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Recent Developments in Labor Law

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RECENT DEVELOPMENTS IN LABOR LAW

INTRODUCTION

This article will explore and attempt to define recent developments in national labor law as reflected in the decisions of the National Labor Relations Board and the United States courts.* The article will emphasize the changing doctrines in the areas of principle concern under the Labor Management Relations Act. Naturally, space and time prohibit an exhaustive analysis of the decisions of the Board. The basis of selectivity has been those cases which were felt to represent most clearly significant departures in policy application of the LMRA. In tracing these developments, the article will be divided in four major categories: jurisdiction of the Board, representation proceedings, unfair labor practices, and enforcement of collective bargaining agreements under section 301.

JURISDICTION

The most significant jurisdictional developments of last year involved the Second Circuit's remand of an indirect flow case[1] to the Board and its subsequent reversal by the Supreme Court, and the latter Court's decision in three separate cases involving jurisdiction over foreign flag vessels. In addition, the NLRB, in a significant decision, adopted a new policy to be applied to real estate operations.

Impact on Commerce Providing Statutory Jurisdiction

In *NLRB v. Reliance Fuel Corp.*,[2] the Court of Appeals for the Second Circuit ruled that the record did not adequately prove the Board's legal jurisdiction over a local business which sold fuel oil for home consumption. Its gross sales exceeded $500,000 a year, and its purchases from Gulf Oil Corporation exceeded $650,000 annually.[3] Most of the Gulf products were refined outside of the state and delivered to storage tanks within the state.

The court doubted the applicability of the act, absent more of an impact on commerce other than a possible disruption of indirect flow. Therefore, the mere volume in the state of $500,000 in sales of fuel oil and related products refined outside of the state was, not of itself, in the court's opinion, sufficient to show a participation in commerce which could be adversely affected by a labor dispute.

On January 7, 1963, in a per curiam opinion the Supreme Court[4] reversed, holding that the activities of the home fuel company affected commerce and were within the constitutional reach of Congress. The Court reasoned that through the NLRA Congress has explicitly regulated not merely transactions and goods in interstate commerce, but also those activities which, if isolated, might be deemed local, but in the interlacing of business across

* For an extensive discussion of the 1961 developments, see Comment, Labor Law's New Frontier: The End of the Per Se Rules, 3 B.C. Ind. & Com. L. Rev. 487 (1962).

1 See textual discussion following note 5 infra.

2 297 F.2d 94 (2d Cir. 1961), remanding 129 N.L.R.B. 1166 (1960).

3 The Board treated Reliance as a "retail concern." Therefore, the $500,000 amount of gross sales met the Board's own standard for the exercise of jurisdiction.

4 83 Sup. Ct. 312 (1963).

state lines adversely affects commerce.[5] The Court then briefly commented that the jurisdictional test was met here in view of the fact that each purchase by Reliance within the state necessarily involved the transportation of petroleum products from outside the state. Thus its operations and the related unfair labor practices "affected commerce within the meaning of the Act."

In *Carol Management Corp.*,[6] the Board asserted jurisdiction over a multi-state enterprise whose primary affairs involved the ownership and management of residential properties, including a shopping center and a hotel. The Board's asserted jurisdiction was based on a consideration of the totality of the diversified operations, particularly those of the shopping center and hotel.

In this case the Board announced for the first time that it would apply its office building standard to employers (owners, lessors, contract managers) engaged in the operation of a shopping center. The exercise of such jurisdiction would be conditioned upon a showing that the shopping center earned $100,000 in gross revenues, of which $25,000 was derived from an organization or store whose operation alone meets any of the Board's jurisdictional requirements, exclusive of the indirect outflow or inflow standards. The significance of this case lies only in the fact that the Board has finally categorized shopping center operations which of their nature affect commerce. The adoption of a fixed numerical standard (*i.e.*, $100,000; $25,000) has given certainty and stability to an area plagued with confusion.

Jurisdiction Over Foreign Flag Vessels

A trilogy of companion cases, involving the same facts, was recently decided by the Supreme Court.[7] Each of these jurisdictional cases involved an American corporation that beneficially owned certain seagoing vessels whose legal title was registered to a foreign subsidiary of the same American corporation.

In a 1961 representative proceeding upon the application of the National Maritime Union,[8] the Board found that United Fruit Company owned all of the stock of the Empresa Hondurena de Vapores, S.A. and controlled its board of directors and officers. In addition, it found that United Fruit, an American corporation, operated a fleet of thirteen vessels in its regular course of business under a time-chartered agreement with Empresa which owned ten of the thirteen ships. Their crews were completely Honduran, and the ships were Honduran registered. It was further found that under Honduran law, only a union whose "Juridic Personality" is recognized by Honduras

[5] Polish Alliance v. NLRB, 322 U.S. 643, 648 (1943).

[6] 137 N.L.R.B. No. 48 (1962).

[7] McCulloch v. Sociedad Nacional de Marineros de Honduras, 83 Sup. Ct. 671 (1963); Sociedad Nacional Marineros de Honduras v. McCulloch, 201 F. Supp. 82 (D.D.C. 1962) (suit by foreign bargaining agent to enjoin Board Members, injunction denied); McLeod v. Empresa Hondurena de Vapores S.A., 200 F. Supp. 484 (S.D.N.Y. 1961) (suit by foreign owner seeking to enjoin election, injunction denied), rev'd sub nom. N.M.U. v. Empresa Hondurena de Vapores S.A., 300 F.2d 222 (2d Cir. 1962) (National Maritime Union intervened and petitioned for a writ of certiorari).

[8] 134 N.L.R.B. 287, 49 L.R.R.M. 2303 (1961).

and is composed of at least ninety per cent Honduran citizens can represent the seamen. Furthermore, Empresa was compelled to bargain exclusively with the Honduran union, Societad, on all matters covered by the contract.

