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Labor Law: Scope of Remedy

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RECENT DECISIONS

Labor Law—Scope of Remedy: Despite a party's continued refusal to bargain in good faith with reference to a particular substantive provision of a collective bargaining contract, the United States Supreme Court has held, in *H. K. Porter Co. v. N.L.R.B.*,[1] that the Board is without power to devise a remedy which would compel the violator to agree to that provision.

In this particular case, the employees' bargaining agent, the United States Steelworkers' Union, sought to procure a clause providing for the check-off of union dues. Although it had no general policy against a dues check-off and admitted that such procedure, being already utilized at some other plants, would cause it no inconvenience, the company adamantly refused to grant such a provision for the reason that it "did not wish to give aid and comfort to the Union."[2] The Trial Examiner, whose findings and conclusions were adopted by the National Labor Relations Board, concluded that the employer had failed to bargain in good faith, its refusal to grant a check-off being solely "for the purpose of frustrating agreement with the Union."[3] The Board's standard order requiring the company to bargain in good faith on the check-off issue was upheld by the Court of Appeals in an opinion which intimated that the Board might devise a remedy requiring the company to accept the disputed clause in order to purge itself of its prior bad faith.[4] As a result of the confusion generated by the opinion's ambiguity and the divergent interpretations given it by the Board, the company and the union,[5] the Court of Appeals rendered a decision in clarification of that which it had previously handed down.[6] In clarifying its position, the Court of Appeals expressed the opinion that when (a) the subject of the dispute is a mandatory subject of bargaining, (b) an impasse is reached, (c) the impasse results from bad faith on the part of one who has no "business reason" for maintaining its stance, and (d) the violator has "unmistakably demonstrated a continuing intent to frustrate the Act," the Board

[1] 397 U.S. 99 (1970).
[2] H. K. Porter Co., Inc., AFL-CIO, 153 N.L.R.B. 1370, 1373.
[3] *Id.* at 1372.
[4] United Steelworkers of America v. N.L.R.B. 363 F.2d 272 (1966).
[5] The company interpreted the decree as another order that it bargain in good faith and, thus, proposed to discuss the possibility of making available to the union a table in the payroll office. The union, on the other hand, interpreted the decree as an order requiring the company to both agree to the check-off provision and allow the union to collect dues during non-working hours in non-working areas of the plant. The Board, accepting the company's interpretation, ordered the company to bargain with the union as to some form of dues collection. United Steelworkers of America, v. N.L.R.B., 389 F.2d 295, 297-298 (1967).
[6] United Steelworkers of America v. N.L.R.B., 389 F.2d 295 (1967).

is justified in compelling the violator to agree to the disputed clause.[7]

Acting without benefit of a clear definition of the precise scope of Section 8(d) of the National Labor Relations Act,[8] the Court of Appeals interpreted that section as a guide to be used in determining whether a violation has occurred and not as a limitation upon the scope of remedy the Board may devise. Thus, reasoned the Court, since that section does not relate to the scope of remedy, the provision that the obligation to bargain collectively "does not compel either party to agree to a proposal" would not prohibit the Board from compelling the recalcitrant employer to agree to the check-off.[9] such compulsion would not preclude the violator from seeking a concession in return, but would merely prevent it from "dreaming up new reasons" for opposition to the clause after its prior bad faith with reference thereto has been determined. Only in this manner, concluded the Court, might a party's ability to frustrate the purposes of the Act be circumscribed.[10]

Recognizing the desirability of devising a remedy which would prevent circumvention of the Act, the United States Supreme Court nevertheless considered the Board's action in compelling agreement to be an overextension of the powers conferred upon that agency[11] and an act in direct contravention of Section 8(d). Interpreting that section as both a guide and a limitation, the Court pointed out the anomaly that would exist should 8(d) be viewed as precluding the Board from finding bad faith in mere failure to reach agreement on a particular proposal while permitting the Board to compel agreement in that same dispute.[12]

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[7] *Id.* at 299, 301.

[8] The pertinent provisions of this Act read as follows:

> For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . . 29 U.S.C.A. § 158(d).

