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Labor Law--Jurisdiction of NLRB--Dollar Yardstick of NLRB and the "Affecting Commerce" Test

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some in his pocket, the jury again must decide if this explanation is plausible enough, under the circumstances, to rebut the presumption. An important element shedding light upon *X's* intent is the manner in which he concealed the merchandise. If he placed the goods in his pocket or in the bottom of a shopping bag, this would seem to indicate that the requisite intent to shoplift was present. If he placed the goods in a more revealing position, the jury might well find that his explanation dissolves the presumption of intent. Thus, the controlling elements appear to be the manner in which the goods are concealed and at what location in the store the accused is accosted.

While the West Virginia statute aids the state in its prosecution by employing a presumption of intent, the North Carolina statute seems to be the better of the two, in that it eliminates the intent element altogether. Viewing the ultimate goal to be attained, that of affording the merchant a practical remedy for his protection, the North Carolina statute more nearly satisfies this need. Although some injustice may result in North Carolina because one with a plausible explanation may still be found guilty, an equal injustice may result in West Virginia. Where one who is guilty is acquitted because the jury felt that the accused had successfully rebutted the presumption of intent, he may then bring an action against the merchant for false arrest, false imprisonment, or malicious prosecution. The law must treat all citizens equally, and the housewife who picks up a fifty cent item is equally as guilty as a professional shoplifter who takes hundreds of dollars worth of merchandise. Our shoplifting statute is a step forward toward modernizing the law to keep pace with the modernized world of today.

David Mayer Katz

Labor Law—Jurisdiction of NLRB—Dollar Yardsticks of NLRB and the "Affecting Commerce" Test

The National Labor Relations Board assumed jurisdiction of a labor dispute where the evidence showed that Employer, a New York corporation, sold within the state more than 500,000 dollars worth of fuel oil products purchased in the state from a refinery engaged in interstate commerce. The Board found Employer had engaged in unfair labor practices and petitioned the United States Circuit Court of Appeals for enforcement of an appropriate cease

and desist order. *Held,* remanded to the Board with instructions to take further evidence to determine the manner in which the labor dispute affects interstate commerce. *NLRB v. Reliance Fuel Oil Corp.,* 297 F.2d 94 (2d Cir. 1961).

The problem in the instant case involves the application of the "dollar yardsticks" which the Board applies to determine if a particular labor dispute will have a sufficient impact on interstate commerce to warrant its attention.

Congress in enacting the National Labor Relations Act 29 U.S.C. §§ 151-68 (1958), as amended, 29 U.S.C. § 401 (Supp. II, 1961), made it applicable to labor disputes "affecting commerce" and thus exercised its power to regulate commerce to the fullest extent possible. *Polish National Alliance v. NLRB,* 322 U.S. 643 (1944); *Cf. Guss v. Utah Labor Board,* 353 U.S. 1 (1956); *NLRB v. Fainblatt,* 306 U.S. 601 (1939). Even activities intrastate in nature are subject to control if they have a close and substantial relation to interstate commerce. *NLRB v. Jones & Laughlin Steel Corp.,* 301 U.S. 1 (1936).

It was recognized early that the Board did not have the facilities and resources to extend effectively its jurisdiction to the limits of the commerce power. The Board found it necessary to withdraw the boundaries of its jurisdiction in order to concentrate on disputes which had a substantial affect on interstate commerce. For fifteen years jurisdiction was circumscribed on a case-by-case basis until the Board found it more effective to establish published minimum jurisdictional requirements rather than rely on the time consuming and confusing case method. These minimum standards were revised from time to time and proved effective in reducing the amount of energy and money expended on determining jurisdictional questions. In 1956, the Supreme Court rules in *Guss v. Utah Labor Board, supra,* that the state could not act where the Board refused jurisdiction and urged revised standards to fill the "no man's land" thus created. In 1958 the Board publicly announced the adoption of new jurisdictional standards. Press Release (R-576). The revised standards were subsequently formally published in a series of cases. See Siemons Mailing Service, 122 N.L.R.B. 81 (1958), for the history of the NLRB "jurisdictional yardsticks."