From these facts the Board concluded that United Fruit operated a single, integrated maritime operation under which were the Empresa vessels, recognizing both to be joint employers of the seamen sought to be covered. It assumed jurisdiction and ordered an election. The vessels' foreign owner sought an injunction in a federal district court which was denied.[9] The Court of Appeals for the Second Circuit reversed.[10]

Citing its earlier decision in *West India Fruit & S.S. Co.*,[11] the Board concluded that the maritime operations involved more United States contacts than foreign. It held that Empresa was engaged in "commerce" within the meaning of section 2(6) of the act[12] and that its maritime operations "affected commerce" within section 2(7).[13] An election was ordered so that the seamen could choose the National Maritime Union, Societad, or no union at all.

On appeal to the Supreme Court, all parties conceded that Congress has the constitutional powers to apply the NLRA to foreign ships while in American waters. The Court, however, proceeded directly to the question of whether Congress exercised these powers. The Board, in its argument, relied principally on the test it had evolved of balancing the relative weights of the ship's foreign as compared to American contacts.[14] The Supreme Court, relying heavily on the case of *Benz v. Compania Naviera Hidalgo*,[15] concluded that the legislative history of the NLRA "inescapably describes the boundaries of the act as describing only the workmen of our own country and its possessions."[16] Furthermore, the Court determined that following the "balancing of contacts test" of the Board to the ultimate might require the Board to inquire into the internal discipline and order of all foreign vessels calling at United States ports. The inevitable disturbance that would be caused in maritime law and in international relations would lead to embarrassment in foreign affairs and be extremely impractical in practice.

The decisive question, therefore, appeared to the Court to be no more basic than a consideration of whether the act as written was intended to have any application to foreign registered vessels employing foreign seamen. And as in *Benz*, the NLRB was unable to point to any specific language in the act itself or in its legislative history that would reflect a Congressional intent to give the act such coverage.

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[9] 200 F. Supp. 484 (S.D.N.Y. 1961).

[10] 300 F.2d 222 (2d Cir. 1962).

[11] 130 N.L.R.B. 343, 47 L.R.R.M. 1269 (1961).

[12] 61 Stat. 137 (1947), 29 U.S.C. § 152(6) (1958) defines "commerce" to mean "trade, traffic, commerce, transportation or communication among the several States. . . ."

[13] 61 Stat. 137 (1947), as amended, 29 U.S.C. § 152(7) (1958) provides:

> The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

[14] Where a contrary result in the balancing test is reached, the Board has concluded that the act is inapplicable. E. G. Dalzell Towing Co., 137 N.L.R.B. No. 48, 50 L.R.R.M. 1164 (1962).

[15] 353 U.S. 138 (1957).

[16] Id. at 144.

With such an absence of clear Congressional intent, which must be shown affirmatively in the delicate field of international relations, the Board was held to be without jurisdiction. The requirement of clear intent was based on an appreciation of the international problems involved in applying the sanction of the act to a foreign flag. The Court had to be particularly conscious of the latter situation since any determination would result in the regulation of the internal order of the ship. It, therefore, was quick to indicate that its conclusion does not foreclose such a practice in different contexts, *e.g.*, the Jones Act,[17] where the problem of internal regulation may not be present.[18]

Representation Proceeding

Qualification for Representation

The Board has recently reaffirmed its position that as long as a labor union meets the statutory requirements, the Board is bound to process its petition. In *Alto Plastic's Mfg. Corp.*,[19] the Board held that it is without authority to withhold its process from a petitioner seeking an election if the petitioner qualifies as a labor organization under section 2(5).[20] This is true even though the union may be an "ineffectual representative, even though its contracts do not secure the same gains as other employees in the area, even though certain of its officers have criminal records or there are betrayals of trust and confidences, or that funds are missing." However, the Board did caution that it would revoke the certificate in the event the union becomes nothing more than a sham or paper union.

Contract as a Bar to Election

In the *Boston Gas Co.* case,[21] the Board took occasion to redefine the purpose of the contract bar rule. The Board explained that it is designed to deal with situations involving questions concerning representation and is not applicable to proceedings for clarification or amendment of outstanding certifications.

In a further development on the contract bar rule, a majority of the Board in *Paragon Prods. Corp.*[22] revised the rule as previously defined and followed since the *Keystone* case in 1958.[23] The net effect of the interpretation as established in *Keystone* was to *require* a presumption of illegality with respect to any contract containing a union security clause which did not expressly reflect the precise language of the statute. But the Supreme Court

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[17] 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1958).

[18] McCulloch v. Sociedad Nacional de Marineros de Honduras, supra note 7, at 678.

[19] 136 N.L.R.B. No. 70, 49 L.R.R.M. 1867 (1962).

[20] Section 2(5) sets forth two requirements:

1) Employees must participate in the organization.

2) That the organization exists for the purpose in whole or in part of dealing with employers concerning wages, hours and other terms and conditions.

[21] 130 N.L.R.B. 1230, 47 L.R.R.M. 1429 (1961).

[22] 134 N.L.R.B. 662, 49 L.R.R.M. 1160 (1961).

[23] Keystone Coat, Apron & Towel Supply Co., 121 N.L.R.B. 880, 42 L.R.R.M. 1456 (1958).

had sharply curtailed the area in which the provisions of a contract will be presumed illegal,[24] thus causing the Board to modify its position.

The Board therefore ruled that only a clearly unlawful union security provision in a contract will be sufficient to render that contract *no* bar regardless of whether it has ever been or was ever intended to be enforced by the parties.[25] Should the union security provisions be ambiguous and not clearly unlawful, such will not affect the contract as a bar in the absence of a Board or court determination of illegality as to the particular provision.

