Notre Dame Law Review

Volume 34 | Issue 2 Article 7

3-1-1959

Legislation and Administration: Labor Law -- Contract-Bar -- Recent NLRB Decisions Significantly Alter Contract-Bar Doctrine

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LEGISLATION AND ADMINISTRATION

LABOR LAW—CONTRACT-BAR—RECENT NLRB DECISIONS SIGNIFICANTLY ALTER CONTRACT-BAR DOCTRINE.—One of the strongest policies underlying the Labor-Management Relations Act[1] is that employees should be free to choose, as their bargaining representatives, whatever union they desire.[2] A severe limitation upon this policy exists, however, in the contract-bar doctrine. This doctrine provides, as the name indicates, that a valid existent contract between an employer and a union will act as a bar to a representation proceeding by another union during the life of that contract.[3] In an attempt to balance the competing policy considerations in a case involving a labor contract, the "competing policy considerations" being the aforementioned freedom of choice and the desire to stabilize labor-management relations, the NLRB has evolved a set of rules to determine whether a particular contract will be a bar to representation proceedings. A series of recent cases has made rather extensive revisions in the rules dealing with union schisms, union-security contracts, claims of rival unions and contract duration. Minor changes were also made in the rules dealing with the effect of changed circumstances on an existing contract and with the adequacy of the contract necessary to bar proceedings.

Effect of Illegal Union Security Clauses: The Keystone Case

The first case in this series was *Keystone Coat, Apron and Towel Supply Co.*,[4] which involved the effect of union-security clauses on a contract urged as a bar to representation proceedings. In *Keystone,* the Board insisted on literal compliance with sections 8(a)(3) and 302 of the LMRA. Thus, a union security clause which does not comply on its face with section 8(a)(3) will render the contract ineffective as a bar. The Board ruled that it will no longer uphold a contract which contains a union-security clause which does not *explicitly* grant old non-union members the statutory thirty-day grace period.[5] Thus, contracts containing deferral clauses,[6] agreements purporting to be recissions or amendments curing such clauses,[7] or ambiguous clauses,[8] will not bar an election.

The Board has applied this same reasoning to check-off provisions in a contract. Henceforth, a check-off clause will also have to conform on its face to section 302 of the LMRA.[9] In regard to both union-security and check-off provisions, the Board ruled that extrinsic evidence will be inadmissible for the purpose of attempting to show the validity of any such provisions.[10]

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1 Labor-Management Relations Act (Taft-Hartley Act) 61 Stat. 136 (1947), 29 U.S.C. § 151 (1952).

2 The policy clause of the LMRA explicitly declares that it is the policy of the United States that employees shall have the right to designate "representatives of their own choosing." 61 Stat. 136 (1947), 29 U.S.C. §151 (1952).

3 Matter of National Sugar Refining Co. of New Jersey, 10 N.L.R.B. 1410, 1415 (1939).

4 121 N.L.R.B. No. 125, 5 CCH LAB. L. REP. ¶55,727 (1958).

5 This overrules such prior decisions as Sandler Co., 110 N.L.R.B. 738 (1954), and Milwaukee Gas Light Co., 111 N.L.R.B. 837 (1955).

6 American Dyewood Co., 99 N.L.R.B. 78 (1952), and similar cases are overruled on this point.

7 Previously the Board had held that an amendment to an illegal union-security clause was sufficient to cure any defect in the original contract, New Jersey Oyster Planters and Packers, Inc., 98 N.L.R.B. 1187 (1952), unless a petition was filed before the amendment took effect. National Lead Co., 97 N.L.R.B. 651 (1951).

8 This overrules such cases as Continental Can Co., 100 N.L.R.B. 682 (1952).

9 The Board had previously held that failure to conform to the provisions of this section did not remove the contact as a bar. Milwaukee Gas Light Co., 111 N.L.R.B. 837 (1955).

