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Two important factors in labor-management relations have significance necessary to an understanding of specific aspects of labor law. First, the labor-management relation affects matters of vital importance to those involved (property rights, personal rights and actual survival in a business world), and this is so more than with many other fields of law. The social and political overtones of this fact add to the intensity and scope of the problem. Second, labor law has developed from a beginning in which management was dominant and unreasonable through a pendulum swing in which labor has achieved a certain ascendancy. This has resulted in bitter feelings on both sides. It has also resulted in important psychological concepts on both sides which have distorted the real problems involved.

As this pendulum swung, management was always thinking in terms of an immediate past in which the rules were more favorable to management than thereafter. Consequently, management developed an approach to labor relations in which the labor movement was seen as a gradual encroachment on a lawful and rightful *status quo*. On the other hand, labor supporters felt that they had had to wring from management rights which should have been labor's anyway. Labor saw a pattern of continuing resistance to the acceptance of labor rights which had already been written into the law of the land.

One unfortunate effect of all this has been that management and labor have both tended to become more and more aggressive, often making somewhat unrealistic demands. Recently there has been some indication that both of these attitudes have undergone revision. Enough remains, however, to justify the statement that one of the most important services a labor-management counsellor can perform for his client, on either side of the table, is to acquaint him with the "facts of life" in labor law. When this is done, much of the misunderstandings which produce unfair labor practices will be dispelled. But until it is done, there will be an insufficient appreciation of the real issues which are involved in these cases.

Unfair labor practices can be understood only in the light of the rights sought to be protected by the National Labor Relations Act (U. S. Code, Title 29, Sections 151 *et seq.*). The Act protects workers in organizing themselves into unions and bargaining concerning the terms of employment with employers. An unfair labor practice by an employer is a violation of these rights. Administration of the Act has been conducted by the National Labor Relations Board which has exhaustively explored all phases of the industrial relation to the end that the parties will really deal at

arm's length as equals. It is in the wide ramifications of this attempt to give labor equal strength and knowledge that some of the misunderstanding about unfair labor practices has arisen.

Section 8(a) of the Act forbids the following employer conduct:

(1) Interference with, restraint or coercion of employees in the exercise of their guaranteed rights.
(2) Domination of, interference with or financial or other support of labor organizations.
(3) Discrimination in hire, tenure or condition of employment aimed at encouragement or discouragement of union membership, except that the union shop is authorized, consistent with state law. (Under a union shop an employee must join the union after employment and the union must accept him or at least his initiation fee and dues which qualify him for employment.)
(4) Discrimination against an employee for filing charges or giving testimony under the Act.
(5) Refusal to bargain collectively with the employee representative, where duly selected.

It should be noted that the right of a worker to refrain from union activity is also protected. This points up the fact that there are really four entities with rights in this picture. Other than the employer and the union, the individual employee and the general public are also involved. The adjudication of all of these interests requires a series of compromises which constitute the specific rules we are about to discuss.

Organizational drives produce many unfair labor practice problems. The employees' right to organize and the employer's right to run his business and control the use of his property come into square conflict. The problems involve a related section of the Act, 8(c), which is the "free speech" provision. This section declares that expressions of opinion containing no promise of benefit or threat of reprisal neither constitute nor evidence an unfair labor practice. We will begin the discussion with the organizational phase but remember that these principles apply throughout the relations.

Employers are responsible for the acts of supervisory personnel and, in some cases, the acts of employees, private citizens or town officials where the employer initiates or encourages the activities, and fails to disavow them publicly. The rules are not the same as those of agency; they represent a realistic recognition by the Board of the devious ways in which an employer can influence the behavior of others (3730).[1]

Spying on employees, questioning employees as to union activities and other methods of getting information about the union activities of employees constitute ULP (unfair labor practices).

[1] Unless otherwise indicated, citations will be to Commerce Clearing House Labor Law Reporter.

Subterfuges such as hiring a detective to investigate "thefts" will fail if thefts have not increased but labor organization has recently been commenced. Polling employees or requiring applicants to declare their union views are forbidden (3740).

The removal of a plant to another location, the "runaway shop," is forbidden where it is motivated by an anti-union consideration. Of course a legitimate business purpose, if the real motivation, is a sufficient excuse even though the incidental effect is to discourage unionism (3795).