However, the strong position assumed by the Board in regard to clearly unlawful union security provisions was not adopted in relation to illegal "hot cargo agreements." In the precedent case of *Food Haulers, Inc.*,[26] a panel majority over-ruled the contract bar policy of the *Pilgrim Furniture* case,[27] where the Board held that a contract containing a "hot cargo" clause outlawed by Section 8(e) of the LMRA would *not* bar an election.

The new policy is that such a "hot cargo" agreement although unlawful will *not* affect a contract's validity as a bar to an election. The rationale of the Board's decision was that the agreement does not act as a restraint upon an employee's choice of a bargaining representative or upon any other objective of contract bar rules. Setting aside an entire contract as an election bar on finding an unlawful "hot cargo" clause constitutes a more drastic sanction in a representation proceeding than is permitted by statute in an unfair labor practice proceeding. Thus a "hot cargo" provision is carefully distinguished from an illegal security provision which by its nature denies freedom of choice and determination to an employee.

Termination of Representation Proceedings

Leonard Wholesale Meats, Inc.[28] revised a previous Board ruling so that any petition will be considered premature if it is filed more than ninety days (instead of 150) before the terminal date of a subsisting contract. The decision in no way modifies the length of the insulated period which remains at sixty days. This reduction was apparently considered to be necessary in view of the considerable decrease in the elapsed time between the filing of the petition and elections resulting in the choice of a unit representative.

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[24] NLRB v. News Syndicate Co., 365 U.S. 695 (1961). The Supreme Court ruled that it would not assume that unions and employers would violate a federal law. Unless there are provisions that specifically call for illegal activity, a contract cannot be held illegal because it fails affirmatively to disclaim all illegal objectives.

[25] Such clearly unlawful provisions would include:

1) Those that expressly or unambiguously require an employer to give a union member preference in hiring, laying off, etc.
2) Those that specifically withhold from non-members or new employees the statutory 30-day grace period.
3) Those that require as a condition of employment payment of sums other than dues or initiation fees.

[26] 136 N.L.R.B. No. 36, 49 L.R.R.M. 1774 (1962).

[27] 128 N.L.R.B. 910, 46 L.R.R.M. 1427 (1960).

[28] 136 N.L.R.B. No. 103, 49 L.R.R.M. 1901 (1962).

Severance from an Established Unit

In *Kalamazoo Paper Box Corp.*,[29] a panel majority overturned the approach adopted in recent cases in ascertaining whether severance from an established unit should be accorded to a subgroup of employee truckdrivers. That approach had for the most part not required an affirmative showing in each case that the interests of the group seeking severance be substantially different from those of other employees in the established units. The net result, in effect, had been a granting of severance to truckdrivers automatically whenever requested.[30]

The majority will now allow severance only when the petitioning employees in reality constitute a functionally distinct group and, as a group, have overriding special interests. The Board will henceforth base each determination on the particular facts before it rather than on a consideration of title, tradition or practice, which do not, of themselves, establish that separate special interests exist. Therefore, the Board has reversed the cycle and returned to its earlier position of weighing the special interests of the group with the community of interest shared with other employees.[31] The chief interests to be considered include wages, base of pay, hours of work, supervision, seniority and benefits. When the community of interest is predominant, the Board will now deny severance.

Employer Interference with Election

Two recent cases indicate that pre-election statements made by an employer or his supervisors are coming into closer scrutiny by the Board, as it changes the former "threat or prediction test."[32]

In the case of *Haynes Stellite Corp.*,[33] a panel majority held that a high ranking supervisor's pre-election statement, "We have been told (by customers) that we would not continue to be the sole source of supply if we become unionized due to the possibility of a work stoppage because of strikes or walkouts," constituted substantial interference with the election. The Board found that in fact only one customer had informed the company that it would seek other sources of supply. This material misrepresentation in the circumstances of a vigorous anti-union campaign was enough to set the election aside. The Board implied that had the statement been true, the employer would have been within his legal rights in making it.

The Board found cause to have an election set aside in *Trane Co.*[34] where the employer made certain statements under the guise of explaining his legal rights, which, *inter alia,* included: "Do you want to gamble away all these things?" (present benefits); that the employer would bargain on a

[29] 136 N.L.R.B. No. 10, 49 L.R.R.M. 1715 (1962).

[30] Long-Lewis Hardware Co., 134 N.L.R.B. 1554, 49 L.R.R.M. 1375 (1961).

[31] May Dep't Stores, Co., 85 N.L.R.B. 550, 24 L.R.R.M. 1436 (1949).

[32] The Board had previously drawn a line between statements which constituted "threat of reprisals" and those which were "predictions." An employer could say that he would be unable to pay the union scale, and if the union came in, he would have to move the plant. Chicopee Mfg. Co., 107 N.L.R.B. 106, 33 L.R.R.M. 1064 (1953). This distinction has now apparently lost its significance.

[33] 136 N.L.R.B. No. 3, 49 L.R.R.M. 1711 (1962).

[34] 137 N.L.R.B. No. 165, 50 L.R.R.M. 1434 (1962).

"cold blooded business basis"; and "the employees might come out with a lot less than they have now."

The Board found the former "threat or prediction" test to be too mechanical. In the future, the Board suggested, the surrounding circumstances and the economic realities of the particular employer-employee relationship will be determinative, rather than the application of a mere label to the employer's speech. The Board is becoming more conscious than before in creating and maintaining laboratory type conditions for the conduct of the election.

A new cause to set aside election results, that of racial appeals, has found limited acceptance with the Board. In the *Sewell Mfg.* case,[35] the Board ruled that under certain circumstances, racial appeals will provide grounds for setting aside an election. However, the majority established certain narrow limits within which such an appeal would be sufficient: (a) If the party making the appeal dishonestly and inaccurately represents the other party's position on racial matters, and/or does so in an inflammatory manner; (b) if the appeal to racial prejudice is on matters unrelated to the election issues or the union's activities.