10 Prior to this decision the Board had turned to extrinsic evidence to determine the meaning which the parties had given to an ambiguous provision. New Orleans Laundry, Inc., 100 N.L.R.B. 966 (1952).

Finally, in this decision the Board modified its rules in regard to the effect of deauthorization elections under section 9(e)(1), and as to the failure of the union to comply with sections 9(f), (g) and (h). Under these modified rules a contract will not be a bar to proceedings if within the preceding year a majority of the employees have voted to rescind the authority of the union to enter into a union-security agreement. Failure to comply with sections 9(f), (g) and (h) of the act will also remove the contract as a bar. However, for the purposes of the act, compliance will be found to exist whenever the union is in compliance at the time of the execution or renewal of the contract or where the union has received a notice of compliance within the twelve-month period preceding the execution or renewal of the contract. Compliance will also be found if a union receives a notice of compliance before the filing of the petition, provided that first steps to achieve compliance were taken before the execution or renewal of the contract. If the union does not achieve compliance until after the filing of the petition by a rival, the contract will still be a bar provided that initial steps to gain compliance were taken before the contract date, and actual compliance occurred within a reasonable time thereafter.[11]

Union Schisms: Hershey Chocolate Case

The second of the Board decisions, *Hershey Chocolate Corp.*,[12] dealt with the effect of a union schism on an existing contract. In this case, the Board clarified its rules regarding union schisms and defunctness. The controversy arose out of the expulsion of the Bakery and Confectionary Workers Union (B & C) from the AFL-CIO in December, 1957, and the chartering of a rival union, the American Bakery and Confectionery Workers Union, AFL-CIO (AB & C). The membership of B & C Local 464 voted overwhelmingly at a special membership meeting to withdraw from B & C and affiliate with AB & C. The employer was then presented with claims on behalf of the two rival unions. The Board held that on the basis of these facts a true schism existed and an election was ordered. In the course of this decision the Board set forth its new rules on the effect of a union schism. The requirements for finding that a schism exists were summarized by the Board as follows:

> . . . a basic intra-union conflict is a necessary prerequisite to a finding that a schism exists . . . [W]e deem a basic intra-union conflict to be any conflict over policy at the highest level of an international union . . . or within a federation which results in a disruption of existing intra-union relationships.[13]

The Board explicitly overruled *Brightwater Paper Company*[14] and similar cases which involved a local conflict that was unrelated to any basic intra-union conflict. The Board's conclusion from the re-examination of *Brightwater* is sound, for to permit purely local conflicts to upset an existing collective bargaining agreement would operate as an inducement to raiding and an encouragement to dissidents to repudiate the contract.

Presently, not only must there be a basic intra-union conflict involved, but the employees must take such action as to create so much confusion in the bargaining relationship that stability may only be restored through an election. However, before the Board will act it still must be satisfied that the employees have had an opportunity to make their views known and felt concerning disaffiliation. Formalities or restrictions in the union constitutions need not be observed. All that need occur is that action be taken by members of the unit at an open meeting called for the purpose of considering disaffiliation. The members in the unit must, of course, be given due notice of such

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11 As the Board pointed out, this does not represent a substantial change in its rules concerning failure to comply with the filing requirements. Keystone, Coat, Apron & Towel Supply Co., 121 N.L.R.B. No. 125, 5 CCH LAB. L. REP. 55,688, 55,692 (1958).

12 121 N.L.R.B. No. 124, 5 CCH LAB. L. REP. ¶55,726 (1958).

13 *Id.* at 55,684.

14 54 N.L.R.B. 1102 (1944).

a meeting. Lastly, before the Board will act, the employer must be confronted by claims on behalf of both organizations presented within a reasonable time after disaffiliation action was taken by the members.[15]

AB & C Local 464 contended that the actions of the employees effectively assigned the contract rights to them so that the existing agreement was a bar. Rejecting this argument the Board pointed out that the rule which allowed a contract to remain a bar where there was an agreement among the interested unions to transfer contract rights[16] did not apply to a case where a true schism existed. The Board also ruled that, where a contract is removed as a bar due to a schism, unlimited intervention will be allowed by outside unions. The employer's contention that the winning union should assume the existing contract was likewise rejected, so apparently a new contract must be negotiated following a schism situation.

