown & Root, Inc., 311 F.2d 447 (8th Cir. 1963)); safety awards (Miami Coca-Cola Bottling Co., 151 N.L.R.B. 1701 (1965), *remanded on other grounds*, NLRB v. Miami Coca-Cola Bottling Co., 360 F.2d 569 (5th Cir. 1966)); and bonuses (International Trailer Co., 150 N.L.R.B. 1205 (1965)). If back pay is required, the NLRB has the power to compute it. *See* Nathanson v. NLRB, 344 U.S. 25 (1952); Note, *A Survey of Labor Remedies*, 54 VA. L. REV. 38 (1968).

[13] National Labor Relations Act § 10(c), 29 U.S.C. § 160(c) (1964).

behind section 301 of the Taft-Hartley Act[14] indicates a preference for forums other than the Board for adjudication of contract disputes. The early version of the bill passed by the Senate in 1947 contained a provision which called for the inclusion of breach of contract among the unfair labor practices subject to the jurisdiction of the NLRB.[15] In conference, however, this provision was dropped in favor of contract enforcement by the usual processes of law rather than the NLRB.[16]

The congressional preference of submitting contract disputes to the courts and arbitration has been given substantial weight by the federal courts. In *NLRB v. American National Insurance Co.*[17] the Supreme Court refused to enforce a Board order directing the employer to refrain from insisting on a broad management relations clause in a collective bargaining agreement. The Court said that the "Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements."[18] In *Textile Workers v. Lincoln Mills*[19] the Supreme Court said that industrial peace can best be served by enforcement of collective bargaining agreements in the courts.[20] While the courts are felt to be a preferred forum for contract disputes, labor arbitrators are considered best equipped to handle the industrial common law lying behind such agreements.[21] However, despite the preference shown to arbitrators and the courts the remedies available in each forum are considered cumulative, not exclusive.[22]

The difficult question is the scope of the Board's remedial powers when the unfair labor practice involves repudiation of the contract and thus is a violation of section 8(a)(5).[23] The Supreme Court dealt with the problem of a breach of a collective bargaining agreement by repudiation in *H.J. Heinz Co. v. NLRB.*[24] There the Court enforced a Board order requiring an employer to sign a written contract embodying agreed-upon terms.[25] In

[14] Labor Management Relations Act, 29 U.S.C. § 185 (1964).

[15] S. 1126, 80th Cong., 1st Sess. §§ 8(a)(6), (b)(5) (1947).

[16] H.R. CONF. REP. No. 510, 80th Cong., 1st Sess. 42 (1947). For further discussion, *see* Dowd Box Co. v. Courtney, 368 U.S. 502, 505-12 (1962).

[17] 343 U.S. 395 (1952).

[18] *Id.* at 404.

[19] 353 U.S. 448 (1957).

[20] *Id.* at 455.

[21] United Steelworkers Union v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960).

As between the courts and arbitration, legislation and court decisions point to a preference for the method agreed upon by the parties. Labor Management Relations Act § 203(d), 29 U.S.C. § 173(d) (1964): "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement."

In John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964), and the *Steelworkers Trilogy* [United Steelworkers Union v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers Union v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers Union v. American Mfg. Co., 363 U.S. 564 (1960)] the Supreme Court emphasized that the "preference of national labor policy for arbitration as a substitute for tests of strength between contending forces could be overcome only if other considerations compellingly so demanded." John Wiley & Sons, *supra* at 549-50.

[22] Carey v. Westinghouse Elec. Corp., 375 U.S. 261 (1967); Smith v. Evening News Ass'n, 371 U.S. 195 (1962); Teamsters Local 174 v. Lucas Flour, 369 U.S. 95 (1962).

[23] National Labor Relations Act, 29 U.S.C. § 158(a)(5) (1964).

[24] 311 U.S. 514 (1941).

[25] *Id.* at 526. The Court held that a refusal to sign was in violation of § 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5) (1964), and that the remedy was authorized by § 10(c) of the Act, 29 U.S.C. § 160(c) (1964).

1965 the Ninth Circuit enforced a similar order, requiring the employer to honor the contract.[26] In doing so, it clarified what it meant by "honor":

> Read in this light, the word 'honor' has the limited role of placing the parties, with reference to the contract, back in the position which they occupied prior to the breach. It does not mean that specific performance was decreed . . . . Nor is it an adjudication as to the validity of any or all of the contract provisions.[27]

In other words, "honor" meant simply to sign the contract. This was as far as the Board had gone until it decided *Schill Steel Products, Inc.*[28] Instead of merely ordering the employer to sign the contract, the Board ordered the employer to reimburse employees for the loss of any benefits plus interest which would have accrued to them under the contract which the employer had refused to sign.[29] The Board's decision in *Schill Steel* went unchallenged and was not appealed to the courts.