Just prior to the election in *Sewell,* the employer distributed among all of his employees a photograph showing James Carey, President of the I.U.E., dancing with a Negro woman. Also, there was included a letter signed by Carey and Walter Ruether praising the freedom riders. In setting aside the election, the Board found that such propaganda had no relation to any issue in the election but was designed solely to excite racial feelings.

As indicated, this area is relatively new. However, the Board has recognized that racial prejudice is a powerful emotional force, not calculated to encourage reasoning. When such an appeal is made, the burden of proof is on the party making the appeal to establish that it was truthful and germane. But when there is a doubt as to whether the total conduct of the party was within the described bounds, the doubt will be resolved against him.

UNFAIR LABOR PRACTICES

Interference with Organizational Activity

In *May Dep't Stores Co.*[36] the Board breathed new life into the apparently discredited *Bonwit Teller* doctrine[37] by holding that an employer's refusal to grant a union equal time during working hours for the purpose of replying to pre-election speeches made by the employer violates section 8(a)(1) of the act. The Board found no basis for the contention that *Livingston Shirt*[38] "overruled the *Bonwit Teller* doctrine as it applies to department stores. . . ."[39] Moreover, the Board felt that nothing in the *Nutone*[40] case

[35] 138 N.L.R.B. No. 12, 50 L.R.R.M. 1532 (1962).

[36] 136 N.L.R.B. No. 71, 49 L.R.R.M. 1862 (1962).

[37] "It requires little analysis to perceive that *Bonwit Teller* was the discredited *Clark Bros.* doctrine in scant disguise. It is equally contrary to the statute and congressional purpose." Livingston Shirt Corp., 107 N.L.R.B. 400, 407, 33 L.R.R.M. 1156, 1158 (1953).

[38] Supra note 37.

[39] 49 L.R.R.M. at 1863. Compare the language quoted from *Livingston Shirt,* supra note 37.

[40] NLRB v. United Steelworkers of America (Nutone), 357 U.S. 357 (1958). In

prohibited the result reached. Members Rodgers and Leedom dissented essentially on the ground that *Nutone* would prohibit the finding of an unfair labor practice in the absence of a factual showing of substantial diminution of the union's ability to organize employees. Their point would seem to be well taken since the majority made no analysis of the facts to substantiate its conclusion that the union's organizational ability was in fact substantially diminished.

In the absence of such a factual analysis, the result reached takes on the appearance of a per se rule, with all the attendant difficulties such rules have encountered in the courts.[41]

Superseniority

In *Swarco Inc v. NLRB*[42] the Sixth Circuit upheld the Board's position that granting of superseniority to economic strikers who would return to work, though motivated by an honest desire to continue plant operations, violates sections 8(a)(1) and (3). Particularly significant is the fact that the trial examiner's finding as to the employer's good faith was not questioned by the Board.

Within eight days of the *Swarco* decision, the Third Circuit, in *Erie Resistor Corp. v. NLRB*,[43] decided that the adoption of preferential seniority to assure tenure to replacements is proper if the employer is motivated solely by necessity to protect and continue his business. This disagreement among the circuits seems destined for resolution since the Supreme Court granted certiorari in the *Erie* case.[44]

Employer's Right to Subcontract, Lockout and Discontinue Operations

1. *Subcontracting*

In *Town & Country Mfg. Co.*[45] the Board held that an employer's unilateral *decision* to subcontract work, previously performed by members of the bargaining unit, violates section 8(a)(5) regardless of the motivation behind such decision. Thus the decision to subcontract work is now a mandatory subject of collective bargaining. *Fibreboard Paper Prods. Corp.*,[46] which made the employer's motivation the deciding factor in determining whether a refusal to bargain in good faith had occurred, is thereby overruled.

On the precise facts of *Town & Country*, an overruling of *Fibreboard*

Nutone the General Counsel argued that an otherwise valid no solicitation rule, when coupled with employer anti-union solicitation, constitutes an unfair labor practice. "For us to lay down such a rule of law would show indifference to the responsibilities imposed by the Act primarily on the Board to appraise carefully the interests of both sides of any labor-management controversy in the diverse circumstances of particular cases and in light of the Board's special understanding of these industrial situations." Id. at 362-63.

[41] See Comment, Labor Law's New Frontier: The End of the Per Se Rules, 3 B.C. Ind. & Com. L. Rev. 487, 513 (1962).

[42] 303 F.2d 668 (6th Cir. 1962).

[43] 303 F.2d 359 (3d Cir.), cert. granted, 83 Sup. Ct. 48 (1962). For extended discussion of the Board's position and the difficulties it has encountered in the courts, see Note, 4 B.C. Ind. & Com. L. Rev. 438 (1963); Comment, supra note 41.

[44] Supra note 43.

[45] 136 N.L.R.B. No. 111, 49 L.R.R.M. 1918 (1962).

[46] 130 N.L.R.B. 1558, 47 L.R.R.M. 1547 (1961).

is not necessary since the employer's decision was in fact discriminatively rather than economically motivated. The motivation behind such a decision may, however, still be relevant for purposes of fashioning a remedy. Significantly, the Board, in ordering reinstatement of the replaced employees and compulsory termination of the subcontract, based this action on the 8(a)(3) (discrimination) violation rather than 8(a)(5) (refusal to bargain).

Member Rodgers was unwilling to overrule *Fibreboard*. Moreover, he dissented to the majority's finding that the employer had in fact discriminated. Since he viewed the decision to subcontract as being economically motivated, he found no refusal to bargain.