Where a schism is found to exist, the Board pointed out, the issue of defunctness will not be reached. However, the Board indicated that in the future it will continue to apply the rule that when a union is unable or unwilling to represent the employees it will be considered defunct and the contract will not be a bar. When an issue of defunctness arises, only the actions of the signatory parties will be considerd. Thus, unless the international union joins in signing the contract it may not later allege its ability or willingness to assume the contract.

Rival Claims and Petitions: Deluxe Metal Case

The Board announced new rules as to the timeliness and sufficiency of rival claims and petitions in *Deluxe Metal Furniture Co.*[17] The first major change enunciated in this decision was the abandonment of the *General X-Ray*[18] doctrine. In the future a naked claim of representation and a petition to the Board will have to be presented within the "open" period established in this decision. This abandonment of the *General X-Ray* rule will have no effect on substantial claims made by a union. A substantial claim may be found in two situations: (1) It will be found where an incumbent union continues to claim to represent the employees and management, but nevertheless enters into a contract with a rival union.[19] (2) It will also be made where a non-incumbent union does not file because the employer leads the union to believe that it will be recognized or that a contract will be entered into, and the employer then enters into a contract with another union.[20]

The Board announced a second change in this area by ruling that a contract entered into on the same day as the petition was filed will bar an election providing that the contract is effective immediately or retroactively and the employer has no knowledge that a petition has been filed.[21] A contract signed the day after a petition will not bar an election even though the employer has no knowledge of the petition.[22] The cut-off time will be midnight even though the contract results from bargaining continued from the evening before.

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15 The Board expressly overruled such cases as A.C. Lawrence Leather Co., 108 N.L.R.B. 546 (1954) which implied that the element of time was unimportant in the determination of schism situations.

16 The Board honored a transfer of contract rights in Michigan Bell Tel. Co., 85 N.L.R.B. 303 (1949).

17 121 N.L.R.B. No. 135, 5 CCH LAB. L. REP. ¶55,733 (1958).

18 General Electric X-Ray Corp., 67 N.L.R.B. 997 (1946).

19 An example of such a practice may be found in Acme Brewing Co., 72 N.L.R.B. 1005 (1950).

20 Chicago Bridge & Iron Co., 88 N.L.R.B. 402 (1950).

21 The Board had previously held that a contract signed the same day that a petition was filed barred an election provided that the employer had no knowledge of the petition. Laycob Hat Co., 107 N.L.R.B. 1009 (1954). However, this was true even though the contract was not to take effect until later. Mississippi Lime Co. of Missouri, 71 N.L.R.B. 472 (1946).

22 The Board expressly overruled Anheuser-Busch Inc., 116 N.L.R.B. 186 (1956) and similar cases on this point.

Henceforth a petition will be considered premature if it is filed more than 150 days before the termination of the contract. If a showing of schism, defunctness, illegal security agreement, etc., is made on a petition filed more than 150 days before the termination date, the Board will order a hearing. Provided that the Board's decision is made on or after the nineteeth day preceding the terminal date, an election may be ordered even though the petition was filed prematurely.[23] The only other exception to the 150-day rule which was specifically provided for is that the seasonal-industry rule will not be affected.[24] The Board also created an insulation period consisting of the last sixty days immediately preceding the terminal date of the contract. During this period no petition of a rival union will be allowed no matter what conduct occurs relative to the bargaining parties. However, if an agreement is not reached by the parties before the end of this insulation period, a petition will be timely which is filed after the terminal date, but before the effective or execution date of the new contract.

