Boston College Law Review

Volume 4 | Issue 2 Article 25

1-1-1963

Labor Law—Strike Assessments Not Periodic Dues.—NLRB v. Food Fair Stores

Stephen M. Richmond

Labor Law—Strike Assessments Not Periodic Dues.—*NLRB v. Food Fair Stores.*[1]—After having been partly unsuccessful in collecting a uniformly-imposed strike assessment to be paid to fellow members on strike against another market chain, the Retail Food Clerks Union requested the Food Fair Corporation to execute a check-off and to discharge employees who failed to pay.[2] Under the union shop agreement then in force, the company attempted to collect the funds and threatened to discharge nonpaying employees. In affirming the decision of the National Labor Relations Board, the Court of Appeals for the Third Circuit HELD: Assessments of any type are not "periodic dues" within Sections 8(a)(3) and 8(b)(2) of the Labor Management Relations Act[3] even when uniformly levied among all members of the union; hence the action of both the union and the company, under these same sections, constituted an unfair labor practice.

In the *Food Fair* case the circuit court was faced with the problem of effectuating protections from the possible inequities of a closed shop granted workers by sections 8(a)(3) and 8(b)(2), and concurrently permitting orderly operation of labor unions and its corollary, the necessary maintenance of a union treasury (also implicitly recognized and protected by these same sections). As will be seen, the court felt bound by existing NLRB rulings while rejecting both attempts to distinguish these decisions from the principal case and to rationalize a more permissive interpretation of the term "periodic dues." Consequently, the court was unable to completely harmonize the somewhat conflicting anti-closed shop and anti-free rider policies, and the problem raised by this case remains unsolved.

Section 8(a)(3) allows union shop agreements. It provides that union membership may be required within thirty days of employment, and prohibits an employer from denying employment to any person whom he reasonably believes was not allowed union membership for any reason other than for nonpayment of "periodic dues and initiation fees." Section 8(b)(2) goes on to limit union activity in that any attempts to have an employee discharged for any other reason than nonpayment of "periodic dues and initiation fees uniformly required" shall constitute an unfair labor practice.

From the outset the NLRB has differentiated between the terms "periodic dues" and "assessments." Failure to pay assessments for nonattendance at union meetings,[4] for refusal to participate in union activities such as picketing,[5] or for failure to meet financial obligations on time,[6] have all been held invalid grounds for discharge under union shop agreements. The rationale in these decisions has been that the assessments are not uniformly levied in conformity with the express wording of the act and that such a charge is punitive, not a revenue measure. These cases may be distinguished

---

[1] 307 F.2d 3 (3d Cir. 1962).

[2] The contract then in force provided for a union shop, and employees had given the required written authority to the company for the check-off of "membership dues."

[3] 61 Stat. 140 (1947), 29 U.S.C. §§ 158(a)(3) & (b)(2) (1958) (Taft-Hartley Act).

[4] Electric Auto-Lite Co., 92 N.L.R.B. 1073, 27 L.R.R.M. 1205 (1950), enf'd, 196 F.2d 500 (6th Cir.), cert. denied, 344 U.S. 823 (1952).

[5] Eclipse Lumber Co., 95 N.L.R.B. 464, 28 L.R.R.M. 1329 (1951), enf'd, 199 F.2d 684 (9th Cir. 1952).

[6] The Great Atl. & Pac. Tea Co., 110 N.L.R.B. 918, 35 L.R.R.M. 1159 (1954).

from the present situation, then, in that they do not dispose of the question of an assessment which has been uniformly charged to *all* members for the express purpose of raising revenue. Fines and penalties, the union concedes, are clearly outside the term "periodic dues"[7] for these may be a basis for discrimination against individual workers contrary to the protection of the act. The argument continues that if every member of a union is to pay an assessment he is actually paying a fee which can be distinguished from the sanctioned periodic dues only because it is not divided up into periodic payments; the money could be collected then by raising the dues rather than by levying an assessment. This attempt to draw a distinction between types of assessments (individually assessed fines and penalties as opposed to generally applied charges) is rejected by the court because of "a pattern revealing consistency in the holding of the Board that assessments in any of their various forms may not be included within the term 'periodic dues.' "[8]

The legislative history of section 8(a)(3) indicates that the problem of uniformly required assessments was considered in the light of the history of Cecil B. De Mille,[9] who was ejected from a union and subsequently blackballed from radio for a refusal to pay such an assessment earmarked for political purposes. The main problem in this area at which 8(a)(3) was directed was the forcing of a member to contribute to a political cause with which he might not agree.[10] The Board has made the questionable deduction that in attacking the result in *De Mille*, Congress has also attacked uniform assessments in a union security provision.[11]

Reference was made by the present court to a Seventh Circuit case[12] in which an employee was discharged for failure to pay union dues. Here the court assumed without discussion that if the discharge had been for nonpayment of assessments it was illegal, and the case was decided on the question whether an employee was obliged to continue to tender dues after they had been refused for nonpayment of an assessment.