Two subsequent cases give impetus to the idea that the severe remedy given in *Town & Country* will be used where discrimination does in fact occur. In *Renton News Record*,[47] a group of employers jointly purchased a "Goss Press" which greatly increased the speed and efficiency of composing room operations and greatly reduced the need for composing room employees. When this change of operations was effectuated, excess employees were discharged. The Board, relying on *Town & Country*, found that a unilateral decision to automate constitutes a refusal to bargain. In this respect, there is no difference between a unilateral decision respecting subcontracting and one respecting automation.

However, there was an express finding that the employers were not discriminating and, therefore, did not violate 8(a)(3). The employer was ordered to bargain with the union about composing room conditions but was not required to reinstate the discharged employees. The Board's reasoning was that reinstatement would adversely affect employers who were not parties to the proceeding and that such relief would be punitive, not remedial. In respect to this latter point, it would seem significant that the Board expressly noted that the employers "were faced with the choice of either changing their method of operations . . . or being forced to go out of business." The conclusion seems virtually irresistable that the remedial aspect of the case rested on the finding that the discharges were not discriminatively motivated.

Hawaii Meat Co.[48] gives further credence to this conclusion. Here, the employer, after his employees had engaged in an economic strike, unilaterally decided to subcontract the work which had been performed by these striking employees. Upon the strikers' unconditional offer to return to work, they were informed that they no longer had jobs to return to. Applying *Town & Country*, the Board held that the decision to subcontract had turned the economic strike into an unfair labor practice strike. Accordingly, the refusal to take back the employees constituted a violation of 8(a)(3). Reinstatement was ordered, and the employer was ordered to bargain with the union about his decision to subcontract.

That the duty to bargain under *Town & Country* may be quite easily satisfied was perhaps indicated in *Weingarten Food Center, Inc.*[49] This case involved an employer's decision to sell five out of six retail outlets. He did not bargain on this decision, but he did notify the union of his plan to grant

[47] 136 N.L.R.B. No. 55, 49 L.R.R.M. 1972 (1962).
[48] 139 N.L.R.B. No. 75, 51 L.R.R.M. 1430 (1962).
[49] 140 N.L.R.B. No. 67, 52 L.R.R.M. 1001 (1962).

severance pay to those employees who were not to be rehired at the remaining store. He also asked for union assistance in deciding which employees should be retained. The 8(a)(5) complaint was dismissed. Member Rodgers relied on his dissent in *Town & Country*. Member Fanning felt that *Weingarten* was an improper case in which to apply *Town & Country*, since the General Counsel had not taken exception to the trial examiner's ruling that there had been no 8(a)(5) violation. Member Brown dissented on the ground that *Town & Country* would require a finding of an 8(a)(5) violation.

The subcontracting issue has also been before the federal courts under Section 301 of the Taft-Hartley Act.[50] For instance, in *Webster Elec.*[51] the Court of Appeals for the Seventh Circuit held that an employer who unilaterally subcontracted janitorial services, previously performed by bargaining unit employees, violated the union shop clause in the collective bargaining agreement. There was no express clause covering subcontracting, but the court found the employer's action to be inconsistent with the basic purpose of a union shop.

2. *Discontinuance of Operations*

In *Darlington Mfg. Co.*,[52] it was held that an employer who completely shuts down operations after a union election victory, where he is at least partially motivated by animosity towards the union, violates section 8(a)(3). The employer vigorously contended that it had an absolute right to stop doing business, regardless of its motivation for such a decision. Recognizing that the issue had never before been directly decided, the Board found that section 8(a)(3) constituted a qualification on the right to stop doing business. The stark rigidity of this proposition may be qualified by the Board's finding that Darlington was but one link in a chain of corporate entities which included several other plant facilities. Viewed in this light, the facts do not strictly support the conclusion that Darlington went out of business, but the language of the opinion is clearly sufficient to indicate that the case was decided on that basis.[53]

The Board ordered back pay for approximately 500 affected employees, to continue until such time as they are able to obtain "substantially equivalent" employment. In addition, the remaining plants in the corporate chain were ordered to bargain with the union about the preparation of preferential hiring lists, on which the names of affected employees would be placed. Of course, section 8(a)(5) was also violated but the Board made it clear throughout the opinion that the back pay award was given to rectify the 8(a)(3) violation.

An employer, for valid economic reasons, decided to transfer the site of his plant facilities. However, he was found to have accelerated the transfer

[50] 61 Stat. 156 (1947), 29 U.S.C. § 185 (1958).

[51] UAW, Local 391 v. Webster Elec. Co., 299 F.2d 195 (7th Cir. 1962).

[52] 139 N.L.R.B. No. 23, 51 L.R.R.M. 1278 (1962). This case is analyzed from both management and union points of view, in Comment, supra p. 581.

[53] But see Star Baby Co., 140 N.L.R.B. No. 67, 52 L.R.R.M. 1094 (1963), where the employer, for reasons similar to those in *Darlington*, completely shut down his operations. However, unlike *Darlington*, the company was not found to be part of a corporate chain. Nevertheless, the Board ordered the same kind of relief as in *Darlington*.

by one month because of union animosity. Accordingly, in *Ox-Wall Prods. Mfg. Co.*[54] he was ordered to pay one month's back pay to affected employees. Since the case was decided before *Town & Country,* the unilateral nature of his decision to transfer was not discussed.[55]

NLRB v. Preston Feed Co.[56] is another acceleration decision of interest. Here, the employer had been planning to suspend its trucking department and subcontract the work to an affiliated company, this latter point, unlike *Darlington,* being given no attention by the court. With a heavy turnover in truck drivers (and such being legitimate business justification), the only point undecided was the date at which the operations would be suspended. With the advent of a union, however, it was immediately suspended. While the Third Circuit agreed with the Board that the acceleration was an unfair labor practice, it did feel that the Board's order to resume operations was *not* to be construed as precluding future suspension provided that economic justification existed. But with the justification already present, the question unanswered by the court was just how long the employer must wait before it could properly close down its department.