These rules will apply to all fixed-term contracts regardless of the existence or non-existence of any automatic renewal clauses. An automatic renewal clause will be effective between the parties for the purposes of forestalling renewal, but it will be the 150—60—day rule which will govern the filing of petitions.[25] If the contract is of unreasonable duration the last sixty days of the reasonable period of duration will be insulated. The only situation in which the sixty-day insulation period will not be applicable is one in which the parties terminate the contract other than within the insulated period.

The only effect that this will have on the premature extension doctrine is that a petition filed within the "open" period will not be barred by a prematurely-extended contract. The Board will follow its established definition of a prematurely-extended contract: an agreement or new contract entered into which contains a later date of termination than the original contract.[26] This definition will not apply to any contract entered into during the sixty-day insulated period, or to any contract entered into at a time when the original contract would not have been a bar because of other contract-bar rules.

In *Deluxe,* the Board also revised its rules regarding the issuance of notice by a party to the contract and as to changes or modifications made during the contract term. Any notice of desire to make changes in the contract, if given to the other party immediately preceding the automatic renewal date, will prevent the renewal of the contract for contract-bar purposes. The form or nature of the notice will be immaterial. When a contract contains an automatic renewal clause and a modification clause, any notice given shortly before the automatic renewal date will be treated as forestalling automatic renewal (even though the intention is only to modify the contract).[27] The only exception which the Board will allow to this rule arise when the contract contains both modification and automatic renewal clauses and there is a specific provision that, even if notice is given pursuant to the modification provision, the contract will nonetheless automatically renew. In this situation notice given specifically under the modification provisions will not forestall renewal.[28] The rule permitting a party receiving late

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23 The Board pointed out that the following cases are overruled in so far as they are inconsistent with this rule: Home Curtain Corp., 111 N.L.R.B. 1253 (1955); General Motors Corp., 111 N.L.R.B. 1238 (1955); Lewis Engineering & Mfg., 100 N.L.R.B. 1353 (1952); Stremel Bros. Mfg. Co., 89 N.L.R.B. 1404 (1950).

24 South Puerto Rico Sugar Co., 100 N.L.R.B. 1309 (1952).

25 The vast learning surrounding the *Mill-B* date for purposes of filing now seems to be outdated.

26 Wichita Union Stockyards Co., 40 N.L.R.B. 369, 372 (1942).

27 To the extent that the following cases are inconsistent with this, the Board overruled them: Helmco Inc., 114 N.L.R.B. 1585 (1955); Griffith Rubber Mills, 114 N.L.R.B. 712 (1955); Eagle Signal Corp., 111 N.L.R.B. 1006 (1955).

28 Mallinckrodt Chemical Works, 114 N.L.R.B. 187 (1955); Michigan Gear & Eng'r Co., 114 N.L.R.B. 208 (1955).

29 The Board reversed Carter's Ink Co., 109 N.L.R.B. 1042 (1954) and similar cases in this respect.

notice to waive this delinquency and treat the contract as if timely notice had been given was modified by the Board in the *Deluxe* ruling. Such a waiver will no longer be allowed. The late notice will be treated merely as a request for modification by mutual assent.[29] Of course, the parties may actually terminate the contract after a late notice, but the sixty-day insulation period will still be accorded them.

Finally, the Board ruled that no mid-term modification provision, regardless of its scope, or any action taken thereon except an actual termination, will remove the contract as a bar. Even if the contract contains no such modification provision, the parties may nonetheless modify their agreement without removing it as a bar.[30]

Duration of Contract as Bar: Pacific Coast Pulp and Paper Case

The final major change made by the Board came in *Pacific Coast Ass'n of Pulp and Paper Mfrs.*,[31] where a maximum term of two years was established for contract-bar purposes. The Board has thereby abandoned the "substantial part of the industry" test which had allowed contracts of longer than two years to serve as a bar.[32] Any contract of more than two-years duration will be treated as a contract for two years for purposes of applying the rules announced in *Deluxe Metal Furniture Co.* Extensions of such a long-term contract entered into during the first two years will be considered premature, and a petition filed in the "open" period of 150-60 days prior to the end of the two year term will be timely. However, extensions entered into during the sixty-day insulated period will not be considered premature and will serve as a bar.