Of course any physical attack on the union organizer is forbidden (3780). In addition, threats, however subtle are ULP (3770). In determining whether a statement by an employer is protected by the free speech provision or whether it is an ULP, the exact language used, the circumstances in which it was made, and the employer's history of attitude toward unionism are important. Of course, if the statement is held to be a threat, the free speech provision simply does not protect it (5000).

The employer may give his opinion that unionism has nothing to offer the employees and that the employees will be better off by voting against the union. He may state his preference between unions. He may defend himself against union accusations. He may do this verbally or in writing, though the latter is preferable even if the speech is read as it helps to avoid difficult questions as to just what was said (5000).

But if the context of the employer's remarks suggests that the employer will use his economic power to make the employees worse off if the union wins, or, conversely, to make the employees better off if the union loses, then it is an ULP. Profanity and vigorous, emotional forms of expression do not change the picture unless the overall effect of the statement is changed (3770-5000).

The fact that the threat was ineffective is no defense (3770.02). Conduct may also constitute a threat as, for instance, a discriminatory discharge which, of course, will influence other employees (3770.10). The threat may involve less than discharge, such as the curtailment of privileges (3770.22), personal violence (3770.40), or even isolation of an individual by work assignment (3770.588), and it is still an ULP.

Of course the carrying out of threats is an ULP and this is true whether the threat was communicated or not. Discharges, layoffs, demotions, refusals to reinstate or to hire originally are all ULP if made for anti-union reasons. A "constructive" discharge can occur by unfair job conditions causing an employee to quit. As illustrative of the fact that the nut of the matter is the employer's intent, note these results. If the employer thinks an employee has been guilty of something that would justify discipline, if true, the discipline is not an ULP even though the employer is mistaken and the employee in actuality was not guilty (2210.154). Further, if the employer's motivation was not anti-

union, the discharge is not an ULP even though an incidental effect is to discourage unionism (2210.16).

However, many difficult problems exist in determining whether the reason for the employer's disciplinary action was anti-union or not. The employer's mistaken belief as to whether or not the employees' activity was protected by the Act is no defense (2210.153). An example of this difficulty is the question of whether an employer can discharge an employee who refuses to cross a picket line around some other employer's plant in the course of his employment. The employer's right to have his work performed and the employee's right to participate in concerted activities for mutual protection meet head-on. Though the Board is more favorable to the employee, the Court answer is probably that the employee must cross the picket line during working hours on pain of discharge (2210 notes .29, .30, .173, .435-.438, .64, .654).

Furthermore, the good faith of the employer in claiming the discharge was "for cause" is often in question. Company rules called into being or revived from disuse which was first applied against union organizers are speedily rejected as legitimate bases for discipline. Misconduct by employees, absenteeism, lateness, dishonesty, insubordination, and similar matters are subjected to close scrutiny by the Board before being allowed to sustain discharges. The relative triviality or seriousness of the employee conduct, the position of the employee in the union picture, the employer's proper or anti-union history, as well as the equal or discriminatory application of the applicable company rules are all considered. Personal inadequacy of the dischargee, such as incompetence, is usually rejected if first raised after unionism entered the scene. Business recession or labor-saving devices are other examples of excuses used.

An example of the refinements produced in developing labor law is found in the problems associated with the attempts of the employer to prohibit union solicitation on company time and premises and the so-called "captive audience" doctrine. An employer may prevent solicitation during the employees' working hours provided that the no-solicitation rule applies as well to other sorts of solicitation, such as for social and charitable purposes (3825.243). Giving the privilege to one union but not to another is ULP (3825-2435). However, solicitation on the employer's premises during the employees' free time may not be prevented unless the employer can prove that his business justifies this restriction, as in retail sales departments where it would interfere with business.[2]

Rules against the distribution of literature fair better. Blanket no-distribution rules are probably valid unless the physical setup is such that distribution must be made on company premises to be effective (3825). Rules against solicitation on company premises by non-employees are valid with the same exception.

[2] Bonwit Teller, 21 Labor Cases 67,025; 197 F. 2d 640.

