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Labor Law--Termination of Business--Employer's Right to Permanently Close Manufacturing Plant--Union Discrimination [*Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263 (1965)]

David R. Williams

Recent Decisions

LABOR LAW — TERMINATION OF BUSINESS — EMPLOYER'S RIGHT TO PERMANENTLY CLOSE MANUFACTURING PLANT — UNION DISCRIMINATION

Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263 (1965).

Darlington Manufacturing Company, a South Carolina corporation operating one textile mill, was substantially owned by Deering Milliken & Co., which in turn was controlled by Roger Milliken, president of Darlington. In March of 1956, the Textile Workers Union began an organizational campaign at Darlington, which in September of the same year resulted in the election of that union as the collective bargaining representative. This result was bitterly resented by the company, and it therefore refused to bargain with the union. The president called a board of directors meeting to recommend that the plant be closed. Six days after the union was established at the company, the board decided to liquidate the corporation and shareholder approval followed in October. The plant closed in November and equipment was sold at an auction in December.

The National Labor Relations Board, acting upon a union complaint, found that the Darlington Company had been closed because of the anti-union motives of Roger Milliken,[1] its president, and held that such action was a violation of section 8(a)(3) of the National Labor Relations Act.[2] The Board further decided that since Darlington was part of a single, integrated employer group controlled by Roger Milliken and his family,[3] Deering Milliken & Co. could be held liable for the unfair labor practices of Darlington. Accordingly, the Board ordered back pay for all Darlington employees until they had obtained equivalent work or were put on the preferred hiring

[1] Darlington Mfg. Co., 139 N.L.R.B. 241 (1962), *rev'd*, 325 F.2d 682 (4th Cir. 1963), *vacated and remanded*, 380 U.S. 263 (1965).

[2] 61 Stat. 140 (1947), as amended, 29 U.S.C. § 158(a)(3) (1964) provides in part:

> (a) It shall be an unfair labor practice for an employer . . . (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . .

[3] Darlington Mfg. Co., 139 N.L.R.B. 241 (1962), *rev'd*, 325 F.2d 682 (4th Cir. 1963), *vacated and remanded*, 380 U.S. 263 (1965). Deering Milliken & Co. owned approximately 41% of the Darlington stock at the time of the 1956 liquidation.

lists at the other Milliken mills. However, the court of appeals reversed, holding that an employer has the absolute prerogative to cease doing business entirely or to continue it in part regardless of anti-union motives.[4] On appeal, the Supreme Court held "that when an employer closes his entire business, even if the liquidation is motivated by vindictiveness toward the union, such action is not an unfair labor practice."[5] But this did not dispose of the case, for the Court further held "that a partial closing is an unfair labor practice under [section] 8(a)(3) if motivated by a purpose to chill unionism in any of the remaining plants of the single employer and if the employer may reasonably have foreseen that such closing [would] . . . likely have that effect."[6] Since no findings were made as to the purpose and effect of Darlington's closing with respect to employees in other plants in the Deering Milliken group, the case was remanded to the court of appeals with instructions to remand to the Board for further proceedings consistent with the Court's opinion.[7]

Since the *Darlington* case was one of first impression, the Supreme Court had to decide whether an employer has the absolute right to cease doing business for any reason whatsoever. Prior to *Darlington*, the only language by the Court alluding to this problem was found in *Southport Petroleum Co. v. NLRB*,[8] which by no means resolved the issue. However, the courts of appeal have held that an employer may cease plant operations entirely without violating section 8, regardless of the fact that an anti-union motive contributed to the shut-down.[9] What these courts did not say, however,

[4] Darlington Mfg. Co. v. NLRB, 325 F.2d 682 (4th Cir. 1963), *vacated and remanded*, 380 U.S. 263 (1965). Here the court qualified its decision as follows:

> Of course, the right of discontinuance which we here uphold, means an actual, unfeigned and permanent end of operations — not a removal, nor subcontract, nor a change merely in the form of the corporate entity. No use or subterfuge is suggested here. *Id.* at 685.

[5] Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263, 273-74 (1965).

[6] *Id.* at 275.

[7] *Id.* at 277. The Court felt that this procedure was particularly appropriate since issues of "first impression" were involved.

[8] 315 U.S. 100 (1942). The Court said, "Whether there was a *bona fide* discontinuance and a true change of ownership — which would terminate the duty of reinstatement created by the Board's order — or merely a disguised continuance of the old employer, does not clearly appear. . . ." *Id.* at 106.