Unlike *Ox-Wall* there was conflicting evidence as to when the *final* decision was made — before or after the union notice. The Board resolved this conflict against the employer, thus rejecting the contention that the employer had already decided to close two days later. The *Ox-Wall* relief is therefore unavailable. The presence of the original economic justification (*i.e.,* turnover of drivers) would tend to eliminate a *Darlington*-type relief requiring the affiliate to employ the discharged employees.

In effect, *Preston* is a hybrid of *Darlington* and the type of cases in which the advent of the union is considered an additional expense, one part of the overall economic decision to close.[57] This latter situation has never been accepted by the Board.[58] It has consistently held that hostility to union wages is hostility to unions.[59] The *Preston* case could be interpreted as one circuit court finally agreeing with this position. However, its hybrid character (*i.e.,* the union was not considered as a cost or economic factor itself) would tend to discourage such a conclusion.

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54 135 N.L.R.B. 840, 49 L.R.R.M. 1585, enforced, 51 L.R.R.M. 2595 (2d Cir. 1962).

55 A similar result was reached in Myers Ceramic Prods., 140 N.L.R.B. No. 33, 51 L.R.R.M. 1605 (1962).

56 309 F.2d 346 (4th Cir. 1962).

57 NLRB v. J. M. Lassing, 284 F.2d 781 (6th Cir. 1960) (union considered as a cost, not as a union). See also NLRB v. New England Web, Inc., 51 L.R.R.M. 2426 (1st Cir. 1962). (In view of the precarious financial position of the company, the unionization was a legitimate economic factor) and NLRB v. Houston Chronicle Publishing Co., 211 F.2d 848 (5th Cir. 1954). (The issue is whether there were bona fide business reasons, not whether motives were sound or unsound). These cases are discussed in the Comment referred to in note 52 supra.

58 Meyers Ceramic Prods., supra note 55.

59 NLRB v. Barbers Iron Foundry, 126 N.L.R.B. 30, 45 L.R.R.M. 1283 (1960); NLRB v. R. C. Mahon Co., 118 N.L.R.B. 1537, 40 L.R.R.M. 1417 (1957); NLRB v. Missouri Transit Co., 116 N.L.R.B. 587, 38 L.R.R.M. 1301 (1956); NLRB v. Wallich & Schwalm Co., 95 N.L.R.B. 1265, 28 L.R.R.M. 1438 (1951); NLRB v. Rome Prods. Co., 77 N.L.R.B. 1217, 22 L.R.R.M. 1138 (1948).

3. *Lockout*

In *Brown Food Store*[60] all members of a multi-employer bargaining unit were locked out and temporarily replaced in response to a union strike at one employer's premises. This constituted a violation of 8(a)(3), the response not being within the rule of *Buffalo Linen*[61] which protects a lockout when it can be viewed as a "defensive measure to protect the solidarity of the multi-employer unit."[62] When the non-struck employers replaced their employees and continued to operate, their action was not "defensive" but "retaliatory."[63] In other words, the entire bargaining unit may lock out its employees, but only the struck employer may continue operations with replacements.[64]

It should be obvious to the reader that the *Town & Country* and *Darlington* decisions are but two sides of the same coin. They represent the general trend of Board decisions to restrict unilateral action by employers. The "management prerogative" area is being slowly but surely whittled away.[65]

Informational Picketing

1. *8(b)(4)*

In *Teamsters, Local 760 v. NLRB*,[66] the union conducted a consumer boycott against the employer's products in addition to a general strike which was in progress. Pickets were placed at retail stores urging the public to refrain from purchasing the primary employer's non-union products. Employees of the primary employer were informed that the picketing was for the purpose of enlisting public sympathy. No work stoppages resulted. The Board found this to be a violation of section 8(b)(4)(ii)(B), documenting its per se interpretation with the legal history of clause (ii) and a literal reading of the proviso to 8(b)(4) which exempts only "publicity, other than picketing."

The circuit court observed, however, that the problem of free speech cannot be ignored in this area. Thus the court felt that in the absence of a substantial economic impact, it would have a difficult time finding constitutional justification for the prohibition of peaceful, non-coercive picketing addressed solely to consumers. In effect, this court places picketing within the "publicity" proviso, though the language expressly excludes it.[67]

2. *8(b)(7)*

It was decided in *Irvins, Inc.*[68] that, for purposes of 8(b)(7)(B), a valid election is "conducted" on the date the election results are certified by the

[60] 137 N.L.R.B. No. 6, 50 L.R.R.M. 1046 (1962).

[61] NLRB v. Truckdrivers Local 449, 353 U.S. 87 (1957).

[62] 50 L.R.R.M. at 1047.

[63] Id. at 1048.

[64] The right to replace economic strikers is, of course, guaranteed. NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938).

[65] For an analysis of the cases leading to these important decisions, see the Comment referred to in note 52 supra.

[66] 308 F.2d 311 (D.C. Cir. 1962).

[67] For an analysis of *Local 760* and a criticism of the result reached, see Desmond, Consumer Picketing: The Limited Restrictions of the Labor Management Relations Act, 4 B.C. Ind. & Com. L. Rev. 79 (1962).

[68] 134 N.L.R.B. 686, 49 L.R.R.M. 1188 (1961).

Board. Accordingly, there can be no basis for an alleged violation of that section until the results are certified, and recognition or organizational picketing may continue up to that time. Similarly, the twelve month period, within which picketing for recognition is unlawful, begins to run from the date of certification. However, for remedial purposes, under section 8(b)(7)(B), the Board will require cessation of all post election picketing for twelve months from the date on which the union terminates its picketing, either voluntarily or involuntarily by court injunction.

