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Labor Law - Unfair Labor Practice: Discharge for Whipsawing

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indefinite principles set forth by the court in this case will do little to quiet litigation. It is to be desired and hoped that future decisions will present clear and more easily determinable standards by which individual cases may be uniformly decided.

LABOR LAW—UNFAIR LABOR PRACTICE: DISCHARGE FOR WHIPSAWING

Defendants were wholesale liquor dealers engaged in annual collective bargaining agreements with the union representing their liquor salesmen. An impasse was reached concerning salesmen's commissions during the 1949 negotiations. The union struck only one member of the multi-employer bargaining unit and announced this to be the beginning of a whipsawing action. The employers attempted to retaliate by locking out their salesmen but the National Labor Relations Board ruled that the salesmen had been discharged. The U.S. Court of Appeals held that the companies could have successfully locked out their salesmen, but by discharging them they were guilty of an unfair labor practice and the court allowed the National Labor Relations Board's award of back pay to the union employees. *NLRB v. Morand Bros. Beverage Co.*, 204 F. 2d 529 (C.A. 7th, 1953).

In order to better understand the effect of this decision on labor-management relations, and to more easily comprehend the reasoning upon which it is based, it is necessary to examine in more detail the factual circumstances upon which it was decided.

When the union representing defendant's salesmen[1] struck only one member of the multi-employer bargaining unit,[2] thus beginning a general whipsawing action,[3] the association,[4] according to prearranged plans, sent to its salesmen a letter notifying them to turn in their accounts and

[1] The exclusive collective bargaining agent for all salesmen of the Chicago Association and of the Illinois Association, defendants in the instant case, was the Liquor and Wine Salesmen's Union, Local 62, Distillery, Rectifying and Wine Workers Int'l Union of America, AFL.

[2] April 6, 1953, the union struck the Old Rose Distributing Co., a member of the Illinois Association.

[3] The term refers to a device by which the union strikes only one employer or a small group of employers in the multi-employer bargaining unit and then moves on to another small segment. The union can exert pressure on a single employer who finds his fellow members of the bargaining unit gathering his market, while the union can support the small part of its membership which is on strike almost indefinitely. The technique is described in Leonard v. NLRB, 205 F. 2d 355, 356 (C.A. 9th, 1953) and in "Whipsawing in Multi-Employer Bargaining," 3 Stanford L. Rev. 510 (1951).

[4] Defendants in the initial action were all members of either the Illinois Wholesale Liquor Dealers Association or the Chicago Wholesale Liquor Dealers Association, both of which will hereinafter be referred to as the association.

reports and to settle any cash differences with their employers.[5] The salesmen were out from April 8th to May 1st, at which time all but one of the approximately 800 returned to work.

The union went before the NLRB[6] and the Board charged defendants with violation of Section 8(a)(3) of the National Labor Relations Act,[7] which provides that it is an unfair labor practice for an employer, by discrimination in regard to hire or tenure of employment, or any term or condition of employment, to encourage or discourage membership in any labor organization.[8]

The trial examiner found that the salesmen had been illegally locked out and were entitled to back pay. The Board accepted this finding, but held that the salesmen were discharged and not merely locked out.[9] On appeal, the Circuit Court ruled that a lockout in this instance was permissible, but a discharge was illegal and so remanded the case to the Board to clarify their decision.[10] The original trial examiner again found that the employers intended the severance to be temporary and only for the duration of the strike. The attorney for the Chicago Association testified that the employer had intended a legal discharge, not a lockout, and had also sought to possibly break the union.[11] The Board, relying on this testimony, reversed the trial examiner and declared the employers' action to be an illegal discharge under the Act. The Board further found that the intended permanent severance was also for the purpose of discouraging membership in and destroying the union, and thus called for an award of back pay to the salesmen.[12] Again on appeal, the Circuit Court held that it could not rule that evidence relied on by the Board was unsubstantial or inadequate.[13] In allowing the award of back pay, the Court affirmed a previous holding that the question of back pay is a broad discretionary one for the Board and not for the Courts.[14] A peti-

[5] This letter is reproduced in full in the first opinion of the Court of Appeals, NLRB v. Morand Bros. Beverage Co., 190 F. 2d 576, 579 (C.A. 7th, 1951).

[6] Hereinafter referred to as the Board.

[7] Hereinafter referred to as the Act.

[8] National Labor Relations Act, 61 Stat. 136 (1947), 29 U.S.C.A. § 100 (1947).

[9] Morand Bros. Beverage Co., 91 N.L.R.B. 409 (1950).

[10] NLRB v. Morand Bros. Beverage Co., 190 F. 2d 576 (C.A. 7th, 1951).

[11] The record indicated that hostility had arisen between this witness as counsel for the Chicago Association and the Illinois Association and that the witness had urged separate settlement with the union.

[12] Morand Bros. Beverage Co., 99 N.L.R.B. 1448 (1952). The court also ruled that the Old Rose Salesmen, being strikers, were not entitled to back pay unless they had unconditionally requested reinstatement during the strike.

