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LABOR LAW—LABOR-MANAGEMENT RELATIONS ACT—INTERROGATION CONCERNING UNION MEMBERSHIP AS AN UNFAIR LABOR PRACTICE—Concerned about possible loss of Allied Trades Council approval if a union not a member of the council should be elected by Syracuse Color Press employees in a forthcoming representation election, the plant superintendent called five employees into his private office. He and the general manager questioned them concerning membership and meetings of the nonmember union, and about employee sympathy regarding that union. The nonmember union filed a complaint and the trial examiner of the National Labor Relations Board found

a violation of section 8(a)(1) of the National Labor Relations Act,[1] although he found no actual coercion of the employees. The NLRB adopted the examiner's findings and petitioned the Court of Appeals for the Second Circuit for an enforcement order. *Held,* an enforcement order should issue, on the ground that the situation in which the interrogation was carried on contained elements of *actual* coercion. *NLRB v. Syracuse Color Press, Inc.,* (2d Cir. 1954) 209 F. (2d) 596.

The United Department Store Workers of America, C.I.O., were engaged in a campaign to organize the Lord & Taylor department store. On various occasions low-ranking supervisors asked one Wiszuk, an employee and union organizer, why he wanted a union in the store. They did not argue with him or attempt to persuade him that he was wrong. The interrogations took place during the regular course of business and embodied no threats of reprisal or promises of benefit. On complaint of the union, the NLRB found that this interrogation violated section 8(a)(1). The Board petitioned the Court of Appeals for the Second Circuit for an enforcement order. *Held,* order denied on the ground that there was no showing of actual coercion and there was none inherent in the circumstances in which the questioning was done. *NLRB v. Associated Dry Goods Corp.,* (2d Cir. 1954) 209 F. (2d) 593.

These two cases illustrate the basic split in philosophy developing between the NLRB and the federal courts as to the latitude which is to be given an employer in questioning his employees concerning their union sympathies or activities. Although not always following the announced policy,[2] the Board has consistently stated that the employer and his agents must be strictly neutral where internal union matters are concerned,[3] and that any questioning of employees about the activities of the union or their roles in those activities will be per se a violation of section 8(a)(1). This is based on the idea that such questioning, regardless of the innocence or worthiness of motive and the apparent lack of antipathy toward unionism on the part of the employer, is inherently coercive since it implies a threat of possible future employer re-

[1] Labor-Management Relations Act, 1947, 61 Stat. L. 141 (1947), as amended by 65 Stat. L. 601 (1951), 29 U.S.C. (1952) §158(a)(1).

[2] Opelika Textile Mills, Inc., 81 N.L.R.B. 594 at 595 (1949); West Texas Utilities Co., 85 N.L.R.B. 1396 at 1400; Silver Knit Hosiery Mills, Inc., 99 N.L.R.B. 422 at 425 (1952); Commercial Printing Co., 99 N.L.R.B. 469 at 478 (1952).

[3] NLRB, SIXTEENTH ANNUAL REPORT 144 (1950-1951): "Consistent with past rulings, the Board has continued to hold that the questioning of employees by their employer per se violates Section 8(a)(1) when it concerns the following subjects: Employees' union membership or activities. Their attitude toward the union, or their desire for representation. Their voting intentions in a scheduled Board election, or their views concerning the outcome of a scheduled Board election. . . ." See Standard-Coosa-Thatcher Co., 85 N.L.R.B. 1358 (1949); I.B.S. Mfg. Co., 96 N.L.R.B. 1263 (1951); The F. C. Russell Co., 92 N.L.R.B. 206 (1950); Calcasieu Paper Co., 99 N.L.R.B. 794 (1952). For a critical evaluation of the per se doctrine, see Shuford, "Interrogation of Employees Concerning Union Matters as an Unfair Labor Practice," 3 DUKE B.J. 113 (1953).

prisals,[4] and therefore limits employees in the exercise of their right of self-organization as guaranteed by section 7.[5] The Board has repeatedly denied that employee interrogation is protected employer speech under section 8(c),[6] and as a result finds it repugnant to section 8(a)(1) even though it does not embody an express threat of reprisal or promise of benefit.

