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Labor Law--Interrogation of Employee by Employer as an Unfair Labor Practice

Sterl Franklin Shinaberry
West Virginia University College of Law

factual situation presents itself which would shock the conscience of the court, the mutual mistake doctrine may be favorably invoked to grant relief.

David Mayer Katz

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The NLRB sought enforcement of its order against *D* based on its findings that two of *D's* supervisors interrogated employees concerning their union activities in such a manner as to constitute interference, restraint, and coercion within the meaning of the National Labor Relations Act, 29 U.S.C. § 158(a) (1) (1958). Evidence showed that two of *D's* supervisors had on four occasions during a two week period questioned four employees about their union activities. One was questioned at his home and the others in *D's* plant. *D* had no history of labor trouble or unfair labor practices, nor was there evidence of anti-union activity. *Held,* enforcement granted. The court held that the conduct of the employer's supervisors was of such a nature as might reasonably be found to interfere with the free exercise of employee rights under the Act. A dissent argued that mere interrogation in the absence of unusual circumstances producing "coercive coloration" will not support a finding of an unfair labor practice. *NLRB v. Harbison-Fischer Mfg. Co.,* 304 F.2d 738 (5th Cir. 1962).

Since the passage of the National Labor Relations Act in 1935 which guaranteed the rights of employees to organize and bargain collectively, there has been a constant conflict between these rights and the right of the employer to free speech. In the NLRA of 1935 there was no provision for free speech by an employer. The National Labor Relations Board insisted upon strict and complete neutrality on the part of the employer. It justified its position by indicating the superior economic position of the employer. In 1941, however, the United States Supreme Court upheld the employer's right to speak as long as the speech was not coercive. The Court stated that a speech is not necessarily coercive if it pursues the employer's point of view, but it must be evaluated in terms of totality of the circumstances. *NLRB v. Virginia Electric & Power Co.,* 314 U.S. 469 (1941).

Congress in 1947 amended the NLRA and provided for the employer's right of free speech. 29 U.S.C. § 158 (c) (1958) provides, inter alia, that the expressing of any views, argument, or opinion shall not constitute an unfair labor practice if such expression contains no threat of reprisal or force or promise of benefit. This amendment changed the problem from a conflict over free speech to the question as to what constitutes "coercive speech."

The Board refused to recognize interrogation as an area of free speech. Its position was based upon the idea that the questioning of an employee concerning union activities carried an implied threat and was unlawful. *Standard-Coosa Thatcher Co.,* 85 N.L.R.B. 1358 (1949). However, in 1954 the Board overruled its prior position and held that interrogation in itself was not coercive but could be such when viewed in light of all the surrounding circumstances. *Blue Flash Express, Inc.,* 109 N.L.R.B. 591 (1954). The Board's finding in the instant case is apparently a return to the pre-1954 position since there is no evidence of any other anti-union activities by the employer.

The majority opinion of the court in the instant case approved the Board's finding that interrogation is "coercive speech" and is illegal per se. Other circuits in reviewing the Board's decisions have not gone quite so far without other evidence of anti-union activities by the employer. In a recent decision the court in *NLRB v. Kelly & Picerne, Inc.,* 298 F.2d 895 (1st Cir. 1962), held that the impact of interrogation on the employees determined its legality and the facts did not show that the employer's acts would be interpreted as coercive by the employees. Here, the supervisor had called one employee on the telephone and asked about the union activities. Later, the employee had gone to the supervisor's home where he was asked the same questions. The court seemed to base its finding on the fact that the employer had said nothing about action to be taken by the employer.

In the Fifth Circuit itself, the latest case reached the opposite conclusion from that reached by the court in the principal case. In *NLRB v. Hill & Hill Truck Lines, Inc.,* 266 F.2d 883 (5th Cir. 1959), the court held that all interrogation is not illegal, but to be illegal the interrogation must amount to interference, restraint, or coercion. In *NLRB v. Flemingsburg Mfg. Co.,* 300 F.2d 182 (6th Cir. 1962), the court held that interrogation of employees as to their membership in the union that is seeking to organize the

employer's plant is not illegal per se, but must be considered with the background of such inquiries, the time and manner when done, and the surrounding circumstances to conclude whether such was coercive. The other circuits take the same general view. *NLRB v. Lester Bros., Inc.,* 301 F.2d 62 (4th Cir. 1962); *NLRB v. Firedoor Corp.,* 291 F.2d 328 (2d Cir. 1961); *Bituminous Material & Supply Co. v. NLRB,* 281 F.2d 365 (8th Cir. 1960); *NLRB v. McCatron,* 216 F.2d 212 (9th Cir. 1954); *NLRB v. Tri-State Cas. Ins. Co.,* 188 F.2d 50 (10th Cir. 1951); *Joy Silk Mills, Inc. v. NLRB,* 185 F.2d. 732 (D.C. Cir. 1950); *Sax v. NLRB,* 171 F.2d 769 (7th Cir. 1948).

Some support might be given to the Board's findings and the majority's holding in the instant case by the fact that one of the interviews took place at an employee's home. The Board has held in several cases that interviewing employees in their homes and in places of managerial authority was sufficient to set aside a representation election. *General Cable Corp.,* 117 N.L.R.B. 573 (1957); *Peoria Plastic Co.,* 117 N.L.R.B. 545 (1957); *Mrs. Baird's Bakeries, Inc.,* 114 N.L.R.B. 444 (1955). However, the mere fact that an interview was held at an employee's home has been held by the Board not to be a sufficient grounds for setting an election aside where the interview was held two months before the election. *Sprague Electric Co.,* 112 N.L.R.B. 165 (1955).

The dissenting opinion in the instant case states that the majority decision in upholding the Board's findings is "cutting new ice" and is without much support. A survey of the cases indicates that one would have to agree. Most of the circuits view interrogation by the employer as privileged free speech unless it can be determined from all the surrounding circumstances that such was coercive. The effect of the decision by the court in the instant case upholding the Board's finding is uncertain. Whether the other circuits will follow this precedent in future cases remains unknown. However, the National Labor Relations Board has apparently nullified the Blue Flash Express doctrine, supra, and will hold in the future that interrogation of employees about their union activities carries an implied threat and is therefore unlawful.

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