II. NLRB v. STRONG

The United States Supreme Court in *NLRB v. Strong*[30] approved the Board's assertion of its authority to order payment of back fringe benefits in a refusal to bargain situation. While recognizing the overlapping regimes of the Board and the courts in contract disputes and the preference historically given the courts and arbitrators in such disputes, the Court reasoned that it was necessary to interpret and give effect to the terms of the contract in order to remedy this particular unfair labor practice. The Court relied on the broad language of section 10(c) of the National Labor Relations Act[31] and its own language and decisions in *Phelps Dodge Corp. v. NLRB*[32] and *NLRB v. C & C Plywood.*[33] The Court also added that this remedy was appropriate since the "employer refused to recognize the very existence of the contract providing for the very arbitration on which he now insists."[34]

Notwithstanding the broad language of section 10(c) the Court in *Strong* has removed a significant restraint upon the remedial powers of the Board. The same language has previously been before the Court in similar situations, but the Court has never gone beyond ordering the employer to honor the contract.[35] Although the workers were made whole in *Phelps Dodge*,[36] the unfair labor practice there was a refusal to hire because of union affiliation. To remedy this the Court enforced a Board order requiring an offer of employment plus payment of losses suffered as a result of the

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[26] NLRB v. Hyde, 339 F.2d 568 (9th Cir. 1965).
[27] *Id.* at 572-73.
[28] 161 N.L.R.B. 939 (1966).
[29] *Id.* at 941.
[30] 393 U.S. 357 (1969).
[31] 29 U.S.C. § 160(c) (1964).
[32] 313 U.S. 177 (1941).
[33] 385 U.S. 421 (1967).
[34] NLRB v. Strong, 393 U.S. 357, 361 (1969).
[35] *See* notes 26-29 *supra*, and accompanying text.
[36] 313 U.S. 177 (1941).

unfair labor practice.[37] In *C & C Plywood*[38] the Court agreed that it was necessary for the Board to interpret a contract to discover that the employer's unilateral institution of a premium-pay plan was not authorized and thus was an unfair labor practice.[39] But the Board there went only as far as issuing a cease and desist order.[40]

The Board and the Court in *C & C Plywood* could not have closed their eyes to the contract and still have remedied the unfair labor practice. It was not necessary, however, for the Board or Court in *Strong* to interpret any of the specific terms of the contract to remedy the refusal to bargain. They needed only to recognize the existence of the contract and to order Strong to honor it. Such a decision would not have denied the employees a chance of recovery of back fringe benefits. They still could have been made whole by submitting the matter to arbitration, as provided in the contract, or to the courts. Such a course has heretofore been the preferred method of effectuating the policies of the Act.

III. Conclusion

The *Strong* decision raises significant questions as to the Board's innovative use of its section 10(c) powers. By not deferring jurisdiction on the matter of back fringe benefits to the courts or arbitration, the Board and the Court swept away much of the legislative and common law preference for these forums in matters of contract interpretation and enforcement. The language of the Act indicates that the Board has always had the power to reach such a decision. Whether it was because of a feeling that the courts and arbitrators were better equipped to handle these matters, or because it felt that any extension of its power into this area would not be supported by the courts, the Board exercised restraint. But it asserted its power in *Strong* and the Supreme Court concurred.

Possibly the Board's powers were expanded in the interest of efficiency. By making a full determination of all issues before it, the Board can save the parties the time and expense of arbitration or a lawsuit. This rationale would be easier to justify if not for the long history of recognition of judicial and arbitral expertise in this area. By continued innovative use of its section 10(c) powers there is a danger that the Board will become the primary forum for labor contract disputes, compelling concessions, and otherwise sitting in judgment upon substantive terms of collective bargaining agreements.[41] This cannot be justified, and hopefully the Supreme Court will not be so receptive of such Board actions.

Ira D. Einsohn

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[37] *Id.* at 194.
[38] 385 U.S. 421 (1967).
[39] *Id.* at 428.
[40] *Id.* at 429.
[41] This was expressly forbidden by the Supreme Court in NLRB v. American Nat'l Ins. Co., 343 U.S. 395, 404 (1952). *See* Notes 17, 18 *supra*, and accompanying text.