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Labor Law - Peaceful Picketing Not Restraint and Coercion of Employees

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man and woman enter into marriage there is a presumption that the marriage, though null, was nevertheless contracted in good faith.[7] He who alleges bad faith must bear the burden of proof and if there is doubt as to the good or bad faith of a party, the issue will be resolved in favor of his good faith.[8] It has also been said that the issue of good or bad faith, which necessarily raises a question of fact, should be determined by the trial court.[9] It is submitted that if evidence as to the good or bad faith of a party cannot be produced, or if there is a conflict in that which is produced, the presumption of good faith should prevail. However, if the question is never raised at the trial level, it would appear that the case should be remanded to the lower court for determination of the issue.

Charles Lindsey

LABOR LAW — PEACEFUL PICKETING NOT RESTRAINT AND COERCION OF EMPLOYEES

An employer charged that a union was restraining and coercing employees in the exercise of their right to refrain from union membership. After the union had been certified, unsuccessful contract negotiations precipitated a strike. The strike continued for two years, during which time the striking employees were replaced by non-union employees. In a subsequent election requested by the employer the new employees voted overwhelmingly against representation by the union. The union continued picketing and the company filed unfair labor practice charges with the NLRB. The picketing was at all times peaceful. The employer charged that the union was picketing to force it to recognize the union as bargaining agent for its employees, and thus to compel the employees to join the union or lose their jobs. The trial examiner, relying on legislative history and past Board decisions, rejected the employer's charge. The Board reversed, finding that the conduct of the union was designed to cause the employer to force its employees to join the union or be discharged, and therefore violated Section 8(b)(1)(A).[1] On appeal the court of appeals, *held,* reversed.

7. Prince v. Hopson, 230 La. 575, 89 So.2d 128 (1956); Succession of Pigg, 228 La. 799, 84 So.2d 196 (1955); Succession of Fields, 222 La. 310, 62 So.2d 495 (1952); Succession of Chavis, 211 La. 313, 29 So.2d 860 (1947).

8. Funderburk v. Funderburk, 214 La. 717, 38 So.2d 502 (1949); Succession of Chavis, 211 La. 313, 29 So.2d 860 (1947); Succession of Marinoni, 183 La. 776, 164 So. 797 (1935); Succession of Navarro, 24 La. Ann. 298 (1872); Eason v. Alexander Shipyards, 47 So.2d 114 (La. App. 1950).

9. Succession of Chavis, 211 La. 313, 29 So.2d 860 (1947).

1. 29 U.S.C. § 158 (b)(1)(A) (1947): "It shall be an unfair labor practice

Section 8(b)(1)(A's) prohibition against union coercion to compel employees to join a union is not applicable to peaceful picketing, but is applicable only to the use of force or violence, or threats of economic reprisal against individuals. *Drivers Local 639 v. NLRB (Curtis Bros. Inc.)*, 43 L.R.R.M. 2156 (D.C. App. 1958)

Section 7 of the Wagner Act[2] declared that employees should be free to join, form or assist labor organizations, to bargain collectively through representatives of their own choosing and to engage in other concerted activities to promote their own welfare. The act further declared certain specified conduct of employers was unfair to employees seeking to exercise the freedom given them by the act. The Taft-Hartley Act[3] amended Section 7 of the Wagner Act by declaring that employees also had the right to refrain from collective bargaining activities and made certain union activities which interfered with this right unfair labor practices. Section 8(b)(1)(A)[4] made it an unfair labor practice for a labor organization to restrain or coerce employees in the exercise of their rights under Section 7. In *National Maritime Union*,[5] the first case arising under Section 8(b)(1)(A), the Board refused to find that the section proscribed peaceful picketing, but found on the basis of legislative history that Congress was interested only in eliminating physical violence and intimidation by unions and their representatives, or the use of threats of economic action against specific individuals in an effort to compel them to join the union. The Board said that this section was not concerned with the objective of union activity, but was normally directed to the means by which the objective was accomplished. So long as the strike's objective was directly related to the interest of the strikers and not directed primarily at compelling other employees to forego rights protected by Section 7,[6] there was no violation of Section

for a labor organization or its agents—(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 7."

