

1938

## Labor Law: Affirmative Orders of the National Labor Relations Board: Orders to Disestablish Company Supported Unions

Charlotte Anschuetz

Follow this and additional works at: <https://scholarship.law.marquette.edu/mulr>



Part of the [Law Commons](#)

---

### Repository Citation

Charlotte Anschuetz, *Labor Law: Affirmative Orders of the National Labor Relations Board: Orders to Disestablish Company Supported Unions*, 22 Marq. L. Rev. 202 (1938).

Available at: <https://scholarship.law.marquette.edu/mulr/vol22/iss4/5>

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized editor of Marquette Law Scholarly Commons. For more information, please contact [elana.olson@marquette.edu](mailto:elana.olson@marquette.edu).

## NOTE

LABOR LAW—AFFIRMATIVE ORDERS OF THE NATIONAL LABOR RELATIONS BOARD—ORDERS TO DISESTABLISH COMPANY-SUPPORTED UNIONS.—Relief from the five unfair labor practices<sup>1</sup> which the National Labor Relations Act is designed to exterminate is gained through “cease and desist” orders of the National Labor Relations Board, supplemented by “such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this act.”<sup>2</sup> Reinstatement of discharged employees and restitution of pay have been the most frequent type of affirmative action.<sup>3</sup> These orders to amend violations of Section 8 (3) and (4) usually require reinstatement of the employee, and to make whole for any loss of pay suffered by reason of the discrimination, without prejudice to seniority or other rights and privileges previously enjoyed. A recent adaptation and broadening of this order has been found necessary in the cases of “runaway” mills and factories; here the Board has required payment of transportation expenses of any employee and his family who is forced to move to obtain reinstatement, which reinstatement must be to former positions or to positions corresponding to those originally held, whether in the old plant or in the new.<sup>4</sup> Affirmative action under Section 8 (5) has also been required constantly. Here the guilty respondent company is ordered to bargain collectively with the chosen representatives upon request to do so “as the exclusive representative of its employees \* \* \* in respect to rates of pay, hours of

<sup>1</sup> National Labor Relations Act, 49 STAT. 449 (1935), 29 U.S.C.A. (1937 Supp.) §§ 151-166, provides: Section 8: “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) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it.

“(3) By discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

“(4) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.

“(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a).”

<sup>2</sup> Section 10(c): “\* \* \* If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act \* \* \*”

<sup>3</sup> As in *Agwilines, Inc.*, (1936) 2 N.L.R.B. 1, 19, *aff'd*, *Agwilines, Inc. v. NLRB*, 87 F. (2d) 146, 151 (C.C.A. 5th, 1936); for cases see NLRB SECOND ANNUAL REPORT (1937) 148-154; *The Labor Board and the Courts* (1938) 32 ILL. L. REV. 568, 577-582.

<sup>4</sup> *S & K Knee Pants Company, Inc.* (1937) 2 N.L.R.B. 940; *Herbert Robinson and Otto A. Golluber, Co-Partners Doing Business Under the Firm and Style of Robinson and Golluber*, (1936) 2 N.L.R.B. 460; *Remington Rand, Inc.* (1937) 2 N.L.R.B. 626. In *NLRB v. Remington Rand, Inc.*, 94 F. (2d) 862 (C.C.A. 2d, 1938) the court refused to enforce that part of the Board's order requiring transportation costs, on the ground that this was punitive.

employment, and other conditions of employment.”<sup>5</sup> With all of these orders, except transportation expenses, the courts have found no difficulty.

The question of the scope of affirmative action, however, has arisen very decisively in supplementing “cease and desist” enforcement of Section 8 (1) and (2) by orders to “disestablish” certain company unions; “disestablishment” meaning not merely the withdrawal of support and sponsorship, but dissolution of the company union, or at the least no further recognition of it as a bargaining agency. In the *Greyhound Cases*,<sup>6</sup> the Supreme Court reversed the action of the circuit courts of appeals that refused to enforce orders to disestablish; in *NLRB v. Remington Rand*<sup>7</sup> the circuit court of appeals again refused to enforce disestablishment.