The "captive audience" doctrine is a ramification of the rule that no-solicitation rules must be applied without discrimination. If the employer forbids the union to use company premises for solicitation, the employer cannot himself do so for a last-minute-before-election speech without giving the union a chance to reply.[3] It is unsettled whether or not the "equal opportunity" to be given the union must also be on company time.[4]

The Board has taken the position that the captive audience applies whether there is a flat no-solicitation rule or not and that the employer must tender an "equal opportunity" to the union to reply to an election speech by the employer.[5] In this case nine days elapsed between the speech and the election so the employer was not having the "last word" as he had in an earlier Board case which reached the same result and was cited in the *Seamprufe* case.[6] This view seems to be opposed to the position of at least the Second Circuit Court of Appeals.[7]

The organizational drive is a means to an end—the establishment of the union as bargaining representative and the actual bargaining of the terms and conditions of employment. After an election and Board certification have determined the employees' representative, this matter of selection is clear. But the problem may arise before certification and rules have been developed governing this phase.

The employer's duty to bargain begins when the employees have selected a bargaining representative by majority vote and when that representative has demanded bargaining. When the employer receives such a demand, he then has a duty to bargain even though there has been no election or certification unless he has a good faith doubt as to the majority status of the union, or other representative. If the employer demands an election in bad faith and in the face of clear proof (by membership cards, for instance) that the union has a majority or where the Board finds that the employer did so to gain time to undermine the union, this is the ULP known as Refusal to Bargain (RTB hereinafter) (3080).

When a union is elected and certified, this usually insures its representation status for one year. However, where the employees submit to the employer proof of their repudiation of the union within the year, there is a split in the circuits as to the continuing duty of the employer to bargain with the union anyway (3080). After the year is up, and if no contract is then in force, the employer can again refuse to bargain if he has a genuine doubt as to the union's majority status but he cannot deliberately limit his original contract with the union to one year if the motive is solely

[3] Bonwit Teller, *supra.*
[4] American Tube Bending Company, 23 Labor Cases 67,671.
[5] Seamprufe, Inc., 103 N.L.R.B. No. 17; Vol. 2, C.C.H. No. 12,251.
[6] Biltmore, 97 N.L.R.B. No. 128; C.C.H. 3825.077.
[7] Bonwit Teller and American Tube Bending Company, *supra.*

to test the union's strength again at the end of the certification period.

As for bargaining itself, the following topics must be bargained (3020). The Act refers to " . . . rates of pay, wages, hours of employment or other conditions . . . " and these have been held to include the exceptional as well as the routine aspects. Pensions, bonus plans and profit-sharing plans are included. The employer's practices and procedures for discharge, suspension, layoff, recall, seniority, promotion, demotion and discipline generally are bargainable. Vacations, holidays, leaves of absence, sick leave must be bargained. Safety, sanitation, and health protection are legitimate topics. Grievances, both individual and union, are proper. Union security is bargainable except that no closed shop or preferential hiring agreement is legal. Also, Colorado law requires a three-fourths vote for any form of union security and all such state limitations are recognized under the Federal law. Checkoffs are an appropriate subject for bargaining, and, in any case, each employee's consent must be obtained and the checkoff can be irrevocable for no longer than one year or the expiration of the contract, whichever is earlier. Of course the interpretation of the contract, its term, and arbitration proceedings are bargainable too.

Despite the seemingly complete coverage of the above, there are a number of topics which have been ruled not bargainable. The corporate or other structure of the business and the size and personnel of the official and supervisory force are solely management concerns. (However, it has been held that the number of employees in the unit is a proper subject for union concern.) The general business practices, including the sale or lease of the business, choice of products to be handled, location of plants, schedules of production and methods and processes of production are for management alone. However, these are subject to the rule against "runaway plants" and it has been held by the Board that some schedules of production and some subcontracting of work so affect employees' rights as to be bargainable.

At this point it might be mentioned that the duty to bargain does not cease with the execution of a contract. Interpretation of the contract and matters not covered in the contract and not bargained away must be negotiated as they arise during the course of the contract. Nor, as we shall see, does the duty to bargain cease when negotiations fail and a strike occurs, though it then becomes subject to some exceptions.

The duty is to bargain, not to reach an agreement. There is nothing in the Act or the cases requiring either party to agree to anything. A first view of this strange rule might lead one to believe that a party could go through the motions looking as though he were bargaining but without any real desire to agree. However, the Board soon learned to see through such a proceeding. Various clues were used by the Board to show the intent not

to bargain in good faith which is the test. Remember that the whole picture is considered by the Board. Anti-union conduct during organization is often used to find an employer's real intent. A pattern of details can result in a Refusal to Bargain charge though one or a few of the items might be insufficient alone.