The court is apparently putting the greatest weight on a Ninth Circuit decision, *NLRB v. I.A.M. Guided Missile Lodge 1254*,[13] which deals with a discharge for failure to pay a generally levied assessment. In this case an employee was dropped from union membership for nonpayment of dues *and*

[7] Brief for Respondent Union, p. 4.

[8] 307 F.2d at 16.

[9] De Mille v. American Fed'n of Radio Artists, 17 A.C.A. 480, 175 P.2d 851 (1946), aff'd, 31 Cal. 2d 139, 187 P.2d 769, cert. denied, 333 U.S. 876 (1947).

[10] Now here was a man called upon to put up a contribution to fight a cause in which he did not believe and because he refused to pay the assessment made on him, he was kicked around and is now unable to pursue his work. Such a situation is intolerable and must be corrected.

93 Cong. Rec. 4135 (1947) (remarks of Senator Ellender). Cf. International Ass'n of Machinists v. Street, 367 U.S. 740 (1961).

[11] It is important to note that the assessment in the De Mille case was not discriminatory; that is, it was uniformly required of all members. Hence, it appears that Congress intended to eliminate the nonpayment of assessments as such, as a basis for discharge of employees.

International Harvester Co., 95 N.L.R.B. 730, 733, 28 L.R.R.M. 1337, 1338 (1951).

[12] NLRB v. Die & Tool Makers Lodge No. 113, 231 F.2d 298 (7th Cir.), cert. denied, 352 U.S. 833 (1956).

[13] 241 F.2d 695 (9th Cir. 1957).

assessments and was subsequently discharged from his employment in conformity with a union shop contract which provided that as a condition of employment any member of the union "must pay initiation fees, monthly dues, and general assessments."[14] The Board contended first that to enforce a general assessment was illegal, and second that the inclusion of the invalid term was so interwoven with the valid terms "initiation fees and monthly dues" that all these provisions were infected. In ruling against the Board on this latter point the court in the *Guided Missile* case merely assumed that employment cannot be conditioned on payment of special assessments. Inasmuch as the court ruled that the employee could be discharged in any event, for nonpayment of dues, the issue as to whether assessments are "dues" did not receive full consideration. Thus we have for the first time express consideration on the Court of Appeals level concerning the possible extension of the term "periodic dues" to encompass general assessments under section 8(a)(3).

The court further considered the effect of the somewhat similar language in Sections 302[15] and 8(a)(3) of the Labor Management Relations Act. Section 302 prohibits under criminal penalty the payment of anything of value to the union by the employer excepting, *inter alia*, "money deducted from the wages of employees in payment of membership dues in a labor organization."[16] In construing this section of the act, the Justice Department held that assessments were within the definition of "membership dues" and hence could be legitimately checked-off.[17] The Board acquiesced in this judgment as a "matter of comity,"[18] but held in the *International Harvester*[19] case that section 302 was capable of broader interpretation than section 8(a)(3) with which it was then concerned. Inasmuch as an employee must voluntarily authorize a check-off of an assessment, he may, from time to time, withhold the authority.[20] Hence, under section 302, the worker was protected from capricious and arbitrary assessment. The court in the instant case held that the distinction between sections 8(a)(3) and 302 was valid, laying special emphasis on the criminal sanctions imposed under section 302 in that they represented quite another purpose than those expressed in sections 8(a)(3) and 8(b)(2). Section 302 provides strong protection from sweetheart contracts, pay-offs, etc., while sections 8(a)(3) and 8(b)(2) attempt to avoid the problems of a closed shop.

---

[14] Id. at 696.

[15] LMRA, § 302, 61 Stat. 157 (1947), 29 U.S.C. 186(c) (1958).

[16] Supra note 15.

[17] Opinion of the Justice Department, 22 L.R.R.M. 46 (1948).

[18] William Wolf Bakery, 122 N.L.R.B. 630, 43 L.R.R.M. 1147 (1958). The Board's willingness to conform to the holding of the Justice Department was based on the fact that section 302 was enforceable by the Justice Department. Thus any collateral effect of the check-off provisions of a contract, *i.e.*, as affecting the validity of a contract to serve as an election bar, should be governed by that department's ruling. The court seems correct in not extending this rationale to sections within the sole jurisdiction of the Board.

[19] Supra note 11. Here the Board ruled that a contract provision denying union membership and requiring dismissal from a job for nonpayment of general assessments was invalid.

[20] Opinion of the Justice Department, supra note 17, at 47.