A company union was started in *NLRB v. Pennsylvania Greyhound Lines, Inc.* by the employers without any request from the employees or any demand for organization, the general managers even drawing up the petitions which the employees later circulated, “asking for” a union.<sup>8</sup> Elections were ostensibly to be conducted by the employees but were company-controlled at every step. The company drew up the by-laws and the regulations which were never presented to the entire group of employees for approval; it paid all the expenses; it gave and described the functions of the union and controlled all meetings and discussions. Control of the union was through a “joint reviewing committee” composed of half employees and half management, the chairman being a company executive, the regional manager. The union was merely an agency to handle individual grievances, and even then no matter could be discussed by the joint reviewing board if the department head refused to submit it. Thus no collective bargaining was possible. This was clearly a violation of Section 8 (1).<sup>9</sup> The company attempted to thwart the formation of a bona fide union, finally discharging five men for union activity, thus violating Section 8 (2) and (3).<sup>10</sup> The Board issued orders to cease and desist from these unfair practices, and also demanded the disestablishment of the company union. The fact situation and Board order in *NLRB v. Pacific Greyhound Lines, Inc.* were similar, except that there were fewer “formal provisions” of company control in the constitution and by-laws, employer control being none the less effective. On appeal to the respec-

<sup>5</sup> Recent cases are *NLRB v. Remington Rand, Inc.*, 94 F. (2d) 862 (C.C.A. 2d, 1938); *National Motor Bearing Company*, (1938) 5 N.L.R.B., No. 66; *The Jacobs Bros. Co., Inc.* (1938) 5 N.L.R.B., No. 87; *Zenite Metal Corporation* (1938) 5 N.L.R.B., No. 73.

<sup>6</sup> *NLRB v. Pennsylvania Greyhound Lines, Inc.*, 58 Sup. Ct. 571 (1938) *rev'd* *NLRB v. Pennsylvania Greyhound Lines, Inc.*, 91 F. (2d) 178 (C.C.A. 3d, 1937); *NLRB v. Pacific Greyhound Lines, Inc.*, 58 Sup. Ct. 577 (1938) *rev'd* *NLRB v. Pacific Greyhound Lines, Inc.*, 91 F. (2d) 458 (C.C.A. 9th, 1937).  
<sup>7</sup> 94 F. (2d) 862 (C.C.A. 2d, 1938).

<sup>8</sup> A letter from the General Manager of Maintenance stated that “The management has decided to set up a plan of employee representatives \* \* \* It is to our interest to pick out employees to serve on the committee who will work for the interest of the company and will not be radical.” A sample of the petition which the employees should sign asking for a union accompanied the letter. *Pennsylvania Greyhound Lines, Inc.*, (1935) 1 N.L.R.B. 1, 7, 8.

<sup>9</sup> *Supra* note 1.

<sup>10</sup> *Ibid.*

tive circuit courts of appeals in both cases, the disestablishment orders were disallowed, each court holding that the order outlawed the company union in advance of an election and without a hearing. The Supreme Court, however, relied upon the *Railway Labor Cases*<sup>11</sup> that employer recognition of a company union might be enjoined and the union disestablished, if necessary to prevent interference with the rights secured to employees by the statute.

