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Article 10

Labor Law--Bargaining Order Inappropriate to Remedy Borderline Employer Unfair Labor Practice (NLRB v. Flomatic Corp., 347 F.2d 74 (2d Cir. 1965))

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able in the principal case, since the child was over the age limit prescribed by the adoption sections. The import of the case, then, consists in providing an alternative solution to those in petitioner's position, who would otherwise be unable to gain admission for their children under nonquota status.

It is not likely that the decision will "offer attractive possibilities for fraud," as the government contended. The holding here was limited to situations of pre-existing family units formed outside the United States. Therefore, its use as a precedent for the general importation of illegitimate children would be precluded.[19]

In view of the congressional expression of a policy favoring an easing of immigration restrictions[20] with reference to separated families, the instant decision is long overdue. This case is representative of the humanitarian approach being applied to the problem of immigrant family unity. The 1965 amendment of the Immigration and Nationality Act prescribes a new "series of preference categories that give priority to minor children . . . of persons who have become citizens . . . under the old law."[21] Significantly, the statute does not affect Section 101(b)(1)(B) or (D).[22] Since it is to be assumed that Congress was aware of the instant case, its silence in this matter would seem to indicate agreement with the Court's interpretation.

The Court, by its decision, has taken the most reasonable avenue available, striking down an arbitrary barrier established by a literal statutory interpretation which was clearly inconsistent with the basic policy underlying the law's enactment.

LABOR LAW — BARGAINING ORDER INAPPROPRIATE TO REMEDY BORDERLINE EMPLOYER UNFAIR LABOR PRACTICE. — On the day of a scheduled election to determine whether twenty-eight employees of respondent, a New York corporation, desired unionization, the employer distributed a letter to the employees which contained promises of future benefits, in addition to an invitation to deal directly with the respondent. Subsequent to losing the election, the union petitioned the National Labor Relations Board for a "bargaining order" which was issued by the Board upon a finding that the employer's letter constituted an unfair labor practice. The United States Court of Appeals for the Second Circuit reversed the decision of

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and spouse. . . ." (Immigration and Nationality Act § 101(b)(1)(F), 75 Stat. 650 (1961), 8 U.S.C. § 1101(b)(1)(F) (1964)).

[19] *Supra* note 15, at 538-39.

[20] See, *e.g.*, S. REP. No. 1515, 81st Cong., 2d Sess. 468 (1952).

[21] N.Y. Times, Aug. 26, 1965, p. 1, col. 1.

[22] Pub. L. No. 236, 89th Cong., 1st Sess. (Oct. 3, 1965).

the Board, *holding* that a "bargaining order" is not an appropriate remedy where the facts indicate merely a borderline, unaggravated violation of the National Labor Relations Act. *NLRB v. Flomatic Corp.*, 347 F.2d 74 (2d Cir. 1965).

A union whose request for recognition has been refused may pursue two courses of action under the National Labor Relations Act (hereinafter referred to as NLRA). First, it may file a refusal to bargain charge,[1] the success of which is dependent upon a showing that the union represented a majority of the employees in the appropriate bargaining unit;[2] that the employer refused to bargain;[3] and that the refusal was in bad faith.[4] In the alternative, the union may file a petition for a representation election alleging that a question of representation exists.[5]

Section 10(c) of the NLRA empowers the National Labor Relations Board (hereinafter referred to as the Board) to order a party who is guilty of an unfair labor practice "to take such affirmative action . . . as will effectuate the policies of the . . . [NLRA]." [6] Although the Board, as an administrative organ, is given broad discretion, it is not entirely insulated from judicial review. While the Board is to determine how the effect of prior unfair labor practices will be expunged,[7] a court will not enforce a Board order when it is oppressive or not calculated to effectuate the policies of the NLRA.[8] Moreover, when enforcement becomes necessary, re-

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[1] The refusal to bargain charge will be filed pursuant to the National Labor Relations Act § 8(a)(5), which states: "It shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees. . . ." 49 Stat. 452 (1935), as amended, 29 U.S.C. § 158(a)(5) (1964).

[2] It is a question for the Board as to what constitutes an appropriate bargaining unit so as to effectuate the purposes of the Act. 49 Stat. 453 (1935), as amended, 29 U.S.C. § 159(b) (1964); COHEN, LABOR LAW 150-51 (1964).