Failure to answer the union's demand to bargain, failure to have representatives available at reasonable times and places, and unreasonable conditions of bargaining (such as, that the union organize the employer's competitor first!) are RTB. The employer cannot dictate who shall do the bargaining for the union. He cannot require that they be employees and it has recently been held that he cannot require that they sign non-Communist oaths. (This is not to be confused with the requirement that the *union* file certain non-Communist affidavits 2120).

The bargaining must be for all the employees in the unit and not just the union members. The employer cannot bargain individually with his employees, though they are not union members, if they are in the bargaining unit. Even grievances cannot be handled between employer and employee without giving the union representative a chance to be present if the issue has to do with the union contract.

Unilateral action by the employer on a bargainable topic during negotiations would obviously undercut the union and is RTB. This is one reason why it is important to know what topics are bargainable. There are exceptions to this, such as giving raises to meet the threat of employees leaving for higher wages. But the Board looks carefully at such excuses and finds them invalid if the real motive was anti-union.

In the discussions themselves, the employer may be found to have RTB if he rejects all union proposals and makes none in return. On the other hand, the submission of ridiculous counter-proposals may have the same effect! An example of this might be a proposal by an employer to reduce wages after a union request to raise wages. Unless the employer has valid business reasons for the decrease, it may be a RTB.

Changing positions frequently during negotiations, raising new issues at the last minute, and similar conduct inconsistent with intelligent bargaining may be evidence of RTB.

The employer must provide the union with data on bargainable topics to enable the union to bargain intelligently. Wage rates, job classifications, rate ranges, merit ratings are examples of the detailed data obtainable by the union. Where the employer claims that he is financially unable to raise wages, he must give the union data to support his claim although this may involve opening his books to some extent.

The fact that a strike occurs does not terminate the duty to bargain unless it was called in violation of an existing contract or in violation of the Federal 60-day notice provision. When this occurs, the employer may again bargain with his employees individually.

The duty to bargain is also suspended by a genuine impasse in negotiations. However, a change in conditions which might break the impasse revives the duty. This may be due to external events or to a change of position on the part of one of the parties.

Lockout or mass layoffs do not terminate the duty to bargain. The availability of lockouts and layoffs as bargaining pressure tactics similar to strikes is discussed elsewhere herein.

If an agreement is reached, the union is entitled to have the result dignified by a contract in writing rather than as a declaration of policy by the employer.

A scheme that suggested itself early to ingenious employers was the establishment of a company-controlled union to keep the rascals out. The Act prohibits this. The employer cannot interfere in the organization or function of the union in any of its activities. No money or other support can be contributed to the union or its officials except that they may be paid while off the job during actual bargaining. The employer cannot advance dues to an employee to join a union. There can be no discrimination between unions competing for recognition in the use of company facilities, such as bulletin boards, or the enjoyment of company privileges, such as solicitation on company time. The employer must simply keep hands off unions.

Strikebreaking presents a number of special problems. The theory is that in striking a union is merely applying valid and legal pressures to persuade or compel the employer to grant concessions. The employer may not use his obvious advantages to counter in an unfair manner.

There are two types of strikes with quite different rules. A strike simply to bring pressure upon an employer as an aid to bargaining is called an "economic strike." A strike in protest over an ULP of an employer is called an "unfair labor practice strike." An economic strike may become an unfair labor practice strike if the employer is guilty of ULP during the pendency of an economic strike.

ULP strikers are more favored than economic strikers. The former are entitled to their jobs back, despite replacements, if they request them within a reasonable time after the strike ends. Economic strikers may not be discharged while they are still employees but they may be replaced. If the replacements are intended to be permanent, the economic strikers are no longer employees and are not entitled to their jobs after a strike. Both types of strikers may be awarded back pay after an unconditional offer to return to a job, to which the striker has a right to return, is rejected. These rules are subject to the rules on discrimination discussed above. For instance, in replacing economic strikers, the employer need not follow any particular order but he cannot replace only the active unionists. Also, if vacancies occur at a later date, he cannot use union considerations to determine whom to employ or re-employ. Although, in the absence of a contract,

an employer need not respect seniority, it is a valid criterion for employment.

