Louisiana Law Review

Volume 17 | Number 4
June 1957

Labor Law - Right to Strike During Reopening Negotiations While Contract is Still in Effect

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there is nothing brutal or offensive in taking blood when it is done under the protective eye of a physician.[13] On this ground the majority distinguished the *Rochin* case. However, as Mr. Chief Justice Warren pointed out in his dissenting opinion, in both cases the operation was performed by a doctor in a hospital. The only basic difference is that Rochin was conscious and able to protest and Breithaupt was unconscious and unable to protest. Would the result in the *Rochin* case have been different if Rochin had been given a sedative before having his stomach pumped? Certainly, elimination of the need for force could not alter the fact that the privacy of his body was invaded without his consent in order to secure evidence upon which he was convicted. It is true that the use of force is unquestionably an aggravating element. However, the presence or absence of violence should not be the determinative factor in deciding whether a conviction has been brought about by methods which "offend a sense of justice." Rather, it seems that any conviction based upon evidence obtained from the person of the accused without his knowledge or consent should be set aside. This is equally true whether the evidence is in the form of capsules from his stomach or blood from his veins. Perhaps, as the Chief Justice's dissent indicated, the Court was motivated by a desire to help curb the alarming death rate on the American highways. Prevention of highway deaths, like the effort to apprehend dangerous criminals, is of course laudable. But the civil liberties limited in this case were not designed for efficiency and should not be set aside for convenience.

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LABOR LAW — RIGHT TO STRIKE DURING REOPENING NEGOTIATIONS WHILE CONTRACT IS STILL IN EFFECT

A collective bargaining agreement between the company and the union was to remain in effect until October 23, 1951, and thereafter until cancelled in the manner prescribed by the contract. The party desiring cancellation was first required to give a sixty-day notice of desire to amend the contract. Then, if no agreement on proposed amendments was reached during this first sixty-day period, either party could cancel the contract by giving a second sixty-day notice. Sixty days prior to October 23, 1951, the union gave notification of desire to *modify* the agree-

13. Breithhaupt v. Abram, 77 Sup. Ct. 408, 410 (1957).

ment. After eight months of negotiations the union struck, although the *second* sixty-day notice was never given. Unfair labor practice charges were filed against the company for certain actions during the strike and the company defended on grounds that the strike during the life of the contract violated Section 8(d)(4) of the NLRA as amended, which forbids strikes "for a period of 60 days after such notice (notice of modification or termination) is given or until the expiration date of such contract, whichever occurs later."[1] The NLRB held for the union, but was reversed by the Circuit Court of Appeals for the Eighth Circuit.[2] On writ of certiorari to the United States Supreme Court, *held*, reversed. The requirements of 8(d)(4) are satisfied where a contract provides for modification at a date during its term and a strike occurs after that date and after sixty-day notice of desire to modify but before the contract is terminated.[3] *NLBR v. Lion Oil Co.*, 77 Sup. Ct. 330 (1957).

Although there is a lack of jurisprudence on the problem

1. 61 STAT. 140 (1947), as amended, 65 STAT. 601 (1951), 29 U.S.C. § 158 (1952): "Sec. 8(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: Provided, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification —

"(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

"(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

"(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

"(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later."

2. Lion Oil Co., 109 N.L.R.B. No. 106, 34 Lab. Rel. Ref. Man. 1410 (August 5, 1954), reversed, Lion Oil Co. v. NLRB, 221 F.2d 231 (8th Cir. 1955).

3. The Court also rejected the company's alternative contention that the strike was a breach of contract and that the strikers were therefore not entitled to relief regardless of Section 8(d)(4). Justices Frankfurter and Harlan, who concurred in the Court's analysis of Section 8(d)(4), both dissented on this second issue. They criticized the majority for invading the province of the lower court which had apparently not passed on the breach of contract. Both Justices would have remanded the case for a decision on that point in the court of first instance.

presented in the instant case,[4] many writers have noted the difficulties emanating from the inadequate language of 8(d)(4).[5] In essence, they all indicate that the language is susceptible to opposing interpretations. Read literally, the clause precludes strikes before the contract is terminated. This is anomalous, however, since the act was designed to stabilize industry and protect concerted activities by employees, and not to curtail employee activities by inserting a no-strike clause into every contract. Thus, a different interpretation is gained by reading the clause in light of the entire act.

To resolve the ambiguity of Section 8(d)(4), the Court resorted to the overall policy of the Taft-Hartley Act. Noting that the dual purpose of the act was to substitute collective bargain-

4. There are no other Supreme Court cases and only one in the Circuit Courts of Appeals. That case held that strikes before the end of the contract were forbidden by Section 8(d)(4). Local No. 3 v. NLRB, 210 F.2d 325 (8th Cir. 1954). However, the court in the instant case said without explanation that the above decision was reconcilable. See NLRB v. Lion Oil Co., 77 S. Ct. 330, 333, n. 4 (U.S. 1957).

5. ISERMAN, CHANGES TO MAKE IN TAFT-HARTLEY 97 (1953): "Strikes under Reopening Clauses. Technically, it is possible to read Section 8(d) to mean that when a contract provides for reopening during its term, a party demanding a change pursuant to the reopening clause may not strike or lock out until the contract expires. The Labor Board does not so construe the section. Congress could readily correct this defect, if it is one, by inserting in clause (1) a phrase calling for serving the notice of modification, 60 days before the modification pursuant to the reopening provisions of the contract. The Wood bill contained such a phrase in 1949." Incidentally, the Wood bill referred to by Mr. Iserman, H.R. No. 4290, § 8(d)(1), 81st Cong., 1st Sess. 20 (1949), read as follows: "(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, or such contract contains reopening provisions for purposes of modification, sixty days prior to the time it is proposed to make such termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, or such contract contains reopening provisions for purposes of modification, sixty days prior to the time it is proposed to make such termination or modification."