[3] An employer refuses to bargain if he is motivated by "a rejection of the collective bargaining principle or by a desire to gain time within which to undermine the union." Artcraft Hosiery Co., 78 N.L.R.B. 333, 334 (1948).

[4] Bad faith can be determined only after the Board examines all the circumstances surrounding the refusal to bargain. The circumstances should include the "unlawful conduct of the employer, the sequence of events, and the time lapse between the refusal and the unlawful conduct." Joy Silk Mills, 85 N.L.R.B. 1263, 1264 (1949), *modified*, 185 F.2d 732 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 914 (1951). It should also be noted that an employer does not have any obligation to bargain until a "clear and unequivocal" request to do so has been made by the majority representative.

[5] A charge of unlawful refusal to bargain under § 8(a)(5) must allege that there is no question of representation, and that the union is the exclusive representative. A representation petition requires the Board to find that a question of representation exists, and that it remains to be resolved by an election. See Bernel Foam Prods. Co., 146 N.L.R.B. 1277 (1964).

[6] 49 Stat. 453 (1935), as amended, 29 U.S.C. § 160(c) (1964).

[7] International Ass'n of Machinists v. NLRB, 311 U.S. 72, 82 (1940).

[8] Republic Aviation Corp. v. NLRB, 324 U.S. 793, 798 (1945).

sort must be had to the courts, since the Board's orders are not self-enforcing.[9]

In *M. H. Davidson Co.*,[10] the employer refused to bargain in violation of Section 8(a)(1) and 8(a)(5) of the NLRA.[11] The union, believing a genuine question of representation existed, petitioned the Board for a representation election—which was subsequently lost. The Board, having been petitioned by the union to review the election, found that the employer, by interrogating his employees, making threats of reprisals, promising various benefits, and discharging two employees, had engaged in unfair labor practices. The employer contended that the union had waived any objections it might have had concerning its conduct prior to the election since, having knowledge of the unfair labor practices, it had proceeded with the election. However, the Board dismissed this contention indicating that the waiver principle should be applied only in those cases where a bona fide question concerning representation exists.[12] The court held that the employer's actions demonstrated "the bad faith of its original challenge of the union's majority." [13] Therefore, no genuine question of representation existed, and an application of the waiver doctrine would constitute a complete disregard of the Board's obligation to enforce the public policy against those refusals to bargain which induced the filing of the petition. "In such a situation the Board's statutory obligation to prevent refusals to bargain and to enforce the public policy enunciated by the Act is paramount." [14]

In 1954, the Board expressly overruled *Davidson* in *Aiello Dairy Farms*,[15] and propounded a doctrine which estopped a union from asserting an employer's unfair labor practices [16] where the union proceeded to a representation election with knowledge of those practices. The Board indicated that once the union had ascertained the employer's unfair labor practices it had two courses to pursue: (1) it could file a charge of unfair labor practices against

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[9] COHEN, *op. cit. supra* note 2, at 151. Section 7 enumerates the employee's right to organize and bargain collectively. 49 Stat. 452 (1935), as amended, 29 U.S.C. § 157 (1964). Section 9(c)(1) provides for Board-conducted representation elections by secret ballot where the employees' rights under section 7 have been infringed. 49 Stat. 453 (1935), as amended, 29 U.S.C. § 159(c)(1) (1964).

[10] 94 N.L.R.B. 142 (1951).

[11] Section 8(a)(1) states that "it shall be an unfair labor practice for an employer—to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title. . . ." 49 Stat. 452 (1935), as amended, 29 U.S.C. § 158(a)(1) (1964). For provisions of section 8(a)(5), see *supra* note 1.

[12] Denton Sleeping Garment Mills, Inc., 93 N.L.R.B. 329 (1951).

[13] M. H. Davidson Co., 94 N.L.R.B. 142, 144 (1951).

[14] *Id.* at 144-45.

[15] 110 N.L.R.B. 1365 (1954).

