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LABOR LAW - CONSTITUTIONAL LAW - NATIONAL LABOR RELATIONS ACT- RIGHT OF EMPLOYER TO DISPARAGE LABOR UNIONS AND TO ADVISE HIS EMPLOYEES AGAINST JOINING THEM

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LABOR LAW — CONSTITUTIONAL LAW — NATIONAL LABOR RELATIONS ACT — RIGHT OF EMPLOYER TO DISPARAGE LABOR UNIONS AND TO ADVISE HIS EMPLOYEES AGAINST JOINING THEM — In the spring of 1937 the respondent distributed anti-union literature to its employees. Some of the material specifically denied any design on the part of the employer to prevent the employees from joining a union, and none of the literature pretended to be more than the advice and opinions of the employer. Nevertheless, the unions were thoroughly condemned as rackets, controlled by Communists, which deprive the workingman of his economic freedom and force him to pay for the privilege of working. The National Labor Relations Board found that the distribution of this literature interfered with, restrained, and coerced the employees [1] in the exercise of their rights of self-organization.[2] It thereupon issued a cease and desist order and applied to the court for its enforcement. *Held*, the order of the board was invalid because it violated the constitutional guarantee of free speech.[3] *National Labor Relations Board v. Ford Motor Co.*, (C. C. A. 6th, 1940) 7 L. R. R. 163.

The principal case could have been approached from the standpoint of the constitutionality of the act. Granting that there was a coercive effect upon the minds of the employees, was it the kind of coercion which could validly be prohibited under the First Amendment of the Constitution? The decision of the court does not indicate that this issue was ever squarely presented to it, and the right of free speech was seemingly used only as a basis for limiting the power of the board to find as a matter of fact that coercion existed.[4] At the present time, the National Labor Relations Board and the courts differ widely in their opinions concerning the extent to which an employer may be prevented from

[1] 49 Stat. L. 452, § 8 (1935), 29 U. S. C. (1935), § 158: "It shall be an unfair labor practice for an employer—(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7."

[2] 49 Stat. L. 452, § 7 (1935), 29 U. S. C. (1935), § 157: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection."

[3] United States Constitution, Amendment I: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press. . . ."

[4] The court's decision fails to make clear whether it was unable to find substantial evidence that coercion existed, or whether because of the constitutional issue of free speech involved, it was putting the board's findings to a more rigid test which was not met.

expressing his views on labor unions without violating his right of free speech.[5] Any expression which might be interpreted as showing his preference for individual bargaining,[6] or as indicating that a union is superfluous[7] has been regarded by the board as coercing and interfering with the employee in his right to freely organize. But the courts have held that an employer has a constitutional right to express his opinion of labor unions unless his words carry an actual threat to the positions of employees who might be interested in union membership.[8] In the principal case the board observed that the derogatory pamphlets were distributed personally to the workers by company servicemen; that this was done at a time when the union was conducting a drive to organize the respondent's employees; and that the respondent had already discharged several employees for union activity and had intimidated union organizers. It thereupon concluded that under these circumstances the pamphlets constituted a warning to the employees that anyone joining the union would get into difficulties with the employer. If he were not actually discharged, he would be considered a foolish, gullible person who was not entitled to much consideration in matters of promotion and layoff. The court, on the other hand, decided that no threats were contained in the literal interpretation of the employer's words, and it was unwilling to deprive the employer of his right of free speech by finding that the background of anti-union activities on his part injected an element of coercion. In the words of the court "The servant no longer has occasion to fear the master's frown of authority or threats of discrimination for union activities, express or implied."[9] This would seem to be too broad a statement. The employer's direct threats of discharge and discrimination in matters of promotion and layoff will not be rendered non-coercive by the fact that the employee has a right to reinstatement under the act. As long as he must take positive action to assert his rights under the act, he is subject to coercion by the employer's outright threats against the tenure of his position. Nor does the act prevent the employee from inferring an indirect threat to his position when the employer condemns unions and union activity. As a practical matter, he might not infer a threat of discharge from the employer's mere denunciation of unions. That the employer would retaliate with such an obvious and easily proven violation of the act is doubtful. But certainly the employee will think twice before engaging in union activity if the employer's tirade might contain a concealed threat of discrimination in matters of promotion. A conclusion by the employee

[5] 39 MICH. L. REV. 110 at 116 (1940). See Thornhill v. Alabama, 310 U. S. 88 at 101-102, 60 S. Ct. 736 (1940), indicating that the right of free speech gives the employer a right correlative with that of the employee to discuss the facts of a labor dispute.

[6] In the Matter of The Midland Steel Products Co., 11 N. L. R. B. 1214 (1939).

[7] In the Matter of Union Pacific Stages, 2 N. L. R. B. 471 (1936).

[8] Continental Box Co. v. N. L. R. B., (C. C. A. 5th, 1940) 113 F. (2d) 93; Midland Steel Products Co. v. N. L. R. B., (C. C. A. 6th, 1940) 113 F. (2d) 800; N. L. R. B. v. Falk Corp., (C. C. A. 7th, 1939) 102 F. (2d) 383; Montgomery Ward & Co. v. N. L. R. B., (C. C. A. 7th, 1939) 107 F. (2d) 555; Jefferson Electric Co. v. N. L. R. B., (C. C. A. 7th, 1939) 102 F. (2d) 949.

[9] Principal case, 7 L. R. R. 163 at 168.

that such a threat did exist would not be without justification, since proof of discrimination in matters of promotion and layoff is so difficult that it is doubtful that the employer could be forced to reinstate him under the act. This case would seem to lend itself better to the practical analysis of the board than to the theoretical approach of the court.

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