The federal courts, on the other hand, have generally adopted the policy of judging interrogation of employees in the light of the totality of the conduct of the employer. Some decisions seem to be based on the per se violation doctrine,[7] but they are in the minority. Even though the courts are divided as to whether interrogation qualifies for protection under section 8(c),[8] they will not find a violation of section 8(a)(1) in the absence of actually coercive language, unless the interrogation is shown to be part of a plan to defeat a union or is carried out against a background of known union hostility.[9] This will be so even though the questioning is directed at the employee's membership in a union,[10] his attendance at union meetings,[11] or the way the employee is going to vote in a union election.[12] Particularly will this be so if the interrogation is casually done by lower rank foremen or supervisors in the course of their daily work and appears to be "more indicative of a natural business interest than of any interference, restraint or coercion,"[13] or if the plant is small and shows a history of discussion of union questions between employees and their supervisors.[14] Where the employee is called into

[4] Standard-Coosa-Thatcher Co., note 3 supra, at 1362: "Our experience demonstrates that the fear of subsequent discrimination which interrogation instills in the minds of employees is reasonable and well-founded. The cases in which interrogated employees have been discharged or otherwise discriminated against are numerous."

[5] 61 Stat. L. 141 (1947), as amended by 65 Stat. L. 601 (1951), 29 U.S.C. (1952) §157.

[6] 61 Stat. L. 141 (1947), as amended by 65 Stat. L. 601 (1951), 29 U.S.C. (1952) §158(c).

[7] Minnesota Mining & Mfg. Co., (8th Cir. 1950) 179 F. (2d) 323; Joy Silk Mills, Inc. v. NLRB, (D.C. Cir. 1950) 185 F. (2d) 732; NLRB v. Jackson Press, Inc., (7th Cir. 1953) 201 F. (2d) 541. For a comment on the latter case, see 62 YALE L.J. 1258 (1953).

[8] NLRB v. Montgomery Ward & Co., (2d Cir. 1951) 192 F. (2d) 160, says it does. *Contra*: NLRB v. England Bros., Inc., (1st Cir. 1953) 201 F. (2d) 395; NLRB v. Minnesota Mining & Mfg. Co., note 7 supra.

[9] Sax v. NLRB, (7th Cir. 1948) 171 F. (2d) 769 at 773; John S. Barnes v. NLRB, (7th Cir. 1951) 190 F. (2d) 127 at 130; NLRB v. Tennessee Coach Co., (6th Cir. 1951) 191 F. (2d) 546; NLRB v. England Bros., Inc., (1st Cir. 1953) 201 F. (2d) 395. The courts thus follow the doctrine set forth by the Supreme Court in NLRB v. Virginia Electric & Power Co., 314 U.S. 469, 62 S.Ct. 344 (1941), that the coercive effect of language should be determined by the entire factual context in which it is spoken.

[10] NLRB v. England Bros., Inc., note 9 supra; NLRB v. Fuchs Baking Co., (5th Cir. 1953) 207 F. (2d) 737.

[11] NLRB v. Arthur Winer, Inc., (7th Cir. 1952) 194 F. (2d) 370; John S. Barnes v. NLRB, note 9 supra.

[12] NLRB v. Hinde & Dauch Paper Co., (4th Cir. 1948) 171 F. (2d) 240; NLRB v. Tennessee Coach Co., note 9 supra.

[13] NLRB v. Fuchs Baking Co., note 10 supra, at 738.

[14] John S. Barnes v. NLRB, note 9 supra; NLRB v. Arthur Winer, note 12 supra.

the office of a high-ranking company official and is questioned as to his union activities or membership, the courts are far more likely to scent the "aroma of coercion,"[15] even though no actual threats are made. This appears to be the warning to employers which the *Syracuse Color Press* case holds. In the future, even though the courts do not adopt the Board's per se doctrine so as to make all interrogation an unfair practice they are likely to be extremely sensitive when the personnel and physical setting involved in the interrogation are such as to make the average worker uneasy and thus put him at a disadvantage in relation to his questioners.

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[15] Joy Silk Mills, Inc. v. NLRB, note 7 supra, at 740.