2. 49 STAT. 449 (1935), 29 U.S.C. § 141 (1935).

3. Pub. L. No. 101, 80th Cong., 1st Sess., amending 49 STAT. 449 (1935), 29 U.S.C. § 141, 157 (1935): "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)." This section is hereafter referred to as Section 7.

4. 29 U.S.C. § 158 (b)(1)(A) (1947).

5. National Maritime Union of America (The Texas Company), 78 N.L.R.B. 971 (1947).

6. *Id.* at 973, "The touchstone of this section is normally the means by which

8(b)(1)(A). In applying Section 8(b)(1)(A) the Board has made no effort to distinguish between strikes as such and picketing, but has treated the two activities as one. Originally the Board refused to find that peaceful picketing in *any* situation violated the section,[7] but later modified its position on this point and found that there were situations in which a peaceful strike would violate 8(b)(1)(A). In *Pinkerton's National Detective Agency, Inc.*[8] the union struck to force the employer to discharge employees who were not union members, although there was no valid union security agreement. The Board found the strike to be an unfair labor practice since it was directed primarily at compelling an employee to forego rights protected under Section 7.[9] Except for this situation the Board followed the rule of *National Maritime Union* until 1957. When the instant case was before the Board in 1957 it found that peaceful picketing by a union after losing a representation election was a violation

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it is accomplished, so long as its objective is directly related to the interest of the strikers and not directed primarily at compelling other employees to forego rights which section 7 protects."

7. District 50, United Mine Workers of America, 106 N.L.R.B. 903 (1953) (union struck to force employer to recognize it where another union had been certified); Painters District Council No. 6, 97 N.L.R.B. 654 (1951) (union struck to induce employees to withdraw certification petition); Medford Building and Construction Trades Council, 96 N.L.R.B. 165 (1951) (union picketed to force employer to agree to illegal union security contract); United Construction Workers, 94 N.L.R.B. 1731 (1951) (union struck to force employer to join an employers' association which would have forced employees to join the union under a union security clause contained in a contract with the employers' association); Miami Copper Company, 92 N.L.R.B. 322 (1950) (minority union forced company, through strike threats, to negotiate on grievances outside presence of the certified union); Lumber and Sawmill Workers Union, 87 N.L.R.B. 937 (1949) (union sought to force employer to agree to an illegal union shop clause, picketing the plant and following company trucks and picketing them at delivery points); Local 74, United Brotherhood of Carpenters and Joiners, 80 N.L.R.B. 533 (1948) (union picketed to force employer to recognize it after employees had refused to join the union; also picketed jobs where the employees were working); Perry Norvell Company, 80 N.L.R.B. 225 (1948) (after one union had been recognized, disgruntled employees struck; and when the recognized union refused to sanction the strike, they joined the rival union and demanded recognition).

The Board found 8(b)(1)(A) violations where there had been threats of force against employees, Pinkerton's Detective Agency, Inc., 90 N.L.R.B. 205 (1950); Clara Val Packing Company 87 N.L.R.B. 703 (1949); Seamprufe, Inc. 82 N.L.R.B. 892 (1949); where there had been physical force used against employees, Painters' District Council No. 6, 97 N.L.R.B. 654 (1951); United Construction Workers, 94 N.L.R.B. 1731 (1951); United Furniture Workers of America, Local 309, 81 N.L.R.B. 886 (1949); where there had been mass picketing, Local 1150, United Electrical, etc. Workers, 84 N.L.R.B. 972 (1949); International Longshoremen & Warehousemen Union, 79 N.L.R.B. 1487 (1948); and where there had been threats of economic reprisal against employees, Pinkerton's National Detective Agency, Inc., 90 N.L.R.B. 205 (1950); Clara Val Packing Company, 87 N.L.R.B. 703 (1949); Seamprufe, Inc., 82 N.L.R.B. 892 (1949).

8. 90 N.L.R.B. 205 (1950).