The company unions which the Board ordered disestablished in the *Remington Rand Case* were created as a result of "back-to work" associations during a strike by employees in six plants. This strike had been precipitated by a refusal to negotiate in good faith with the "joint protective committee" which represented a clear majority of the workers. It was broken by typical ruthless strike-breaking tactics: an intense propaganda drive, threats to move the plants, strike breakers from four leading strike-breaking agencies, spies, bribery, and misstatements, coupled with a "back-to-work" movement which the Board had no doubt was sponsored by the employers.<sup>12</sup> Thereafter the back-to-work associations in each plant were formed into company unions with company sponsorship. The court based its refusal to allow the order of disestablishment on the two grounds that it did not add anything to the order which already required the respondent to withdraw all recognition from the unions, and that it was "quite likely to impress an unfair stigma on these unions."<sup>13</sup>

The problem before us is the permissive scope of these affirmative orders. It is first necessary to reexamine the policies and purpose of the National Labor Relations Act, and the intent of Congress. One of the policies stated in Section 1 of the Act is to protect the "exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing."<sup>14</sup> Section 7 enumerates the rights of employees under the Act, including that "Employees shall have the right to self-organization, to form, join, or assist labor organizations."<sup>15</sup> Section 8 specifies the unfair practices

<sup>11</sup> *Texas & N. O. R. Co. v. Brotherhood of Railway and Steamship Clerks*, 281 U.S. 548 (1930); *Virginian Railway Co. v. System Federation No. 40*, 300 U.S. 515 (1937). In the first case, the Railway Co. was ordered to completely "disestablish" the Association of Clerical Employees "because they were shown to be motivated to oppose demands of the Railway Brotherhood and to promote another organization more favorable to the employers. It was held that the aim of the Railway Labor Act was to insure freedom from interference with selection of representatives, and therefore that enforcement thereof was contemplated.

<sup>12</sup> 2 N.L.R.B. 626, 664-666.

<sup>13</sup> *NLRB v. Remington Rand, Inc.*, 94 F. (2d) 862, 870 (C.C.A. 2d, 1938).

<sup>14</sup> Section 1: "\* \* \* It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

<sup>15</sup> Section 7: "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."

from which labor shall be protected.<sup>16</sup> The policy of the act, in a word, is to permit and foster real collective bargaining between labor and capital. This is substantiated by Congressional intent. Senator Wagner said, when speaking on the bill in the Senate, that it meant the "Prohibition of certain unfair practices which are intended to make the worker a free man, to decide for himself whether he wants an organization, and if he wants one, what the type of organization shall be."<sup>17</sup> The Senate Committee reported on the bill that its objectives were (1) to promote peace in industry by developing collective bargaining and allowing employees to organize freely and to deal with employers through representatives of their own choosing, and (2) to procure economic adjustment by encouraging "That equality of bargaining power which is a prerequisite to equality of opportunity and freedom of contract."<sup>18</sup> The report of the House Committee on the proposed bill is even clearer, for it states that such affirmative action is to be taken as will effectuate the policies of the act enumerated in Section 1, that the action will need to be adapted to the needs of the individual case, and specifically that it includes "refraining from bargaining with an organization corrupted by unfair labor practice."<sup>19</sup> The general policy and intent of the Act are clear.

The most important problem is to ascertain when such a factual situation exists that affirmative action is necessary in addition to an order to cease and desist. By legislative and administrative law requirement, the Board may make no order except upon findings of fact that unfair labor practices are being or have been engaged in,<sup>20</sup> but its findings are conclusive when there is any evidence to sustain them.<sup>21</sup> In this situation, such evidence is found in the relation between the employer and the union. Mere status as a company union is not sufficient to warrant an order of disestablishment. The Act does not, and never was intended to outlaw the company union. The House Committee in its report, after stating that company unions were not prohibited, added "if by the term is meant an organization of workers confined by their own volition to the boundaries of a particular plant or employer," and that "It is of the essence that the right of employees to self-organization and to join or assist labor organizations should not be reduced to a mockery by the imposition of employer controlled labor organizations."<sup>22</sup> The dangers and defects of the company union were

<sup>16</sup> *Supra* Note 1.

<sup>17</sup> 79 CONG. REC. 7574 (1935).

<sup>18</sup> Report of the Senate Committee on Education and Labor, SEN. REP. No. 573, p. 1-4, 74th Cong. 1st Sess.