Henceforth the Board will also refuse to recognize any contract of indefinite duration as a bar for any period of time. This will include contracts with no termination or duration clauses, contracts terminable at will,[33] temporary agreements effective while complete agreement is being reached, and extensions of existing contracts during negotiation of a new agreement or modification of the old agreement.

Effect of Changed Circumstances: General Extrusion Case

The Board also made relatively minor changes in its rules regarding the effect of changed circumstances on the contract. The *General Extrusion Co.*[34] decision as announced by the Board adheres substantially to prior decisions as to the effect of changed circumstances on a contract. Thus, the Board will continue to rule that a contract does not bar an election if changes have occurred in the nature of the operations of the business between the signing of the contract and the filing of the petition.[35] Provided that action is taken before a rival petition is filed, an amendment to the contract which provides for these changes will render the contract a bar to proceedings.[36] The rule still holds that a good-faith purchaser of a business who does not bind himself to assume the contract thereby removes the contract as a bar.[37]

The Board did simplify its rules concerning changes in the size of the operation occurring after the signing of the contract. A contract will not serve as a bar where it

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30 The Board pointed out that this will work a substantial change in this area of the contract-bar rules:

> . . . the Board anticipates the elimination of the practice of scrutinizing and classifying the scope of a modification clause, the breadth of any notice given, and the actions of the parties in order to evaluate the intended effect of a notice or a clause and then basing a contact-bar determination upon the resulting evaluation. Deluxe Metal Furn. Co., 121 N.L.R.B. No. 135, 5 CCH LAB. L. REP. 55,698, 55,704 (1958).

31 121 N.L.R.B. No. 134, 5 CCH LAB. L. REP. ¶55,735 (1958).

32 Under its previous rules the Board had allowed a contract for as long as five years in Allis-Chalmers Mfg. Co., 111 N.L.R.B. 389 (1955).

33 The Board overruled Rohm & Haas Co., 108 N.L.R.B. 1285 (1954) and similar cases which had recognized contracts of indefinite duration.

34 121 N.L.R.B. No. 147, 5 CCH LAB. L. REP. ¶55,742 (1958).

35 New Jersey Natural Gas Co., 101 N.L.R.B. 251 (1952); Sheets & Mackey, 92 N.L.R.B. 179 (1950).

36 The Board observed that such an amendment will have to comply with the standards set in *Deluxe Metal.*

37 Jolly Giant Lumber Co., 114 N.L.R.B. 413 (1955).

was executed before any employees were hired, or where there has been a substantial increase in the number of employees. The "yardstick" established in *General Extrusion* would require that thirty percent or more of the employees be employed at the time of the contract and that fifty percent of the job classifications be in existence at that time, if the contract is to serve as a bar.[38]

Adequacy of Contract: Appalachian Shale Case

The Board restated most of its rules as to adequacy of the contract in *Appalachian Shale Products Co.*[39] It found that few changes were necessary in this area. An oral agreement will continue to be ineffective as a bar.[40] A contract that has not been signed by all the parties before the filing of a petition will not be a bar in any case. This represents a minor change in that an exception was formerly permitted if the parties had considered the contract concluded and had put some of the provisions into effect before the petition was filed.[41]

The rule that a contract requiring ratification by the members as a condition precedent to its taking effect is not a bar when a petition is filed before ratification was modified slightly. Previously, such a condition could be found in an understanding between the parties which was not incorporated into the contract. In the future it will be necessary that such a condition be incorporated in the contract by express language. Otherwise the failure to obtain prior ratification will remove the contract as bar.[42]

The rule that a contract must incorporate substantial terms and conditions of employment has been tightened. In the future a contract covering merely wages or covering several areas which are not thought to be substantial will not be a bar.[43]

Conclusion

The modifications in the contract-bar rules appear to have been prompted by two major considerations. First, the case-load of the Board has been constantly growing.[44] Coupled with the recent expansion of the Board's jurisdiction, this load will undoubtedly grow to even greater proportions.[45] This consideration has probably contributed greatly to the Board's desire to clarify and simplify the contract-bar rules. Second, the Board appears to have attempted to achieve greater balance between the interests of stability and the free choice of the employees.

