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Labor Law - Authority of National Labor Relations Board to Require Reaffirmation of Non-Communist Affidavit

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LABOR LAW—AUTHORITY OF NATIONAL LABOR RELATIONS BOARD TO REQUIRE REAFFIRMATION OF NON-COMMUNIST AFFIDAVIT—Section 9(h) of title I of the Labor-Management Relations Act[1] requires that officers of unions which desire access to NLRB facilities file non-Communist affidavits with the Board. During the effective period of appellee unions'[2] compliance with this requirement, the Board referred certain affidavits to the Department of Justice for investigation. After the suspected officers had refused to testify concerning the truth or falsity of their affidavits in subsequent grand jury proceedings the Board issued a Notice and Order requiring the officers to reaffirm the truth of the prior affidavits and to attest to non-membership in the Communist Party since filing them. The unions applied for and obtained an injunction against enforcement of this order.[3] On appeal, *held,* affirmed. "The Board has no authority . . . to deprive the Unions of their compliance status under section 9(h). The scheme of section 9(h) is clear. It imposes a criminal penalty for filing a false affidavit. . . . There is nothing in the Act or in its legislative history or in good sense to indicate that Congress meant to go further and impose the drastic penalty of excluding the union from the Act's benefits because its officer had deceived the union as well as the Board by filing a false affidavit." *Farmer v. United Electrical, Radio and Machine Workers of America,* (D.C. Cir. 1953) 211 F. (2d) 36, cert. den. 347 U.S. 943, 74 S.Ct. 638 (1954).

For several years following the enactment of the statute, the Board strictly adhered to the position that, filing being merely a "condition precedent to the use of the processes of the Board,"[4] the truth or falsity of the affidavits was for the determination of the Department of Justice, and was not litigable in unfair labor practice[5] or representation proceedings.[6] Even where the filing officer

[1] 61 Stat. L. 136 (1947), as amended, 65 Stat. L. 601 (1951), 29 U.S.C. (1952) §159(h).

[2] United Electrical, Radio and Machine Workers of America; American Communications Association; International Fur and Leather Workers Union.

[3] United Electrical, Radio and Machine Workers of America v. Herzog, (D.C. D.C. 1953) 110 F. Supp. 220.

[4] 93 CONG. REC. 6860 (1947).

[5] Craddock-Terry Shoe Corp., 76 N.L.R.B. 842 (1948); Lannom Mfg. Co., 103 N.L.R.B. 847 (1953); NLRB v. Sharples Chemicals, Inc., (6th Cir. 1954) 209 F. (2d) 645; NLRB v. Vulcan Furniture Mfg. Corp., (5th Cir. 1954) 26 CCH Lab. Cas. ¶68,544.

[6] Lion Oil Co., 76 N.L.R.B. 565 (1948); American Seating Co., 85 N.L.R.B. 269 (1949); Alpert & Alpert, 92 N.L.R.B. 806 (1950).

had publicly announced his renunciation of Communist Party membership to have been a ruse in order to comply with section 9(h), an employer could not challenge the union's compliance status in adversary proceedings.[7] The legislative history of section 9(h) apparently sustains this view. Although the bill[8] as originally passed by House and Senate required no affidavit but denied Board facilities to any union having Communist officers, the section was amended to its present language in conference, Senator Taft explaining the revision on the ground that under the original approach proceedings "might be tied up for months while determination was made as to whether a man was a Communist. . . . Under the amendment an affidavit is sufficient for the Board's purpose and there is no delay unless an officer of the moving union *refuses to file* the affidavit required."[9]