[9] NLRB v. New England Web, Inc., 309 F.2d 696 (1st Cir. 1962). Here the record indicated that defective merchandise brought about serious consumer dissatisfaction which resulted in a considerable loss of revenue. In holding that New England Web had not committed an unfair labor practice under § 8 the court relied on the following premise: "We start with the proposition that a businessman still retains the untrammeled prerogative to close his enterprise when in the exercise of a legitimate

is that an employer has an *absolute* right to cease doing business for any reason whatsoever. In all the prior cases, there was usually an economic justification for closing down the particular business involved, and union organization was considered a legitimate economic factor.[10] In determining whether a shutdown was in fact justified, prior history of union hostility was considered to be a relevant factor.[11]

The Supreme Court clearly distinguished the situation in *Darlington* from that of a "runaway shop,"[12] in which a company merely relocates its plant, and a "shutdown" in which employees could cause a plant to reopen by renouncing the union.[13] Such cases involve discriminatory practices aimed at obtaining some future benefit from new employees. In contrast, the Darlington Mill was closed permanently and its assets were sold to a third party. It should be noted that the Court recognized that its holding in *Darlington* might have some adverse effects upon organizational activities of unions, independent of the decision to close the business; however, the Court did not consider this to be of sufficient importance in the over-all labor-management picture to justify altering its decision.[14] Even though such a result might be expected in a marginal business, the Court saw no practical alternative to its decision in the present case.

Concerning the relationship between Darlington and the Deer-

and justified business judgment he concludes that such a step is either economically desirable or economically necessary. This prerogative exists quite apart from whether or not there is a union on the scene." *Id.* at 700. See, *e.g.*, NLRB v. New Madrid Mfg. Co., 215 F.2d 908 (8th Cir. 1954); Mount Hope Finishing Co. v. NLRB, 211 F.2d 365 (4th Cir. 1954); NLRB v. Caroline Mills, Inc., 167 F.2d 212 (5th Cir. 1948); NLRB v. Tupelo Garment Co., 122 F.2d 603 (5th Cir. 1941).

[10] In NLRB v. Rapid Bindery, Inc., 293 F.2d 170 (2d Cir. 1961), the court said, "the decided cases do not condemn an employer who considers his relationship with his plant's union as only one part of the broad economic picture he must survey when he is faced with determining the desirability of making changes in his operation." *Id.* at 175.

[11] NLRB v. New England Web, Inc., 309 F.2d 696, 701 (1st Cir. 1962); NLRB v. Lassing, 284 F.2d 781, 783 (6th Cir. 1960), *cert. denied*, 366 U.S. 909 (1961); *cf.* NLRB v. Corning Glass Works, 293 F.2d 784 (1st Cir. 1961); NLRB v. R. C. Mahon Co., 269 F.2d 44, 47 (6th Cir. 1959).

[12] *E.g.*, NLRB v. Preston Feed Corp., 309 F.2d 346 (4th Cir. 1962). Here, although the transfer of trucking operations had been decided prior to union activity, it was emphasized that it was an unfair labor practice to put the transfer into immediate effect, only after the company had learned of the success of the union's organizational campaign. In NLRB v. Wallick, 198 F.2d 477 (3d Cir. 1952) a similar situation was presented where a department was closed for anti-union reasons and work was transferred to an independent contractor. See, *e.g.*, NLRB v. Kelly & Picerne, Inc., 298 F.2d 895 (1st Cir. 1962); Jay Foods, Inc. v. NLRB, 292 F.2d 317 (7th Cir. 1961); NLRB v. R. C. Mahon Co., 269 F.2d 44 (6th Cir. 1959).

[13] NLRB v. Norma Mining Corp., 206 F.2d 38 (4th Cir. 1953).

[14] Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263, 274 n.20 (1965).

ing Milliken group, the Court agreed with the court of appeals that if Darlington were to be viewed as an independent employer, then closing the business was not an unfair labor practice. On the other hand, the Court could not accept the view that the same conclusion would follow if Darlington were considered an integral part of the Deering Milliken enterprise.[15] Since the Court was unable to determine whether the Deering Milliken group constituted a single enterprise, the case was remanded to the court of appeals for further review of this point. In addition, the Board's findings dealt *only* with the foreseeable effect of the Darlington closing upon Darlington employees. Thus, the case was also remanded to the Board on this point for further findings as to the "purpose" and "effect" of the closing upon employees in other Deering Milliken enterprises.