9. Thus the Board said the case fell within the exception to the rule of National Maritime Union, 78 N.L.R.B. 971, 973 (1947): "The touchstone of this

of 8(b) (1) (A).[10] In *Alloy Manufacturing Co.*[11] the Board went even further and found that placing the employer's name on a "We Do Not Patronize" list after losing an election was a violation of 8(b) (1) (A). In the *Alloy* case the Board expressly overruled *National Maritime Union.*

In the instant case the court of appeals refused to accept the Board's revised interpretation of 8(b) (1) (A), and held that the section did not proscribe peaceful picketing.[12] The interpretation given the legislative history of 8(b) (1) (A) by the trial examiner and the dissenting Board member was accepted by the court.[13] Section 8(b) (1) (A) was construed to prohibit only

section is normally the means by which it is accomplished, so long as its objective is directly related to the interest of the strikers and *not directed primarily at compelling other employees to forego rights which section 7 protects.*" (Emphasis added.)

10. Curtis Bros. Inc., 119 N.L.R.B. 232, 41 L.R.R.M. 1025 (1957). Since that decision the Board has consistently found that peaceful picketing by a union after losing a representation election was a violation of 8(b) (1) (A). Retail Clerks International Association, 120 N.L.R.B. #189, 42 L.R.R.M. 1198 (1958) (union continued to picket store after losing an election called despite union's disclaimer of representation of employees); Paint Makers Union, 120 N.L.R.B. # 89, 42 L.R.R.M. 1195 (1958) (union demanded recognition which was refused; when union began picketing employer petitioned for an election, which was held over the union's disclaimer of any interest in securing recognition at that time. When union continued picketing after losing the election, Board found an 8(b) (1) (A) violation); Operating Engineers, 119 N.L.R.B. 320 (1957) (union lost election, continued picketing); Machinists Union, 119 N.L.R.B. 307 (1957) (after losing election union continued picketing and placed employer's name on "We Do Not Patronize" list).

11. 119 N.L.R.B. 307 (1957) Since the decision in the instant case, the *Alloy* case has been reversed on appeal to the Ninth Circuit Court of Appeals. NLRB v. IAM Lodge 942 (Alloy Mfg. Co.), 43 L.R.R.M. 2548 (9th Cir. 1959). In that decision the court did not pass on the issue of union picketing, as it was not properly presented on the appeal. The court held that placing the employer's name on a "We Do Not Patronize" list was not a violation of 8(b) (1) (A), but was protected by the free speech provisions of Section 8(c) of the National Labor Relations Act and the First Amendment of the United States Constitution.

12. Thus the court announced it agreed with the interpretation of 8(b) (1) (A) given by the Board in National Maritime Union, 78 N.L.R.B. 971 (1947).

13. The following excerpts from the legislative history seem to be the most often quoted parts:

"The purpose of the amendment is simply to provide that where unions, in their organizational campaigns, indulge in practices which if an employer indulged in them would be unfair labor practices, such as making threats or false promises or false statements, the union also shall be guilty of unfair labor practices." 93 Cong. Rec. 4136 (April 25, 1947) Senator Ball.

Senator Taft: "The effect of the pending amendment (8b1A) is that the Board may call the union before them exactly as it has called the employer, and say, 'Here are the rules of the game. You must cease and desist from coercing and restraining the employees who want to work from going to work and earning the money which they are entitled to earn.' The Board may say, 'You can persuade them; you can put up signs; you can conduct any form of propaganda you want to in order to persuade them, but you cannot, by threat of force or threat of economic reprisal, prevent them from exercising their right to work.' As I see it, that is the effect of the amendment." 93 Cong. Rec. 4561 (May 2, 1947).

Senator Ball: ". . . the only purpose of (Section 8b1A) is to protect the rights

coercive *conduct* of the unions,[14] such as the use of force, violence and economic reprisal.[15] To interpret Section 8(b)(1)(A) as the Board did in the instant case would make Section 13[16] meaningless. Section 13 provides that nothing in the act shall be construed so as to interfere with or impede or diminish in any way the right to strike, except as specifically provided.[17] Section 8(b)(1)(A) does not specifically prohibit strikes or picketing, but is worded in very broad terms. For this reason the court felt it should not be interpreted so as to interfere with the right to strike. Furthermore, to interpret Section 8(b)(1)(A) as proscribing peaceful picketing would make Sec-

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of employees, to free them from the coercion of goon squads and other strong arm organizing techniques which a few unions use today." Radio Broadcast inserted in Congressional Record by Senator Ball, 93 Cong. Rec. A2378 (May 13, 1947).