However, the present case is one of several since early 1953 in which the mere act of filing was deemed by the Board in ex parte proceedings to be insufficient compliance with section 9(h). An officer's conviction for filing a perjurious affidavit was held to render a contract executed during the period of apparent compliance no bar to a representation election;[10] in another case, an officer's conviction for false statements to FBI agents that he had never been a Communist was held to invalidate union certification.[11] When the Board refused to handle a representation petition after Ben Gold, president of the International Fur and Leather Workers Union, had been indicted for perjury under this section, the District Court for the District of Columbia held the Board to be without authority to suspend the union's compliance status;[12] yet a few months later it held that the decision in the principal case did not foreclose the Board's power to conduct an administrative investigation of an officer's alleged admission of continuing adherence to the principles of the Communist Party.[13] The Board rejected Ben Gold's affidavit, dated three weeks after his perjury conviction, "in the interests of protecting the integrity of the Board's processes."[14] This recent approach of the Board, although not anticipated during congressional consideration of section 9(h),[15] reflects increasing

[7] American Seating Co., note 6 supra; Lannom Mfg. Co., note 5 supra.

[8] H.R. 3020, 80th Cong., 1st sess. (1947).

[9] 93 CONG. REC. 6447 and 6860 (1947) (emphasis added).

[10] Kind & Knox Gelatine Co., 104 N.L.R.B. 1034 (1953).

[11] Compliance Status of Local 214, Intl. Fur and Leather Workers Union, 106 N.L.R.B. No. 223 (1953).

[12] Intl. Fur and Leather Workers Union v. Farmer, (D.C. D.C. 1953) 117 F. Supp. 35.

[13] International Union of Mine, Mill and Smelter Workers v. Farmer, (D.C. D.C. 1954) 25 CCH Lab. Cas. ¶68,283, petition for stay pending appeal den. (D.C. Cir. 1954) 25 CCH Lab. Cas. ¶68,362.

[14] Compliance Status of Intl. Fur and Leather Workers Union, 108 N.L.R.B. No. 168 (1954).

[15] One writer has asserted that "The secrecy of conference sessions, the relatively slight mention of Section 9(h) in ensuing debate, and the haste with which the compromise bill was passed all contribute to minimize the reliability of any claim to clear congressional intent." Greenwald, "Non-Communist Affidavits: Taft-Hartley Sound and Fury," 12 LA. L. REV. 407 at 409 (1952).

recognition of the ineffectiveness of the perjury sanction.[16] It is noteworthy that, after denial of certiorari in the principal case, bills were introduced in both houses of Congress[17] granting the Board power to withdraw recognition from a union whose officer either has refused to testify or has been convicted of perjury, unless union members unseat such officer within thirty days. Senator Humphrey, co-sponsor of the bill, declared that "Where gross abuses of the affidavit processes exist the Board should be permitted to act and recognize the facts for what they are."[18] It is doubtful whether such legislation is necessary. Congressional motivation in requiring only an affidavit was the prevention of delays in certification and in prosecuting unfair labor practices. Administrative investigation after perjury conviction, refusal to testify, or public affirmation of continued Communist sympathies, would not so delay Board adversary proceedings. Such investigation would effectuate the fundamental legislative purpose of preventing Communist labor leaders from tying up American industry,[19] and would seem justified by the *existing* statute.[20]

Richard Z. Rosenfeld

[16] Attorney General McGrath wrote, "Difficulty is experienced in the maintenance of prosecutions under this section because of the necessity of proving that an affiant *at the time of the making of his affidavit* was a member of the Communist Party. . . ." N.Y. TIMES, July 1, 1951, §1, p. 17:3 (emphasis added).

[17] S. 3463, 83d Cong., 2d sess. (1954); H.R. 9158, 83d Cong., 2d sess. (1954).

[18] 100 CONG. REC. 6241 (May 14, 1954).

[19] Cf. 93 CONG. REC. 3519 (1947).

[20] Criticizing the principal case obiter, the Court of Appeals for the Fifth Circuit stated that Congress "must necessarily have intended that the Board should be obligated to determine whether what purports to be an affidavit is one in fact." NLRB v. Vulcan Furniture Mfg. Corp., note 5 supra. Wrote Board Member Gray in an earlier case, "I find no evidence that Congress intended by the reference to criminal sanctions to preclude resort by the Board to appropriate administrative sanctions, as well." Dissent in American Seating Co., note 6 supra, at 276.