In *Woodward Motors Inc.*,[69] the union placed two signs in a snowbank abutting the employer's premises after it had lost an election, and the results had been certified. One sign read: "We Are Not Picketing for Organization or Recognition." The other stated that "The Employees of Woodward Motors Inc. Are Not Protected by a Union Contract." Two union agents were stationed in a nearby auto to insure that nothing happened to the signs. This was held to be recognition or organizational picketing within the meaning of 8(b)(7)(B), the Board making it clear that the publicity proviso of 8(b)(7)(C) is to be read as a self-contained unit [*i.e.*, applying only to (C)], without reference to the rest of 8(b)(7). This view was reinforced in *Janel Sales Corp.*[70]

In other words, 8(b)(7)(C) is not to be read as a direct qualification to 8(b)(7), as a whole, but merely as a statement of a separate but related rule. Under the doctrine of the above two cases, the proviso of subparagraph (C) is not available to a union as a defense to an alleged violation of subparagraph (A).

The Board was presented with another 8(b)(7)(C) situation in the *Barker Bros. Corp.* case,[71] in a slightly different context, however. There, during normal store hours the union picketed an employer's retail outlets at the customers' entrances with signs stating that the stores were non-union and asking that the public cease doing business therein. The union took elaborate steps to advise the public and other unions that the picketing was purely informational. Nonetheless, over a three month period there were three instances of delivery stoppages and several minor delays. During this time picketing occurred at approximately eighteen stores.

The majority, holding this to be protected by 8(b)(7)(C), reasoned that the publicity proviso protects publicity picketing except where an "effect" thereof "is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services."[72] If read literally, these words would clearly prohibit the activity here involved. This was the basis of the dissent by members Rodgers and Leedom. The majority took what might be called a "rule of reason" approach and would not apply the words literally. What constitutes an "effect" under the statute depends on whether the employer's business has been disrupted or curtailed. It is apparent that a quantitative test which concerns itself solely with the number of deliveries not made or services not

[69] 135 N.L.R.B. No. 90, 49 L.R.R.M. 1576 (1962).

[70] 136 N.L.R.B. No. 143, 50 L.R.R.M. 1033 (1962).

[71] 136 N.L.R.B. No. 54, 51 L.R.R.M. 1053 (1962).

[72] Section 8(b)(7)(C) was added by § 704(c) of the LMRDA, Pub. L. 86-257, 73 Stat. 519 (1959).

performed, is, in the majority's opinion, an inadequate yardstick for determining whether to remove informational picketing from the proviso's protection. The test, as framed by the majority, is described in terms of actual impact on the employer's business. Whether such picketing is unlawful under 8(b)(7)(C) is a question of fact to be resolved in light of all the circumstances of the case.[73]

In view of the Board's holding in the *Barker* case and in the previously mentioned *Teamsters* decision, it is apparent that the Board intends to measure the lawfulness of 8(b)(4) and 8(b)(7) informational picketing in terms of its economic effect on the employer's business. This will necessitate some affirmative showing of substantial interference or curtailment.

Union Control of Seniority

A question of unfair representation by an union arose in *Miranda Fuel Co.*[74] The case involved a business in which a seasonal slack existed from April 15 to October 15 during which time many employees were laid off. The collective bargaining agreement provided that the layoff should be according to seniority. Those employees with insufficient seniority to withstand the layoff could obtain a leave of absence for the duration of the slack season. If they reported to the shop steward on the morning of October 15, their seniority status would be unaffected by the leave of absence, but any man who failed to report on the specified day forfeited all seniority rights under the agreement. Lopuch, an employee, for personal reasons applied for and received a leave of absence commencing on April 12. Because of illness he was prevented from reporting until the 30th. At the union's insistence, Lopuch was dropped to the bottom of the seniority list. Initially, the union based its request on the fact that Lopuch had returned late, but, upon learning of his illness, the reason later given was Lopuch's early departure. Lopuch's seniority status was such that he would have been entitled to work during the entire slack season.

The Board, in a supplemental decision,[75] held that section 8(b)(1)(A) "prohibits labor organizations when acting in a statutory representative capacity, from taking action against any employee upon considerations or classifications which are irrelevant, invidious, or unfair."[76] It stated that unions are under a greater duty than employers with respect to members of the bargaining unit. Moreover, the union and employer violate sections 8(b)(2)

[73] For an extended analysis of 8(b)(7) cases, see Comment supra note 41, at 605.

[74] 140 N.L.R.B. No. 7, 51 L.R.R.M. 1584 (1962).

[75] Originally, the Board had decided that the collective bargaining agreement violated sections 8(a)(1) and (3) and 8(b)(1) and (2) of the act because it gave complete control of seniority status to the union, 125 N.L.R.B. 454, 45 L.R.R.M. 1122 (1959). On appeal the Second Circuit held that the union did not have complete control over seniority and the action taken against Lopuch was unauthorized and "constituted a delegation of power over seniority rights which improperly encouraged union membership and discriminated against employee Lopuch," NLRB v. Miranda Fuel Co., 284 F.2d 861 (2d Cir. 1960). Certiorari was granted (June 5, 1961) and the case was remanded to the Board for consideration in the light of Local 357 v. NLRB, 365 U.S. 667 (1960), decided in the interim. *Local 357* decided that a union hiring hall was not per se unlawful under 8(a)(3).