The Court also drew an analogy between a partial closing, as was apparently the situation in *Darlington,* and the "runaway shop" and "temporary closing" cases. The Court intimated that a possible remedy in a case of discriminatory partial closing, similar to the remedies available in the latter cases, might be to reinstate the discharged employees in other parts of the business.[16]

Although the Court finally remanded the case for further findings on whether the Deering Milliken group constituted a single enterprise, there was some discussion of whether an employer who controls a number of related enterprises is actually to be regarded as a "single employer" for the purpose of finding a violation of section 8. Criteria applied in numerous cases[17] in the past to determine single employer status included whether there were "present unity of interest, common control, dependent operation, sameness in character of work and unity of labor relations . . . ."[18] But in making a determination of this question in *Darlington,* the Court did not want to suggest that a close organizational integration of

[15] *Id.* at 274.

[16] *Id.* at 275.

[17] *E.g.,* NLRB v. Williams, 195 F.2d 669, 672 (4th Cir.), *cert. denied,* 344 U.S. 834 (1952). Here the fact that two companies were three-quarters of a mile apart and that ownership of one was in the name of the wife of the principal owner did not destroy its status as a single unit. In NLRB v. Lund, 103 F.2d 815 (8th Cir. 1939), the existence of a single employer was obvious. The corporations involved were family owned; the business was similar; employees were transferred back and forth; identical trademarks were often used; and, all the employees recognized the central authority of one man. See also, NLRB v. Deena Artware, Inc., 361 U.S. 398 (1960); A. M. Andrews Co. v. NLRB, 236 F.2d 44 (9th Cir. 1956); NLRB v. Somerset Classics, Inc., 193 F.2d 613 (2d Cir.), *cert. denied,* 344 U.S. 816 (1952).

[18] NLRB v. Gibraltar Indus., Inc., 307 F.2d 428, 431 (4th Cir. 1962), *cert. denied,* 372 U.S. 911 (1963).

corporations is a necessary prerequisite to establishing a violation of section 8(a)(3); therefore, it set out even less stringent criteria than those above.[19] In addition, the Court mentioned that the old element of "motivation which is aimed at achieving the prohibited effect," in addition to concerted anti-union activities, must be shown before there is a violation of section 8(a)(3).[20]

Thus, the *Darlington* decision is favorable to labor in that the adverse effect upon unionism in cases of partial closing has been reduced, as in the "runaway shop" and "temporary closing" situations. However, there are potential evils remaining for which there is no apparent remedy. For example, the criteria established for finding a violation of section 8 emphasize the motivation for partially closing down. A finding of motivation was considered to be a necessary prerequisite "in an area which trenches so closely upon otherwise legitimate employer prerogatives. . . ."[21] Even in the absence of an anti-union motive it is possible that the practical ef-

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[19] Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263 (1965), where it was said:

> If the persons exercising control over a plant that is being closed for anti-union reasons (1) have an interest in another business, whether or not affiliated with or engaged in the same line of commercial activity as the closed plant, of sufficient substantiality to give promise of their reaping a benefit from the discouragement of unionization in that business; (2) act to close their plant with the purpose of producing such a result; and (3) occupy a relationship to the other business which makes it realistically foreseeable that its employees will fear that such business will also be closed down if they persist in organizational activities, we think that an unfair labor practice has been made out. *Id.* at 275-76.

It should be noted that the above criteria are apparently not so stringent as to require "dependent operation, sameness in character of work and unity of labor relations" for establishing an unfair labor practice. Instead, persons exercising control over a plant need only have such a substantial interest in another business that a closing motivated by anti-unionism will foreseeably cause employees in the other business to fear that their plants will also close down if they persist in union activities.

Furthermore, at the present stage of proceedings before the National Labor Relations Board, the Board has withheld ruling on whether the record should be reopened for further hearing, but has ordered that General Counsel for the National Labor Relations Board file a bill of particulars describing the nature of the evidence it expects to use should the record be reopened. The Board felt that such additional information would assist it in determining whether the proposed evidence would so materially relate to the issue of "purpose" and "effect" as to justify reopening the record. In its order for a bill of particulars, the Board considered the following information to be relevant: (1) Any publicity that may have been circulated, its source, and by whom it was circulated if known; (2) The nature of the knowledge of employees of Deering-Milliken Mills, generally; (3) A description of statements made or action taken; (4) Any additional evidence; and, (5) A description of any documentary evidence to be offered including its title, date, author, party to whom addressed, and a summary of its contents. 4 CCH LAB. L. REP. § 9717, at 16477 (Oct. 7, 1965).

[20] *Id.* at 276.

[21] *Id.* at 276.