The NLRB was amended in 1959 to give state and territorial courts authority to assert jurisdiction in the "no man's land" where the Board declined to act and to freeze the minimum jurisdictional

limits at 1959 standards. The Board may extend its jurisdiction, but may not further restrict it, and may, by rule of decision or published rule, decline jurisdiction over any class or category of employers where it feels that exercise of its jurisdiction is not warranted. National Labor Relations Act, 29 U.S.C. § 164 (1958), as amended, 29 U.S.C. § 164 (Supp. II, 1961).

The court in the principal case states that the NLRB "appears to assume" that a dispute involving any employer whose business exceeds the jurisdictional minimum of 500,000 dollars and who purchases material within the state which originated outside the state necessarily affects commerce within the meaning of NLRA. Recent case decisions of the NLRB show that the Board clearly recognizes that the test of jurisdiction does not depend on business volume alone. There must be a clear indication that the employer's business activities affect commerce. In the NLRB report of the principal case, the intermediate report of the trial examiner indicates that jurisdiction depends on the existence of "legal jurisdiction" and gross volume of business. *Reliance Fuel Oil Corp.*, 129 N.L.R.B. 1166 (1961). The question was put squarely before the Board in *International Longshoremen's Union,* 124 N.L.R.B. 813 (1959), where it was argued that any case-by-case appraisal of the term "affecting commerce" had been rejected by the Board in *Siemons Mailing Service, supra,* and subsequent cases explaining the new jurisdictional standards. This proposition was refused by the Board, which explained that the gross dollar volume test, standing alone, was insufficient to confer jurisdiction on the Board, some proof of legal jurisdiction being necessary. See also *NLRB v. Pease Oil Co.*, 279 F.2d 135 (2d Cir. 1960), where the Board's term "jurisdictional standard" is termed a misnomer.

The jurisdictional yardsticks considered alone could serve as a sharp dividing line to identify businesses "affecting commerce." It is highly improbable that an enterprise meeting the gross dollar standards would not affect interstate commerce. *International Longshoremen's Union, supra.* Time and energy expended by the Board in deciding jurisdictional issues could be directed toward ruling on the merits of the disputes. Parties to labor disputes would know to which forum, state or federal, to apply for relief and would not run the risk of expending time and money carrying a case through several trial stages to discover they were in the wrong court.

Such an arbitrary definition of "affecting commerce," however, would destroy the distinction between interstate commerce and commerce affecting the internal affairs of a state. "That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system." *NLRB v. Jones & Laughlin Steel Corp., supra.* Numerous decisions indicate that the courts would not accept the criteria of volume of sales alone as adequate evidence that a business activity affected commerce. *NLRB v. Fainblatt, supra; NLRB v. Drummond,* 21 F.2d 828 (6th Cir. 1954). The proper criterion for determining jurisdiction is the impact of local action on interstate commerce which must be determined as a matter of fact on a case-by-case basis. *NLRB v. Benevento,* 297 F.2d 873 (1st Cir. 1961).

The decisions in the instant case and in *NLRB v. Benevento, supra,* make it clear that the Board must present strong evidence of the affect of local business activity on interstate commerce to support a finding of fact that it has jurisdiction over a local business, or its rulings will not be enforced by the Federal Courts.

Herbert Stephenson Boreman, Jr.

Labor Law—Mandatory Requirements of Bargaining

Union submitted to employer a contract including a proposal that the employer execute a performance bond. Employer assented to all terms except the performance bond and an impasse was reached on this issue. The union struck, and the employer charged the union with an unfair labor practice in proceedings before the NLRB. The NLRB found that the union's insistence upon a performance bond amounted to a refusal to bargain in good faith, National Labor Relations Act § 8(b) (3), 29 U.S.C. § 158(b) (3) (1952), and ordered the union to cease and desist. *Held:* enforcement granted. A performance bond is not within the scope of mandatory bargaining under the National Labor Relations Act § 8(b) (3), 29 U.S.C. § 158(b) (3) (1952). Refusal to come to an agreement over a condition which is not within the scope of mandatory bargaining is a refusal to bargain collectively in good faith which is an unfair labor practice. *Local 164, Brotherhood of Painters v. NLRB,* 293 F.2d 133 (D.C. Cir. 1961).