That this section had never been clearly defined so as to provide for a ready solution to the problem presented in this case was recognized by the Supreme Court:

> ". . . [T]his is the first time in the 35-year history of the Act that the Board has ordered either an employer or a union to agree to a substantive term of a collective-bargaining agreement." H. K. Porter v. N.L.R.B., 397 U.S. 99, 106 (1970).

[9] 389 F.2d 295, 299.

[10] *Id.*

[11] That the Court would so hold any balancing of broad policy interests by the Board a usurpation of power was predictable in view of its previous statement:

> "[W]e think that the Board construes its functions too expansively when it claims general authority to define national labor policy by balancing the competing interests of labor and management." American Ship Building Co. v. N.L.R.B., 380 U.S. 300, 316 (1965).

[12] 397 U.S. at 107, 108.

Although the Court had never before been so explicit with reference to the scope of that section, its present position was predictable in view of its prior holdings to the effect that Section 8(d) "contains the express provision that the obligation to bargain collectively does not compel either party to agree to a proposal or require the making of a concession," and, thus, "the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements."[13] Hence, the present holding:

> [W]hile the Board does have power . . . to require employers and employees to negotiate, it is without power to compel a company or a union to agree to any substantive contractual provision of a collective bargaining agreement.[14]

That the Act is built upon the basic premise of noninterference with substantive terms of a collective bargaining contract is quite clear; Congressional debates held while considering passage of the National Labor Relations Act attest to that fact.[15] Further reflecting the intention that this premise not be forgotten are expressions of Congressional leaders who, seeking to amend the National Labor Relations Act, succeeded in obtaining passage of the Taft-Hartley Act.[16]

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[13] N.L.R.B. v. American Nat. Ins. Co., 343 U.S. 395, 404 (1951). Further reflecting its attitude toward governmental interference with substantive terms of collective bargaining agreements, the Court has stated:

> ". . . Congress intended that the parties should have wide latitude in their negotiations, unrestricted by any governmental power to regulate the substantive solution of their differences." N.L.R.B. v. Insurance Agents' Int'l., 361 U.S. 477, 488 (1960).

See also, Terminal R.R. Ass'n. v. Brotherhood of Railroad Trainmen, 318 U.S. 1, 6 (1943) and N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45 (1937).

[14] 397 U.S. at 102.

[15] Senator Walsh, Chairman of the Senate Committee on Education and Labor, in debate on the bill that became the N.L.R.A., commented:

> [T]he bill requires no employer to sign any contract, to make any agreement, to reach any understanding with any employee or group of employees. . . . All employers are left free in the future as in the past to accept whatever terms they choose. . . . It anticipates that the employer will deal reasonably with the employees, that he will be patient, but he is obliged to sign no agreement; he can say, "Gentlemen, we have heard you and considered your proposals. We cannot comply with your request"; and that ends it. 79 Cong. Rec. 7659, 7660 (1935).

[16] In his report accompanying the bill which became the Taft-Hartley Act, Mr. Hartley, of the House Committee on Education & Labor, described the plight of the employer, subjected to ever-expanding governmental interference, as follows:

> . . . He has been required to employ or reinstate individuals who have destroyed his property and assaulted other employees. . . . He has seen the loyalty of supervisors undermined by the compulsory unionism imposed upon them by the National Labor Relations Board. He has been required by law to bargain over matters to which it is economically impossible for him to accede, and when he has refused to accede has been accused of failing to bargain in good faith. . . . H. R. Rep. No. 245, 80th Cong.,1st Sess. 4-5.

In recognition of and with deference to this intent, the Supreme Court, since first upholding the constitutionality of the N.L.R.A.,[17] has consistently forwarded the policy of freedom of contract.[18] As one writer has put it, the courts have "leaned backward in a conscious effort to provide the maximum of freedom to the parties."[19]

Regardless of its intentions, however, the question remains: Has the Court actually been able to maintain this position of non-interference—or have difficulties encountered in attempting to effectuate the policies of the Act compelled intervention with labor negotiations? And will the problems posed by the Court of Appeals necessitate future intervention in the area of substantive terms of labor contracts?