<sup>19</sup> Report of the House Committee on Labor, H. R. REP. No. 1147, p. 3, 23, 74th Cong. 1st Sess. The whole statement is the following: "And to take such affirmative action as will effectuate the policies of the bill; i.e., as defined in section 1, to encourage the practice of collective bargaining and to protect the exercise by the worker of full freedom of association, self-organization, and designation of representatives of his own choosing. The orders will of course be adapted to the needs of the individual case; they may include such matters as refraining from collective bargaining, posting of appropriate bulletins, refraining from bargaining with an organization corrupted by unfair labor practices. The most frequent form of affirmative action required in cases of this type is specifically provided for \* \* \*" (p. 23).

<sup>20</sup> Section 10(c): "\* \* \* The Board shall state its findings of fact."

<sup>21</sup> Section 10(e): "\* \* \* The findings of the Board as to the facts, if supported by evidence, shall be conclusive \* \* \*"

<sup>22</sup> Report of the House Committee on Labor, *supra* note 19, pp. 17, 18.

also brought out in the Senate discussion on the bill: first, that it is normally confined to a single unit; secondly, that the employees' choice of representatives is usually limited to those working there; and thirdly, that it is supported in whole or part by the employer.<sup>23</sup>

An aggravated example of the more common types of employer interference is found in the *Greyhound Bus Cases*. Here were (1) initial creation of the union and continued sponsorship thereof; (2) dictation of by-laws and regulations; (3) financial support; (4) no dues or assessments; (5) leadership through supervisory employees; (6) all functions dictated by management; (7) no problems discussed without consent of the management; (8) no referendum by employees or meetings for purpose of instructing their representatives; (9) intimidation of employees into membership.<sup>24</sup> The board found "the words combination, interference, and support are separately inadequate to describe the management's part in the association." There was "complete subjugation and control." Disestablishment was the only remedy because "The control of the management so permeates every aspect of its operations that the Association and the management cannot be regarded as separate entities so as to require only the cessation of the latter's domination, interference, and support."<sup>25</sup> Here we are given two criteria to judge whether disestablishment is necessary: (1) if the union disestablished is so constituted as to be incapable of functioning as a bona fide bargaining agency<sup>26</sup> and (2) if there has been so much interference that the union does not exist apart from the management. A third criterion is hinted at in *Atlanta Woolen Mills*<sup>27</sup> where there was little direct interference, but the Good Will Club, a mild form of company union, published a notice on the company bulletin boards that a closed shop agreement had been entered into with it; this the company did not deny, and thereby caused a great influx of membership. The Board at first ordered that a notice be posted that there was no closed shop agreement, but on a second hearing<sup>28</sup> ordered disestablishment as the only effective remedy to restore the situation as it was before the company interfered with the self-organization of its employees, for otherwise the company union would not have attained such membership. This criterion is really one which investigates ill-gotten gains of the employer and refuses to permit him to keep them. Closely linked with this test is the oft-quoted reason for disestablishment given by the Board in *Wheeling Steel Corporation*,<sup>29</sup> that a company union, once started, without further action on the part of the employer, may be an effective power device for him because "Even though he would not have freely chosen the council (company union) as an initial proposition, the employee once having chosen, may, by force of a

<sup>23</sup> 79 CONG. REC. 7570 (1935).

<sup>24</sup> For a discussion of these, see Wettach, *Unfair Labor Practices Under the Wagner Act* (1938) 5 LAW AND CONTEMPORARY PROBLEMS, 223; *The Labor Board and the Courts* (1938) 32 ILL. L. REV. 568.

<sup>25</sup> 1 N.L.R.B. 7, 11-15, 1.c. 15.

<sup>26</sup> See also *Inland Steel Company* (1938) 6 N.L.R.B., No. 66 in which the Board declared on page 32 that because of the sponsorship and economic support of the company union "That organization cannot, in view of the circumstances, operate as a true representative of the employees, and we shall order it disestablished."