MILLIS & BROWN, FROM THE WAGNER ACT TO TAFT-HARTLEY 453 (1950): "This provision, making contracts in effect binding and laying down procedural rules, was intended to make for stability. But it might have the contrary effect by bringing short-term contracts or many "opening clauses." At another place, *id.* at 638, the same author says: "Other problems, too, required special negotiations in light of Taft-Hartley. The sixty-day provision for termination or modification of a contract was different from the terms in many contracts and required adjustments and great care to avoid violations, since the penalties for a strike in disregard of the required period were severe. Here again technicalities and uncertainty as to the requirements created difficulties."

The provision was considered by a Senate Committee in 1948, *Report of the Joint Committee on Labor-Management Relations*, S. REP. No. 986, pt. 3, 80th Cong., 2d Sess. 62 (1946), and the following is found in their report: "The italicized phrase 'whichever occurs later' when applied to the hypothetical case, would appear to require that there be no strike until the end of the contract, which is 10 months later than the end of the 60-day notice period.

"Reading section 8(d) as a whole seems to lead to the conclusion that the act permits a strike, after a 60-day notice, in the middle of a contract which authorizes a reopening on wages."

ing for economic warfare and to protect the right of employees to engage in concerted activities for their own benefit, the Court observed that to restrict the right to engage in concerted activities in this instance would discourage long-term contracts, thus contributing to frustration of the act's attempt to stabilize industry. Turning to the terms of the section in question, the Court considered the use of the words "termination," "modification," and "expiration" significant, holding that the term "expiration date" comprehends both the date when a contract can be modified and the date when it is finally terminated. Buttressing this interpretation the Court found a statutory duty to bargain over modifications when such is contemplated by the contract, and stated that it would be anomalous for Congress to require bargaining and yet deprive employees of their right to strike in order to gain desired modifications.[6] Applying its construction of 8(d)(4) to the instant facts the Court said in effect that October 23, 1951, was an "expiration date" of the disputed contract since it was open for modification on that date and held that the union complied with 8(d)(4) by serving notice sixty days in advance of October 23, 1951, and by not striking during the sixty-day period.

Interpreting an ambiguous portion of a statute in light of the whole act is a well-settled principle of statutory construction.[7] That principle was invoked by the Court in the instant case to authorize a construction of 8(d)(4) which harmonizes with the rest of the act and yet does not unduly strain the language of the clause. Perhaps the most graphic manner in which the soundness of the decision can be illustrated is to consider the consequences that would result from a literal interpretation

6. 77 S. Ct. 330, 335 (U.S. 1957): "Our conclusion is buttressed by a provision of § 8(d) which was added by the Conference Committee.

"'[T]he duties . . . imposed [by subsections (2), (3) and (4)] shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract.'

"The negative implication seems clear: Congress recognized a duty to bargain over modifications when the contract itself contemplates such bargaining. It would be anomalous for Congress to recognize such a duty and at the same time deprive the union of the strike threat which, together with 'the occasional strike itself, is the force depended upon to facilitate arriving at satisfactory agreements.'"

7. This same procedure was used in Mastro-Plastics Corp. v. NLRB, 350 U.S. 270 (1955), wherein the Court held that the word "strikes" in Section 8(d)(4) did not include a strike against an unfair labor practice. The Court there cited United States v. Boisdore's Heirs, 49 U.S. (8 How.) 113, 122 (1850), and other cases holding that an ambiguous portion of a statute should be interpreted in light of the whole act. See further 2 SUTHERLAND, STATUTORY CONSTRUCTION §§ 4703-4706 (3d ed. 1943).

of the clause. Recall that under a strict interpretation of 8(d)(4), the term "expiration date" means only the date when all rights and duties under the contract cease. If subjected to such an interpretation a union with a three-year contract containing a provision for annual reopenings would be unable to strike to enforce demands made during the reopenings. With the union's hands tied by statute the company could reject any demands made without fear of union reprisal. In this situation equality of bargaining power, a prime requisite for effective collective bargaining,[8] is destroyed, although one of the purposes of the Taft-Hartley Act is to provide for such equality.[9] Moreover, if unions shunned long-term agreements, little progress could be made toward the stabilization of industry sought by the Congress that enacted the Taft-Hartley Act.[10]

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LOUISIANA PRACTICE — EXCEPTIONS OF WANT OF CAPACITY AND NO RIGHT OF ACTION DISTINGUISHED

Plaintiff, a married woman suing in her own name, appealed from an adverse decision in a petitory action. The court of appeal reversed the decision of the trial court and decreed plaintiff to be owner of the property in question. On application for rehearing, in the court of appeal,[1] defendant filed an exception of "no right and no cause of action" on the ground that the property was presumably community property and the plaintiff had no standing to sue. The exception was overruled by the court, since it felt the exception was more appropriately an exception of want of capacity, which being dilatory, had to be filed in limine litis.[2] In response to the contention that the exception questioned plaintiff's right of action, the court was of the opinion that the record clearly established the property in question as part of the wife's separate and paraphernal estate. The Supreme Court granted writs of review, and affirmed the judgment of the court of appeal. On rehearing, the Supreme Court *held* that an exception which questions the right or interest of a married woman to file

8. DAUGHERTY, LABOR PROBLEMS IN AMERICAN INDUSTRY 449 (1949): "Another requirement for successful bargaining is that both sides should be of relatively equal strength. There can be no actual bargaining when the employers' group dominates the union, and vice versa."

9. 61 STAT. 136 (1947), 29 U.S.C. § 151 (1947).

10. *Ibid.*

1. Stevens v. Johnson, 81 So.2d 464 (La. App. 1955).

2. *Id.* at 469.