A definite trend toward governmental intervention in the collective bargaining process has already been established. The courts have dictated which subjects must be submitted to bargaining[20] and which ones must be kept out when met with objection.[21] Employers have been ordered to bargain with unions whose majority status has been doubtful[22] and to reinstate workers with back pay following unfair labor practice strikes.[23] Although these measures do not constitute interference with substantive terms, they do indicate the necessity of restrictions upon freedom of contract. It has been argued that the enforcement of reasonable behavior has already indirectly resulted in control over the substantive terms of labor contracts, and that the government, through deciding what constitutes good-faith bargaining and enforcing that which it considers reasonable behavior, has already made an "extensive sacrifice of freedom of contract."[24] As Professor Cox put it:

> [T]he law has crossed the threshold into the conference room and now looks over the negotiator's shoulder. Is the next step to take a seat at the bargaining table?[25]

In view of this development, he warned:

> [U]nless Congress writes into the law guides for the Board to follow, the Board may . . . seek to control more and more the terms of collective-bargaining agreements. *Id.* at 20.

[17] N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

[18] See Terminal R.R. Ass'n. v. Brotherhood of Railroad Trainmen, 318 U.S. 1 (1943); N.L.R.B. v. American Nat. Ins. Co., 343 U.S. 395 (1952); N.L.R.B. v. Insurance Agents' Int'l., 361 U.S. 477 (1960).

[19] ROSS, THE LABOR LAW IN ACTION: AN ANALYSIS OF THE ADMINISTRATIVE PROCESS UNDER TAFT-HARTLEY ACT, p. 27.

[20] Richfield Oil Corp. v. N.L.R.B., 231 F.2d 717 (D.C. Cir.) *cert. denied,* 351 U.S. 909 (1956).

[21] Allis-Chalmers Mfg. Co. v. N.L.R.B., 213 F.2d 374 (7th Cir. 1954).

[22] Franks Bros. Co. v. N.L.R.B., 321 U.S. 702 (1944).

[23] N.L.R.B. v. Seven-Up Bottling Co., 344 U.S. 344 (1953).

[24] See Dodd, *From Maximum Wages to Minimum Wages: Six Centuries of Regulation of Employment Contracts,* 43 COLUM. L. REV. 643, 675 (1943).

According to the *Porter* case, the answer is "no." Despite contrary trends, the policy deemed by the Court to be most worthy of advancement and to outweigh all other policy considerations remains freedom of contract.

One of those "other policies" overshadowed by this decision is that of the duty of the Board "to take such affirmative action ... as will effectuate the policies" of the Act.[26] The courts have generally applied a "hands-off" doctrine in reviewing orders of the Board,[27] acknowledging that the expertise gained by the Board through its daily encounter with labor relations cases renders it a more competent branch to deal with problems arising under the Act.[28] It is the Board which has been given the power to devise remedies to undo the adverse effects of violations,[29] and the Board which has been delegated the duty of "reconciling sometimes divergent interests" in devising those remedies.[30] The faith placed in that body has been extended to the point where the Court has declared that an order of the Board "should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act."[31]

The question then arises as to whether the Board's action in compelling a check-off provision actually did amount to such an attempt so as to justify, on grounds other than freedom-of-contract policy, the Court's intrusion into the Board's domain of "reconciling sometimes divergent interests" in the field of labor law controversy.

Besides freedom of contract, policies intended to be advanced by the Act include industrial peace,[32] equalization of bargaining power,[33] and curtailment of devices used to frustrate the collective

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[25] Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401, 1403 (1958).
[26] 29 U.S.C.A. § 160(c) (1965, Supp. 1970).
[27] See N.L.R.B. v. Seven-Up Bottling Co. 344 U.S. 344 (1953); Fibreboard Paper Products Co. v. N.L.R.B., 379 U.S. 203 (1964); N.L.R.B. v. J. H. Rutter-Rex Mfg. Co., 396 U.S. 258 (1969).
[28] As the Court has stated, where the Board, "in the exercise of its informed discretion" has rendered a decision, the Court will "give considerable weight to that administrative determination." Virginia Elec. & Power Co. v. N.L.R.B., 319 U.S. 533, 540 (1943). Summing up the Court's attitude, the Court of Appeals for the D.C. Circuit stated:

> In fashioning remedies the Board is drawing on its peculiar expertise and reservoir of informed judgment gained from continuous and intimate study of labor relations problems. Because of this, courts must pay special deference to the Board's choice of a remedy. . . . United Steelworkers of America v. N.L.R.B., 376 F.2d 770, 772 (1967).