The *Keystone* case, insisting that contracts literally comply with the union-security provisions of the LMRA, may well have been motivated by a desire to shorten the time required to consider a representation case. Under this decision the Board will but need to look to the union-security clause itself to determine its validity for contract-bar purposes. The possible weakness of this decision is that it may promote raiding by a rival union where the parties to the contract have inadvertently failed to comply with a literal interpretation of the LMRA.

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38 This represents a change only in so far as the Board has established a definite percentage for a finding of a substantial increase.

39 121 N.L.R.B. No. 149, 5 CCH LAB. L. REP. ¶55,743 (1958).

40 J. Sullivan & Sons Mfg. Corp., 105 N.L.R.B. 549 (1953).

41 Oswego Falls Corp., 110 N.L.R.B. 621 (1954) and similar cases are overruled in this respect.

42 Roddis Plywood & Door Co., 84 N.L.R.B. 310 (1949) and similar cases are overruled in this respect.

43 Nash-Kelvinator Corp., 110 N.L.R.B. 447 (1954) and like cases which had allowed contracts covering only wages to be a bar are overruled.

44 N.L.R.B. Release S-82, Nov. 9, 1958, 5 CCH LAB. L. REP. ¶50,129 (1958).

45 The Board substantially lowered its jurisdiction standards in a series of recent decisions. Siemons Mailing Service, 122 N.L.R.B. No. 13, 5 CCH LAB. L. REP. 55,851 (1958); Raritan Valley Broadcasting Co., 122 N.L.R.B. No. 16, 5 CCH LAB. L. REP. 55,852 (1958); Carolina Supplies & Cement Co., 122 N.L.R.B. No. 17, 5 CCH LAB. L. REP. 55,853 (1958); Sioux Valley Empire Electric Assoc., 122 N.L.R.B. No. 18, 5 CCH LAB. L. REP. 55,854 (1958); Ready Mixed Concrete & Materials Inc., 122 N.L.R.B. No. 43, 5 CCH LAB. L. REP. 55,897 (1958); Belleville Employing Printers, 122 N.L.R.B. No. 58, 5 CCH LAB. L. REP. 55,903 (1958); HPO Service Inc., 122 N.L.R.B. No. 62, 5 CCH LAB. L. REP. 55,910 (1958).

By confirming the definition of a schism to "a basic intra-union conflict," the Board overruled those earlier decisions which had allowed a raiding union to disrupt an established bargaining relationship. The *Hershey* case would thus seem to reach a desirable result. The *Deluxe Metal* case represents a similar attempt to achieve stability. By creating a uniform "open" period for petitions, and by permitting mid-term modification, both the parties to a contract and a potential rival union can be far more certain of their respective rights than was formerly true. Obviously this decision should, by clarifying the rules surrounding the timeliness of petitions, enable the Board to handle such cases with maximum speed and efficiency, thus bringing this decision within the purview of one of the Board's most recent motivating considerations.

The effect of the *Pacific Coast Pulp and Paper* case may well be to force parties to enter into two-year contracts exclusively. While this would achieve a high degree of uniformity in contract duration, the practical effect of the decision may be to sacrifice relatively long-term stability in some industries for such uniformity. Future cases will provide a test of the wisdom of such a choice.

The remaining decisions also reflect the desire of the Board to clarify its rules. Certainly any such attempts to remove confusion and to impose stability in the contract-bar area are welcome, although the success of these attempts cannot be accurately measured at the present time.

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