Senator Taft: "I can see nothing in the pending measure which as suggested by the Senator from Oregon (Morse) would in some way outlaw strikes. It would not outlaw threats against employees. It would not outlaw anybody striking who wanted to strike. It would not prevent anyone using the strike in a legitimate way, conducting peaceful picketing or employing persuasion. All it would do would be to outlaw such restraint and coercion as would prevent people from going to work if they wished to go to work. 93 Cong. Rec. 4563 (May 2, 1947).

14. The trial examiner, relying chiefly on National Maritime Union, supra, and Perry Norvell, 80 N.L.R.B. 225 (1948) found that Section 8(b)(1)(A) did not apply to peaceful picketing. See Intermediate Report, Curtis Bros. Inc., 119 N.L.R.B. 232 (1958). Board Member Murdock dissented from the majority when the instant case was before the Board.

15. It is necessary to understand the restricted meaning apparently given the term "economic reprisal" by past Boards and adopted by the court in the instant case. Apparently the term economic reprisal is used to apply to those situations where a union which is established in the plant, although not necessarily recognized, threatens specific individuals with loss of their job or other economic sanctions if they do not cooperate with the union. See Peerless Tool and Engineering Co., 111 N.L.R.B. 853 (1955) (union threatened not to handle grievances for employee unless he paid strike assessment); Pinkerton's National Detective Agency, Inc., 90 N.L.R.B. 205 (1950) (union forced employer to discharge two workers expelled from the union for non-payment of dues; there was no valid union security agreement); Clara Val Packing Co., 87 N.L.R.B. 703 (1949) (union expelled employee from membership because she had not honored picket line at another plant; then union forced employer to discharge her under union security clause); Seamprufe, Inc., 82 N.L.R.B. 892 (1949) (union threatened employee with loss of job if he did not join the union). *Cf.* Miami Copper Co., 92 N.L.R.B. 322 (1950) (minority union sought to force employer to deal with it on grievances within unit certified for majority union; no violation of 8(b)(1)(A) found — no economic reprisal); International Brotherhood of Teamsters, etc. 87 N.L.R.B. 972 (1959) (union did not violate 8(b)(1)(A) by telling strikebreakers they might be expelled from union for their strikebreaking activities; union had right to expel them.)

16. 29 U.S.C. § 163 (1947) "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike or to affect the limitations or qualifications on that right."

17. The word "strike" as used in Section 13 has been held to include picketing. See Sales Drivers, AFL v. N.L.R.B, 229 F.2d 514, cert. denied, 351 U.S. 972 (1955); International Brotherhood of Teamsters, 87 N.L.R.B. 502 (1949).

tion 8(b)(4)(C)[18] redundant. Section 8(b)(4)(c) makes it an unfair labor practice for a union to strike, picket or refuse to work to force an employer to recognize or bargain with a particular labor union if another labor organization has been certified. This section clearly was not applicable in the instant case, but the interpretation given 8(b)(1)(A) by the Board would have rendered Section 8(b)(4)(C) applicable in future cases to which 8(b)(1)(A) would also apply. Thus 8(b)(1)(A) would cover everything covered by 8(b)(4)(c), making the latter section unnecessary. Congress probably would not have enacted Section 8(b)(4)(C) if it had been intended that Section 8(b)-(1)(A) would cover the same subject matter.

