Michigan Law Review

Volume 40 | Issue 8

1942

LABOR LAW -LOSS OF MAJORITY SUPPORT BY REPRESENTATIVE WITH WHOM EMPLOYER HAS BEEN ORDERED TO BARGAIN

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LABOR LAW — LOSS OF MAJORITY SUPPORT BY REPRESENTATIVE WITH WHOM EMPLOYER HAS BEEN ORDERED TO BARGAIN — The National Labor Relations Board found that the employer (respondent) had been guilty of unfair labor practices by interfering with the employees' right to unionize and by refusing to bargain collectively with the Pioneer Tobacco Workers' Local Industrial Union No. 55 when the latter had been designated as the bargaining agent by a majority of the employees in an appropriate bargaining unit. During

the proceedings before the board a motion for leave to intervene was filed by an independent union claiming the support of a majority of the employees, but the motion was denied by the board. The board ordered the employer to desist from refusing to bargain collectively with Local 55 as the exclusive representative of the employees.[1] Upon a petition for enforcement, the Circuit Court of Appeals for the Sixth Circuit upheld the findings of the board but required the board to conduct an election to determine whether Local 55 still had the support of a majority of the employees.[2] *Held*, on appeal to the Supreme Court, the orders of the board should be enforced without the necessity of conducting an election. *National Labor Relations Board v. P. Lorillard Co.*, 314 U. S. 512, 62 S. Ct. 397 (1942).

The National Labor Relations Act [3] imposes the duty upon employers to bargain collectively with their employees through the bargaining agent selected by a majority of the employees in an appropriate bargaining unit.[4] When it has been shown that the employer has refused so to bargain, the board normally has ordered the employer to bargain collectively with the union shown to represent the employees at the time of the violation.[5] If, however, it is alleged that during the interim between the failure to bargain collectively and the issuance of the order by the board the bargaining agent has lost the support of a majority of the employees, the question arises whether or not the employer should be compelled to bargain with this agent notwithstanding the alleged lack of majority support. The board has taken the position that the employer must first remedy the effect of the unfair labor practice by bargaining with the union having the authority to represent the employees at the time of the commission of the unlawful practice, and until the effect of the unfair labor practice has been removed no representation proceedings [6] will be entertained.[7] It would seem clear that in so far as the rights of the employer are concerned this position is correct. It would be scarcely justifiable for the employer to refuse to bargain collectively with a union having the support of a majority of the employees and then, after board action has been taken, offer the loss of a majority following by this union as a defense, when, for all that appears, he should have been bargain-

[1] 16 N.L.R.B. 684 (1939).

[2] 117 F. (2d) 921 (1941).

[3] 49 Stat. L. 449 (1935), 29 U.S.C. (1940), § 151 at seq.

[4] Id., § 8: "It shall be an unfair labor practice for an employer . . . (5) To refuse to bargain collectively with the representatives of his employees. . ." See Smith, "The Evolution of the 'Duty to Bargain' Concept in American Law," 39 MICH. L. REV. 1065 (1941).

[5] In the Matter of Jeffery-De Witt Insulator Co., 1 N.L.R.B. 618 (1936).

[6] Normally representatives for collective bargaining are selected after a petition has been filed by a union purporting to have the support of a majority of the employees of an appropriate unit and asking for board certification under § 9 of the act, and the entire process is known as representation proceedings.

[7] In the Matter of Inland Steel Co., 9 N.L.R.B. 783 (1938). See ROSENFARB, NATIONAL LABOR POLICY AND HOW IT WORKS 586-587 (1940), and cases therein cited. See N.L.R.B. v. Remington Rand, (C.C.A. 2d, 1938) 94 F. (2d) 862.

ing with this union all along.[8] Nor would a company-dominated union be in a position to offer the loss of majority support by the union having a majority at the time of the commission of the unfair labor practice as a reason why the employer should not be compelled to bargain with this latter union, since it does not represent the uncoerced wishes of a majority of the workers.[9] In the principal case, the board refused to consider the claim for recognition of a union which purported to have obtained the support of a majority since the commission of the unfair labor practice, even though there was no allegation that it was employer dominated. The Supreme Court upheld the board action on the ground that compelling the employer to bargain collectively with the union which was the representative of the employees at the date of the commission of the unfair labor practice was matter within the discretion of the board as a part of its duty to remedy the effect of unfair labor practices.[10] Thus the result reached is that after the employer has refused to bargain collectively the employees who have not necessarily been involved in the unfair labor practice have lost a right guaranteed to them under the National Labor Relations Act, i.e., the right to have a majority select agents for collective bargaining,[11] until such necessarily uncertain time as the effect of the unfair labor practice has been removed. It would seem that this goes beyond the scope of remedying the effect of the unfair labor practice.[12] Perhaps the opinion of the Court should not be taken to go so far, and all that is decided here is that the board should not be compelled as a matter of procedure to hear the claims for recognition of the intervening union in the proceedings concerning the unfair labor practice. But the board did not deny the petition on procedural grounds, nor has it indicated its willingness to hear the claims immediately in a separate representation proceedings under section 9c.[13]

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[8] N.L.R.B. v. Bradford Dyeing Assn., 310 U. S. 318, 60 S.Ct. 918 (1940); Oughton v. N.L.R.B., (C.C.A. 3d, 1941) 118 F. (2d) 486, cert. den., (U.S. 1942) 62 S.Ct. 485. But see Stewart Die Casting Corp. v. N.L.R.B., (C.C.A. 7th, 1940) 114 F. (2d) 849; N.L.R.B. v. National Licorice Co., (C.C.A. 2d, 1939) 104 F. (2d) 655. It might be argued, however, that the employer still had the right to show that the loss of a majority is due to factors other than the unfair labor practice.

[9] N.L.R.B. v. Bradford Dyeing Assn., 310 U.S. 318, 60 S.Ct. 918 (1940); International Assn. of Machinists v. N.L.R.B., 311 U.S. 72, 61 S.Ct. 83 (1940). See N.L.R.B. v. Falk Corp., 308 U.S. 453, 60 S.Ct. 307 (1940).

[10] Principal case, 62 S.Ct. 397 at 397-398.

[11] 49 Stat. L. 449 (1935), 29 U.S.C. (1940), § 159 (a).

[12] As a practical matter it might well be that due to the unfair labor practice the petitioning union does not represent an uncoerced majority, for the refusal to bargain collectively may have been the cause of the change. It would seem that then the board would have the power to remedy this effect. See International Assn. of Machinists v. N.L.R.B., 311 U.S. 72 at 82, 61 S.Ct. 83 (1940). However, the union previously having a majority should not be immunized from changes in affiliation caused by other factors. See Stewart Die Casting Corp. v. N.L.R.B., (C.C.A. 7th, 1940) 114 F. (2d) 849, where more than two years elapsed between the commission of the unfair labor practice and the order of the court in the enforcement proceedings.

[13] See generally Hamilton-Brown Shoe Co. v. N.L.R.B., (C.C.A. 8th, 1939) 104 F. (2d) 49; Oughton v. N.L.R.B., (C.C.A. 3d, 1941) 118 F. (2d) 486 (opinion of the court on the first hearing), certiorari denied, (U.S. 1942) 62 S.Ct. 485.