Strikers may not be intimidated or threatened with the loss of their jobs. However, the employer may notify economic strikers that their jobs will be filled if they are not at work on a certain date, though the employer has no duty to notify them before replacing them. The employer can persuade employees not on strike to cross the picket line but he cannot discharge them if they won't cross it. However, the employer can lay off non-striking employees whose jobs are cut out by the strike or he can shut down entirely.

Strikers of either type may be discharged for illegal conduct or for serious violence. Of course if the Board later decides that the discharged employee was not guilty and the discharge was an ULP, then all of the strikers may have become ULP strikers with final rights of reinstatement.

Even though all of the employees who were union members have been replaced, the union still represents the employees in that unit. However, subject to the rule against representation elections within one year of a certification or during an existing contract, employees (*not* the employer) can independently petition to decertify the union even though no other union is in the picture. The employer is guilty of ULP if he fosters this action. Incidentally, the vote on such a petition raises interesting problems since only employees may vote. ULP strikers and unreplaced economic strikers can vote. Also, economic strikers replaced by temporary replacements can vote. Economic strikers discharged because their jobs have been eliminated by changes in the employer's business operations may be able to vote depending on the actual prospects for reemployment.

An unsettled question is whether an employer may use the lockout as a pressure on the employees to aid the employer in bargaining. The lockout is frequently justified on other grounds, as necessary to prevent business loss. Examples of this are employers afraid to take orders which they might not be able to fill due to a threatened strike, employers whose production facilities must be shut down gradually and who fear a sudden strike, and employers afraid of loss of spoilable inventory in the event of a threatened strike. However, the Board appears to take the position that a lockout solely for pressure purposes is ULP. But there is language in court cases to the effect that the Act intended strikes and lockouts to be used equally by each side. The final word has not been spoken.[8]

The remedies of the Board (3840, 5600, 4700) include reinstatement of employees unfairly discharged, demoted, etc., back pay to such employees and to strikers who have been unlawfully refused reinstatements, cease and desist orders against ULP, dis-

[8] See Morand Bros., 20 Labor Cases 66,453 and 23 Labor Cases 67,624; Leonard et al, 21 Labor Cases 66,997 and 23 Labor Cases 67,689. The Board cases are cited at 4090.

establishment of a company-dominated union, and usually a public retraction or promise of good behavior by the employer. A strong incentive for employers to avoid ULP is that a pattern of them may create a poor labor history when an important matter gets before the Board.

An employee with a final right of reinstatement gets his job whether a replacement has been hired or not. However, if the job no longer exists due to a change in business operations, a similar position or other equitable solution will be reached. The fact that the employee has taken another job pending the decision on his case will not prevent reinstatement if he wants it. Strikers must unconditionally request reinstatement as a condition precedent to their right, unless the employer's conduct indicates it would be futile.

Back pay awards may not include pay during an unnecessary delay by the employee in filing charges and do not include earnings elsewhere or pay while the employee was unavailable for work or while the work was unavailable as, for instance, during a legitimate plant shutdown.

These rules represent compromises between the ownership and management rights of the employers and the organization and bargaining rights of the employees. This field of law is still developing. Broad trends as well as details are subject to change. Economic, political and even social pressures are soon reflected in the labor law. The summary we have presented above is but a momentary picture of a dynamic situation.

FELLOWSHIP COMMITTEE

With a thousand members, the Denver Bar Association is no longer the small, friendly organization in which all members are personally known to each other such as it once was not so long ago. For many years the Association has maintained a Fellowship Committee which arranges for visits to members who are ill and for proper memorials by the Association when any member crosses the final bar. Such things we still consider important and we hope that the Association will never become so large that they become neglected or be submerged in the press of our more material activities.

Sometimes it is with a shock that we learn of the death of one of our brothers at the bar many weeks after he has been laid to rest or learn of the serious illness of a colleague only after he has returned to his usual routines. Such happenings are inevitable in an organization of such a size but they are still regarded as lamentable. We ask that all Denver members recall the existence of the Fellowship Committee when they learn of the death or serious illness of one of our colleagues and notify either the Secretary of the Bar Association or Mr. Floyd Walpole, chairman of the Fellowship Committee.