The similarity of the amendments to the Railway Labor Act[21] and section 8(a)(3) also were considered by the court, but were rejected on the ground that assessments were included in the union shop provisions of the Railway Labor Act amendments because of unique conditions in the rail unions wherein they are traditionally supported by assessments rather than dues.[22]

The court's reliance on the distinction between "periodic dues" and "assessments" as these words apply to sections 8(a)(3) and 8(b)(2) and "regular dues" under section 302 seems to have left the union in an anomalous situation. If an assessment uniformly levied among all the members of a union is not encompassed by the term "periodic dues," then the very union employees for whom the protection in section 8(a)(3) was designed could fall victim to free riders who may refuse to meet their fair share of union duties. This argument was dismissed by the court on the ground that internal sanctions are still left to a union to enforce payment of assessments as long as no attempt is made to interfere with a member's employment. While this device may be sufficient in some cases, this need not be so in every instance. In the instant case the court does not consider specifically what sanctions might be applied or their efficacy. Moreover, it would seem that the usual methods available such as ostracism or denial of health and social benefits could only be effective, if at all, over a long period of time, rather than immediately when the funds are needed. Thus, if a union is threatened by the trend of negotiations and its treasury is depleted, it may well be totally hamstrung in its bargaining if it is unable immediately to raise a strike fund. It would seem that the only sure way to maintain a union treasury at a "safe" level would be to keep regular dues at a constantly high rate in excess of usual needs. The probable result of such a policy is an even greater hardship on the union members than the remedy afforded by the *Food Fair* decision. One answer would be to allow general and uniformly levied assessments, as opposed to fines and penalties, in construing section 8(a)(3) and 8(b)(2) as is permitted by the amendments to the Railway Labor Act. There can be no doubt that a decision contrary to the *Food Fair* holding would add to labor's bargaining power. This consideration, however, was never pressed by any of the litigants or the court, all of whom dealt solely with strictly legalistic points of construction rather than any socio-economic question.

In *Worthington Pump & Mach. v. Douds*[23] the court pointed out that the LMRA was designed with the interplay of labor and management in

---

[21] 64 Stat. 1238 (1951), 45 U.S.C. § 152 Eleventh (a) (1958). The applicable phrases of the act read:

> . . . carriers . . . shall be permitted—(a) to make agreements, requiring as a condition of continued employment, that within sixty days . . . all employees shall become members of the labor organization. . . . *Provided,* That no such agreement shall require such condition of employment with respect to employees . . . to whom membership was denied or terminated for any reason other than failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required . . . .

[22] Machinists v. Street, supra note 10, at 765-66.

[23] 97 F. Supp. 656 (S.D.N.Y. 1951).

mind, and further noted that the act was intended to strengthen management's position at the bargaining table.[24] In view of the instant court's basing its decision on a distinction between dues and assessments, yet failing to show why this point is determinative, some reference to the overall purpose of the act could and should have been made. However, considering the Board's position and the Court of Appeals' decisions in the *Guided Missile Lodge* and *Food Fair* cases, with the implicit reluctance to add to the bargaining power of the union in construing 8(a)(3) and 8(b)(2) of the act, it appears that any solution will have to come from Congress.

STEPHEN M. RICHMOND

Labor Law—Superseniority Policies—Relevance of Employer's Motive. —***Erie Resistor Corp. v. NLRB.***[1]—During an economic strike, the Company, after a sharp decline in business and loss of important orders, hired replacements including new employees and returning strikers, and offered tenure to replacements over strikers returning upon settlement of the strike as an inducement to cross picket lines. The Company established a superseniority policy to implement its assurances of tenure under which the replacements were to receive twenty years added to their regular length of service. After settlement of the strike, the Company filled still-vacant places with returning employees according to seniority. Several months later a number of employees were laid off for economic reasons, including some recalled strikers whose seniority was now comparatively low because of the superseniority plan. The Union's complaint that the preferential seniority plan was an unfair labor practice was recommended for dismissal as the evidence did not support a determination that the Company's action was prompted by an improper motive. The Board ruled, however, that the adoption of preferential seniority was inherently discriminatory, the Company's motive being wholly irrelevant.[2] In denying enforcement of the Board's cease and desist order, the Court of Appeals for the Third Circuit HELD: The implementation by the Company of a superseniority plan, although discriminatory, is not a violation of section 8(a)(3)[3] of the National Labor Relations Act unless motivated by a desire to discourage or encourage membership in a labor organization. The adoption of preferential seniority to assure tenure to replacements is proper if the Company is motivated solely by necessity to protect and continue its business.

---

[24] Id. at 660.

---

[1] 303 F.2d 359 (3d Cir.), cert. granted, 83 Sup. Ct. 48 (1962).

[2] 132 N.L.R.B. 621, 48 L.R.R.M. 1379 (1961).

[3] 49 Stat. 449 (1935), as amended by, 61 Stat. 140 (1947), 29 U.S.C. § 158(a)(3) (1958), as amended by Pub. L. 86-257, § 201(e), 29 U.S.C. § 158(3)(i) (1959), provides:

Section 8(a) It shall be an unfair labor practice for an employer—

. . .

(3) by discrimination in regard to hire or tenure of employment . . . to encourage or discourage membership in any labor organization . . . .