[76] 51 L.R.R.M. at 1587.

and 8(a)(3) respectively when the union causes the employment status of an employee to be derogated upon the basis of an unfair classification. Chairman McCulloch and member Fanning dissented essentially on the ground that the union's action, without an additional factual showing of unlawful motivation, did not amount to arbitrary and invidious discrimination in violation of its duty to represent fairly all members. Furthermore, they felt that the proper remedy for such a violation would be revocation of certification.[77] The case does in fact decide for the first time that failure to represent fairly gives rise to an unfair labor practice.

Enforcement of Collective Agreements Under Section 301

The Supreme Court in *Smith v. Evening News Ass'n*[78] held that section 301(a)[79] gives courts, both federal and state, jurisdiction to allow an employee as an individual and as assignee for forty others to bring an action for damages for breach of a collective bargaining contract even though the alleged conduct resulting in the breach was an unfair labor practice within the act. It premised its decision on the proposition that while the authority of the Board to deal with unfair labor practices which also violate a collective bargaining agreement is not displaced by section 301, it is not exclusive and does not destroy the jurisdiction of the courts in a 301 situation.

The Court then proceeded to refute the concept that all suits to vindicate individual rights arising from a collective bargaining contract should be excluded from the coverage of section 301. In so doing, the Court cited decisions which did allow suits under section 301 to obtain specific performance of an arbitration award ordering reinstatement and back pay to individual employees,[80] to recover wage increases in a contest over the validity of a collective bargaining contract,[81] and suits against individual union men for violation of a no strike clause.[82]

The rights of individual employees concerning rates of pay and conditions of employment, the Court stated, are a major focus of negotiation of collective bargaining contracts. Individual claims lay at the heart of the grievance and arbitration proceeding. Thus the exclusion of these claims from the scope of section 301 would stultify the Congressional policy of having the administration of collective bargaining contracts accomplished under a uniform federal law.

The Court, therefore, ruled that the *Westinghouse* case[83] is no longer

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[77] For cases where revocation of certification was deemed to be the appropriate remedy, see Hughes Tool Co., 104 N.L.R.B. 318, 32 L.R.R.M. 1010 (1953); Laurus & Brother, 62 N.L.R.B. 1075, 16 L.R.R.M. 242 (1945).

[78] 371 U.S. 195 (1962). Certiorari was granted after the Michigan Supreme Court affirmed dismissal on jurisdictional grounds. 362 Mich. 350, 106 N.W.2d 785 (1961).

[79] 61 Stat. 157 (1947), 29 U.S.C. § 185(a) (1958).

[80] United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

[81] Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962).

[82] Atkinson v. Sinclair Ref. Co., 370 U.S. 238 (1962).

[83] Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp., 348 U.S. 437 (1955). Suit was brought to enforce the right of employees to wages which were due. The Court dismissed on the grounds that it believed the absence of any provision in § 301(a) to enforce the individual's rights under Federal law precluded jurisdiction.

controlling. Any individual in a section 301 proceeding may enforce employees' rights under the collective bargaining agreement. The courts, in turn, may entertain such a suit, irrespective of the labor policy questions involved, and the courts may resolve these questions on their own.[84]

The Supreme Court had occasion in *Drake Bakeries, Inc. v. Bakery Workers, Local 50*[85] to render a decision involving a section 301 suit for the second time in 1962.

The initial dispute resulted from a union-management disagreement as to certain days on which the plant should be operated. The union, it was charged, instigated a strike making it impossible to resume production on the day involved.

In the district court action for damages, the union successfully moved that the suit be stayed, pending arbitration of the dispute in accordance with the terms of the contract.[86] It further denied by affidavit that it instigated the strike or encouraged its members not to work on the day in question. The court of appeals reversed.[87]

The Supreme Court found the language of the contract sufficiently broad to obligate the employer to arbitrate claims for damages for forbidden strikes. This the Court found to be especially binding on the employer in view of the union denial of responsibility. And it was on the same broad contract language that the Court was able to distinguish this arbitrable argument from that in the *Atkinson* case where claims or complaints of the employer were expressly excluded.[88]

The Court in its opinion stressed the Congressional policy underlying section 301 in providing for the enforcement of a collective bargaining contract, the purpose being to place "sanctions behind agreements to arbitrate grievance disputes, preferring final adjustment by a voluntary method of the parties."

For this reason, the Court declined to enforce merely the no-strike clause which it could do if it refused a stay in the suit for damages in the district court. Instead, it enforced both the no-strike clause and the agreement to arbitrate by granting a stay until the claim for damages was arbitrated. By so doing, the Court concluded, it would merely be remitting the company to the forum of its own choice, and would in no way deny to it the damages to which it may be entitled.[89]

The significance of this decision lies not in the apparent binding effect

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[84] 371 U.S. at 298. For a full discussion of *Smith v. Evening News Ass'n*, see case note p. 766 infra.

[85] 370 U.S. 254 (1962).

[86] 196 F. Supp. 148 (S.D.N.Y. 1960). The contract provided for compulsory, final and binding arbitration, at the request of either of "all complaints, disputes or grievances arising between them involving questions of interpretation or application of any clause or matter covered by this contract or any act or conduct or relation between the parties hereto, directly or indirectly." 370 U.S. at 257, n.2.

[87] 287 F.2d 155 (2d Cir. 1961).

[88] Supra note 82. The Court relied on its reasoning in a prior case that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute he has not agreed to submit." United Steelworkers v. Gulf Nav. Co., 363 U.S. 574, 582 (1960).

[89] Drake Bakeries v. Bakery Workers, Local 50, supra note 85, at 263.

of the arbitration clause but in the difficulty the Court had in reaching its decision. It limited the decision to the specific language of the clause and the specific union activity involved. It would seem that it will take persuasive evidence for a union to establish from the language of the agreement that the employer intended to forego his rights under section 301, regarding alleged violations of the agreement, particularly in view of the fact that a court cannot be considered a less competent adjudicator than an arbitrator.

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