It is submitted that the court in the instant case properly interpreted and applied Section 8(b)(1)(A).[19] The legislative history, while admittedly not conclusive, appears to support the court.[20] The Board had held that where the words of the statute are clear there is no need to resort to legislative history. Thus the Board found there was clearly coercion and 8(b)(1)(A) would apply. While the principle relied on by the Board is undoubtedly sound,[21] its application in the instant case is questionable. The lack of agreement between the present Board and past Boards and between the members of the present Board

18. 29 U.S.C. § 158(b) (1947): "It shall be an unfair labor practice for a labor organization or its agents — (4) 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 use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is . . . (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9."

19. Despite the holding of the court in the instant case the Board has continued to find that peaceful picketing by a union after losing a representation election violates Section 8(b)(1)(A). Electrical Workers Union (Mid-Island Electrical Sales Corp.), 122 N.L.R.B. # 105, 43 L.R.R.M. 1205 (1959). Furthermore, in another very recent case the Board held that a union violated Section 8(b)-(1)(A) by securing recognition as exclusive bargaining agent for employees and negotiating a collective bargaining agreement when the union did not represent a majority of the employees. No election had been held. The contract did not contain a union security clause. The union had been attempting to organize the plant with little success, and some employees had gone on strike in protest against a wage reduction. When the employer signed the contract the employees returned to work. The Board found that the union coerced the employees by signing the contract as exclusive bargaining agent. Bernhard-Altmann Texas Corp., 122 N.L.R.B. # 142, 43 L.R.R.M. 1283 (1959).

20. See footnote 13 *supra*. The legislative history of the Taft-Hartley Act is collected in two volumes. LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT OF 1947 (U.S. Government Printing Office, 1948).

21. Osaka Shosen Kaisha Line v. United States, 300 U.S. 98 (1936). See Kuehner v. Irving Trust Company, 299 U.S. 445 (1936).

illustrates the need for resorting to legislative history to determine what is meant by coercion in Section 8(b)(1)(A).

If either organizational or recognition picketing is effective, it will result in a loss of business to the employer. When this occurs, employees are confronted with the possibility of loss of their jobs or reduction in pay if the employer cannot withstand the economic loss. The only other alternative is for the employees to join the union. Thus the conflict here is between three parties: the employees who do not want to join the union; the employer who wants to avoid the increased labor costs and other problems that accompany unionization; and the union which is seeking to improve wages and working conditions of its members by strengthening bargaining power and eliminating non-union shops. It is clear that all three parties are seeking legitimate ends. Congress, in the National Labor Relations Act, has set out the rules under which the economic struggle is to be waged. Section 8(b)(1)(A) prohibits the union's use of force, violence, or threats of economic reprisal. It was not intended to deny the union its right to picket the employer premises, urging those sympathetic to the union cause to support the union. If the union is to be deprived of this weapon, the decision should be made by Congress.[22]

Sidney D. Fazio

MILITARY LAW — USE OF MANUAL FOR COURTS-MARTIAL BY COURT-MARTIAL MEMBERS DISALLOWED

The defendant pleaded guilty to and was convicted of several charges under the Uniform Code of Military Justice by a general court-martial.[1] Thereafter the law officer[2] fully advised the

22. See Cox, *Collective Bargaining and Industrial Practices*, 35 L.R.R.M. 56 (1954) wherein the author takes the position that neither picketing for recognition nor organizational picketing should be permitted after the employees have signified in an election whether in truth the union is their organization. However, he apparently feels that the present act does not cover the problem and recommends that Section 8(b)(4)(C) be amended to cover it.

1. UNIFORM CODE OF MILITARY JUSTICE art. 16, c. 1041, 70A STAT. 42 (1956), 10 U.S.C. § 816 (Supp. V 1958): "The three kinds of courts-martial in each of the armed forces are — (1) general courts-martial, consisting of a law officer and not less than five members; (2) special courts-martial, consisting of not less than three members; and (3) summary courts-martial, consisting of one commissioned officer."

Any officer on active duty may serve on a court-martial. Enlisted personnel are also eligible to serve on a court-martial if the accused requests their appointment to the court. See UNIFORM CODE OF MILITARY JUSTICE art. 25, c. 1041, 70A STAT. 45 (1956), 10 U.S.C. § 825 (Supp. V 1958).

2. The law officer is peculiar to the general court-martial. "The authority con-