<sup>27</sup> 1 N.L.R.B. 316 (1936).

<sup>28</sup> 1 N.L.R.B. 328 (1936).

<sup>29</sup> 1 N.L.R.B. 699 (1936).

timorous habit, be held firmly to his choice. The employee must be released from these unlawful compulsions." This was recently reiterated in *Inland Steel Company*, where the Board found that "The unlawful refusal to bargain collectively and the sponsorship of a company-dominated union necessarily disrupt the morale of the men, crippling the membership drive of the bona fide union and making serious inroads on membership already gained."<sup>30</sup> This might be termed the criterion of psychological necessity for disestablishment when, under a shallower analysis, a "cease and desist" order would seem to be sufficient. It must always be remembered, however, that the power of the Board extends only to reestablishing the status quo, had the wrongs not been committed.<sup>31</sup>

Whether the circuit court of appeals was justified in refusing the order to disestablish in the *Remington Rand* case is not easy to say. There is no strong evidence that the unions were being actively interfered with or fostered by the management after the strike. At the same time, the court's doubt that Rand paid the expenses of the back-to-work associations during the strike seems difficult to sustain when there was no indication of any other means of financing—no dues, contributions, or requests for any, and many expenditures—particularly when all was so clearly shown to be a part of Rand's strike-breaking scheme. The court's opinion that the order to disestablish does not add anything to the order to withdraw all recognition from the unions (the latter on the ground that another representative had been elected) is not necessarily exact, when one considers the "psychological" aspect. Although the court does recognize this in some degree by its statement that the order might "impress an unfair stigma on these unions,"<sup>32</sup> which shows clearly on which side the court throws the burden of the possible unfairness.

The aforementioned criteria explain why the Supreme Court did not weigh heavily the argument of both circuit courts of appeals in the *Greyhound Cases*, that the Board was not warranted in disestablishing a union before an election of the bargaining agency. Theoretically, perhaps, since the purpose of the Board is to protect the union chosen by the employees as a collective bargaining agent and the employees are free to choose a plant union, this would seem logical; but realistically it is the actual free choice of the employees over which the Board must watch, and correct abuses thereof even though not occurring on election day. When these abuses are supported by evidence, it is our contention that the Board has a very wide power of disestablishment.<sup>33</sup>

CHARLOTTE ANSCHUTZ.

<sup>30</sup> 6 N.L.R.B., No. 66, p. 33.

<sup>31</sup> NLRB v. Remington Rand, Inc., 94 F. (2d) 862, 872 (C.C.A. 2d, 1938); *Inland Steel Company* (1938) 6 N.L.R.B., No. 66, p. 33; NLRB SECOND ANNUAL REPORT (1937) p. 144.

<sup>32</sup> NLRB v. Remington Rand, Inc., 94 F. (2d) 862, 870 (C.C.A. 2d, 1938).

<sup>33</sup> Some recent cases of disestablishment are: *Tiny Town Togs, Inc.* (1938) 7 N.L.R.B., No. 10; *Art Crayon Company, Inc.* (1938) 7 N.L.R.B., No. 17; *The Hoover Co.* (1938) 6 N.L.R.B., No. 110; *David E. Kennedy, Inc.* (1938) 6 N.L.R.B., No. 111; *Arthur L. Colton and A. J. Colman, Co-Partners, doing Business as Kiddie Kover Manufacturing Company*, (1938) 6 N.L.R.B., No. 54; *Kelly Springfield Tire Co.* (1938) 6 N.L.R.B., No. 53; *The Griswold Manufacturing Company*, (1938) 6 N.L.R.B., No. 49; *Simplex Wire and Cable Company*, (1938) 6 N.L.R.B., No. 42; *M. Lowenstein and Sons, Inc.*, (1938) 6 N.L.R.B., No. 37; *Trenton-Philadelphia Coach Co.* (1938) 6 N.L.R.B., No. 25.