[29] As the Court has stated, "One of the chief responsibilities of the Board is to direct such action as will dissipate the unwholesome effects of violations of the Act." Franks Bros. Co. v. N.L.R.B., 321 U.S. 702, 704 (1944).
[30] United Steelworkers of America v. N.L.R.B., 376 F.2d 770, 773 (1967).
[31] Virginia Elec. & Power Co. v. N.L.R.B., 319 U.S. 533, 540 (1943).
[32] Fibreboard Paper Products Co. v. N.L.R.B., 379 U.S. 203, 211 (1964).
[33] 79 Cong. Rec. 7658 (1935) (remarks of Senator Walsh).

bargaining process.[34] By compelling agreement to the check-off provision, it can well be argued that the Board promoted industrial peace through prevention of an unfair-labor-practice strike, the threat of which is ever-present when prolonged negotiations, hampered by violations of the duty to bargain in good faith, prove fruitless. It can also be well maintained that the Board's action did equalize the bargaining power of the parties, making more meaningful the company's duty to negotiate with the obviously overpowered union, which had already conceded ten of the eleven issues actually resolved.[35] And it is beyond doubt that the order of the Board would have prevented the company from frustrating the making of any contract, because it removed from negotiation the issue which had obstructed the reaching of an agreement. Thus, since the Board's order did achieve intended goals, it cannot rightfully be attacked as an attempt to achieve other ends than those which would effectuate the Act's policies.

Further, the Board's order cannot be criticized as violating the court's mandate against devising remedies which are punitive in nature,[36] since its purpose was not to punish the company but rather to "make meaningful this fundamental right of employees"[37] to conduct labor negotiations.

What this suggests is that, when confronted with conflicting policy decisions, the Court will make that choice which best advances the doctrine of freedom of contract, it being the Court's opinion that our present national labor policy is at a stage which still demands the precedence of this policy over all others. With all due deference owed to the expertise of the Board, the Court will not as yet stand aside when it witnesses an act which it considers to be an overextension of power and in contravention of the policy forwarded by the Court itself.

Whether the freedom-of-contract doctrine espoused by the Court in the *Porter* case will remain the policy most vigorously advanced depends upon the success of the Board in coping with the recalcitrant employer determined to defeat the effectiveness of the Act. The ineffectiveness of the Board's remedies, already the object of widespread criticism,[38] may in the future necessitate emphasis upon

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[34] *Id.*

[35] United Steelworkers of America v. N.L.R.B. 389 F.2d 295, 297 (1967).

[36] For a decision holding that punitive remedies are prohibited, *see* Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197 (1938).

[37] United Steelworkers of America v. N.L.R.B., 389 F.2d 295, 301 (1967).

[38] Aware of the limited scope of the Board's power to effectively eliminate circumvention of the N.L.R.A., the Chairman of the N.L.R.B. has commented:

> There may be no single reason for this steep rise in Section 8(a)(5) cases during the last decade, but a number of objective observers believe that a major explanation is that the Board's traditional remedies are

upon other policy considerations. At the present time, however, freedom of contract reigns, susceptible to dethronement by Congressional action alone.

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not sufficiently effective to encourage voluntary compliance with this important part of our law. In recent years, Committees of the Congress, the courts, as well as labor law scholars have expressed concern that the Board's refusal-to-bargain remedies may be inadequate to achieve the purposes of the Act. McCulloch, *Past, Present and Future Remedies Under Section 8(a)(5) of the N.L.R.A.*, 19 LAB. L. J. 131, 133 (1968).

Also aware of this deficiency, Philip Ross has written:

The major shortcoming of the N.L.R.B. lies in its failure to adopt adequate and realistic remedies in those cases where the employer has unmistakenly demonstrated a continuing intent to frustrate the Act. Drotning and Lipsky, *The Effectiveness of Reinstatement as a Public Policy Remedy: The Kohler Case*, 22 IND. & LAB. REL. REV. 179 (1969).