[13] NLRB v. Morand Bros. Beverage Co., 204 F. 2d 529 (C.A. 7th, 1953).

[14] NLRB v. Seven-Up Bottling Co., 344 U.S. 344 (1953).

tion for certiorari by the Association to the United States Supreme Court was denied.

It appears that the Board in ruling on the legality of a lockout must look to the facts of each case and ordinarily the determining factor is the purpose which prompted the lockout by the employer.[15] The Board found to be in violation of the Act any motive contrary to the rights guaranteed in Section 7 of the Act, which is as follows: "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 other concerted activities for the purpose of collective bargaining, or other mutual aid or protection."[16] Thus, when the employer's main purpose was to prevent unionization,[17] discourage union membership,[18] compel membership in a company union,[19] or avoid contractual obligations to a union,[20] the action was ruled illegal. But in the absence of an unlawful motive, the Board has allowed lockouts where the objective was: to take advantage of a more profitable business site,[21] to accomplish needed repairs,[22] to avoid business losses,[23] or to avoid spoilage of materials.[24]

The question of whether employers in a multi-bargaining unit may lock out their employees in retaliation for the union's whipsawing action is of recent origin and is a highly controversial issue. It is an important factor in the struggle between labor and management for the ever changing balance of power. This is clearly evidenced by the intervention of employer and labor groups as amici curiae in the Court of Appeals during the instant case.[25]

[15] 51 Mich. L. Rev. 421 (1953).

[16] National Labor Relations Act: 61 Stat. 136 (1947), 29 U.S.C.A. § 101 (1947).

[17] NLRB v. Long Lake Lumber Co., 138 F. 2d 363 (C.A. 9th, 1943).

[18] NLRB v. Cape County Milling Co., 140 F. 2d 543 (C.A. 8th, 1944).

[19] NLRB v. Cowell Portland Cement Co., 148 F. 2d 237 (C.A. 9th, 1945).

[20] Gerity Whitaker Co., 33 N.L.R.B. 393 (1941); modified, 137 F. 2d 198 (C.A. 6th, 1942); cert. denied, 318 U.S. 763 (1943).

[21] Brown-McLaren Mfg. Co., 34 N.L.R.B. 894 (1941).

[22] Georgia Twine & Cordage Co., 76 N.L.R.B. 84 (1946); modified, 172 F. 2d 293 (C.A. 5th, 1948).

[23] Hobbs, Wall & Co., 30 N.L.R.B. 1027 (1941).

[24] Link Belt Co., 26 N.L.R.B. 227 (1940).

[25] Labor groups who filed amici briefs: American Federation of Labor; International Brotherhood of Teamsters; Chauffeurs, Warehousemen and Helpers of America; Bakery and Confectionery Workers International Union of America; Retail Clerks International Association; and Liquor and Wine Salesmen's Union, Local 62, affiliated with Distillery Rectifying and Wine Workers International Union of America.

Employer groups: Union Employers Section, Printing Industry of America, Inc.;

When the union strikes only one employer of a multi-employer bargaining unit, none of the remaining dealers know whether or not they are next to have their employees strike in the continuous whipsawing process. The employer who is struck suffers business losses while the fellow members of the bargaining unit, who are also his competitors, take over his profits. Meanwhile the union is able to support the small segment of strikers almost indefinitely.

To alleviate this situation, the employers choose to look upon a strike against one member of the unit as a strike against all members and retaliate by locking out all union employees, thus placing an equal burden on the union. Invariably, after the action terminates, the union files charges against the employer for an unfair labor practice and the Board, as in this case, is called on to give their decision.

Excepting the *Morand Bros.* case, the only other recent case to reach the Court of Appeals on this problem was *Leonard v. NLRB*[26] which was decided subsequent to the instant case. There the employers locked out their employees to offset a whipsawing movement by the union, but the employees were retained on the payrolls and their seniority and other benefits were protected when the strike was settled. Thus, there was no question but that the employers intended merely a temporary lockout. The Board completely ignored the effects of the whipsawing action on the economic position of the employer and held that such a lockout would violate the Act. But the Court of Appeals held that the Act relative to discrimination to discourage membership in labor organizations or to the refusal of the employer to bargain collectively was not violated. The Court in overruling the Board followed the reasoning in the instant case and allowed employers to invoke a temporary lockout where the union has begun a whipsawing action. The result, however, was contrary to that of the instant case since the Court in the *Leonard* case found that the employees had been merely locked out while the decision of the instant case was based on the finding that the employees had been permanently discharged.

Not in every instance, however, has the Board held such retaliatory action to be illegal. In *Matter of Betts Cadillac Olds, Inc.*[27] the National Labor Relations Board trial examiner expressed the opinion that the employer is not prohibited from taking reasonable measures where such measures are, under the circumstances, necessary for the avoidance of

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San Francisco Employers Council; Chicago Bakery Employers Labor Council; Seattle Department Stores Association; and National Beer Wholesalers Association of America.

[26] 205 F. 2d 355 (C.A. 9th, 1953).

[27] 96 N.L.R.B. 268 (1951).

economic loss or business disruption attendant upon an unannounced strike. The Board completely adopted this view and held that a multi-employer shutdown was lawful because prompted by economic uncertainty caused by the union's threat to strike the other employers without notice. It is also to be noted that in both *Morand Bros. v. NLRB* and *Leonard v. NLRB* the Board was split in its decision. Chairman Herzog, dissenting to the Board's ruling in the *Leonard* case, insisted that the lockout in question was being used as a legitimate weapon of resistance to union demands and was not an attempt to destroy the union.[28]

The Court of Appeals in refusing to overrule the Board in the instant case based its decision on the grounds that there was conflicting testimony before the Board concerning whether or not the employers intended a lockout or a permanent discharge, and since the Board felt that the greater weight of the evidence revealed a discharge rather than a lockout, the court could only consider, on review, the substantiality of the evidence on which the Board's decision was based. In so doing, the Court gives management the right to counteract one of labor's most effective weapons, the whipsaw. If the employers, however, were not allowed to retaliate in this instance, they would be at the mercy of the union. This would tend to tear down the concept of collective bargaining which has helped create desirable uniformity and stability in labor conditions.[29] Even though Section 7 of the Act gives employees the right to concerted activity with no mention of employers, the basic purpose of the N.L.R.A., as amended, is to remedy inequalities in permissible pressures between labor and management.[30] The lockout impliedly recognized in the 1947 amendment to the National Labor Relations Act should be seen for what it actually is—the employer's means of asserting economic pressure on unions and a corollary of the union's right to strike. The late Senator Taft, Senate author of the Taft-Hartley Act,[31] stated that the basic theory of the Bill is an attempt to create equality between the employer and the employee.[32]

Thus, it seems that in the interest of multi-employer bargaining the

[28] Davis Furniture Co., 100 N.L.R.B. 1016 (1952).

[29] See Rayonier, Inc., 52 N.L.R.B. 1269, 1273–74 (1943). See also The Multi-Employer Lockout, 3 Utah Law Rev. 122, 125 (1952). It has aso been said to be a defensive technique for small businessmen against the demands of strengthened unions. Multi-Employer Bargaining and the National Labor Relations Board, 66 Harv. L. Rev. 886 (1953).

[30] Sen. Rep. No. 105, 80th Cong. 1st Sess. 407 (1947).

[31] The National Labor Relations Act as amended is presently incorporated within the Taft-Hartley Act.

[32] Legislative History of the Labor Management Relations Act, Vol. 2, p. 1206 (1947).

federal courts are establishing precedent to the effect that the employer may lock out his union employees to counteract a whipsaw, unless the purpose of the lockout is to interfere with the concerted activities protected by Section 7, or to escape the duty to bargain collectively, as prescribed by Section 8(d)(4) of the National Labor Relations Act.[83]

SALES–BLANK ENDORSEMENTS OF MOTOR VEHICLE TITLE CERTIFICATES

The plaintiff brought an action against the defendant finance company to recover possession of an automobile which had been wrongfully mortgaged by a used car dealer who had agreed to sell that vehicle for the plaintiff owner. The owner had delivered two vehicles to the used car dealer together with the title certificates endorsed in blank, but with the spaces for the names of the assignees left blank. The dealer was to fill in the name of the assignee for each vehicle when he had made the sale and was also to have the certificates notarized. Before any sale had been made, the dealer gave chattel mortgages on the two automobiles to the finance company on the strength of the two title certificates which had been endorsed in blank. The dealer later defaulted on the mortgages, and the finance company took possession of one of the two automobiles. The court held that failure to fill the blank spaces on the certificates and the failure to have the certificates notarized made the certificates defective on their face. *Hawkins v. M. & J. Finance Corp.*, 238 N.C. 174, 77 S.E. 2d 669 (1953).

The defendant argued that the owner had estopped himself from claiming ownership as against the finance company by cloaking the dealer with indicia of ownership. Testimony was introduced that the custom of used car dealers is to buy old cars without a formal assignment made to the dealer by the former owner. Upon resale of the vehicle, the name of the new buyer is inserted in the space reserved for the name of the assignee, thus creating the impression that the transaction took place between the original owner and the subsequent buyer without intermediate ownership by the dealer.

The court discussed the North Carolina statute[1] regulating the transfer of title to automobiles and held, that compliance with the statute was required in the assignment of the certificate of title before the certificate could be an indicium of ownership. The court stated that the assignment of title by the owner's blank endorsement, which does not name the

[83] 61 Stat. 142 (1947), 29 U.S.C.A. § 101 (1947).

[1] N.C. Gen. Stat. (recompiled, 1953) c. 20, § 72.