[16] National Labor Relations Act § 8(a)(5), *supra* note 1.

the employer prior to the election; or (2) it could proceed with the representation election. Had the union filed its charge of refusal to bargain before conducting the representation election, the Board would not have ordered the election until it determined the validity of the charges.[17] Thus, the Board held that the union must choose between the available remedies since they are mutually inconsistent. The majority indicated that it would be a duplication of effort for the Board to process a refusal to bargain charge after the union had failed to establish a majority in the election, irrespective of the employer's bad faith in refusing to bargain. Under the *Davidson* rule, a union could cause such duplication by not filing an unfair labor charge until after having lost the election.[18] It must be remembered, however, that the rule in *Aiello* was not applicable in cases where the union was not cognizant of the unfair labor practices until after the election.[19]

Recently, the Board overruled *Aiello* in *Bernel Foam Prods. Co.*,[20] and reinstated the *Davidson* rationale, holding that the diverse remedies available to a union are not mutually inconsistent because:

> Although in filing a representation petition the union asserts as a formal matter that a question concerning representation exists, as a practical matter, the union has not altered its position that it represents the employees and it is entitled to recognition. Rather it is stating the employer's assertion of such a question and seeking an election as a means of proving that there is no validity in that assertion.[21]

The Board indicated that a representation election does not determine whether or not the union had a majority at the time of the refusal to bargain, but only whether the union had a majority on the date of the election. The choice referred to in *Aiello* was created not by the union but by the employer's unlawful conduct. Therefore,

> there is no warrant for imposing upon the union . . . an irrevocable option as to the method it will pursue in seeking vindication of the

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[17] If the Board found that unfair labor practices existed and that the union was the representative of the employees, it would have issued a bargaining order. If the Board, on the other hand, found that unfair labor practices had been committed, but that a genuine question of whether the union was the representative of the employees existed, it would have ordered a representation election. See Aiello Dairy Farms, 110 N.L.R.B. 1365 (1954).

[18] See M. H. Davidson Co., 94 N.L.R.B. 142 (1951).

[19] See, *e.g.*, Southwester Co., 111 N.L.R.B. 805, 806-07 (1955); Armstrong Tire & Rubber Co., 111 N.L.R.B. 708, 709-10, *enforced*, 228 F.2d 159 (5th Cir. 1955); Alexander Mfg. Co., 110 N.L.R.B. 1457, 1460-61 (1954).

[20] 146 N.L.R.B. 1277 (1964).

[21] *Id.* at 1280.

employees' representation rights while permitting the offending party to enjoy . . . the fruits of such unlawful conduct.[22]

For conduct that has been specifically proscribed by Congress, an adequate remedy should exist: *Bernel* makes a choice of two easily accessible remedies available to a union afflicted by an employer's unfair practice.

In the instant case, the Court was presented with two questions which arose as a result of the union's allegation, subsequent to the representation election, that the defendant Flomatic Corp. had engaged in unfair labor practices. Initially it was necessary to ascertain whether there was substantial evidence to support the Board's finding that the employer had violated section 8(a)(1). Secondly, the Court had to determine whether the bargaining order issued by the Board was an appropriate remedy under the circumstances. The Court decided that there was substantial evidence to support the section 8(a)(1) charge, although there was not a section 8(a)(5) refusal to bargain violation. Then, in discussing the propriety of a bargaining order, the Court pointed out that while such an order may effectively remedy an employer's interference with an election, possible adverse effects on employees' rights must also be considered.

Since a bargaining order dispenses with the necessity of a prior secret election, there is a possibility that the imposition of such an order may unnecessarily undermine the freedom of choice that Congress wanted to guarantee to the employees, and thus frustrate rather than effectuate the policies of the Act.[23]

While the employer's letter did constitute an unfair labor practice under section 8(a)(1) since it contained promises of benefits, nevertheless, the Court found no flagrant violation of the section[24] and therefore considered the bargaining order an unnecessarily harsh remedy.[25]

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[22] *Ibid.*

[23] NLRB v. Flomatic Corp., 347 F.2d 74, 78 (2d Cir. 1965).

[24] No coercive measures were resorted to by the employer; he did not discharge any employees. Compare Irving Air Chute Co. v. NLRB, 52 L.C. 16,607 (2d Cir. 1965), wherein the employer refused to bargain, threatened his employees, and encouraged formation of a company union. Rejecting the employer's contention that a second election should have been ordered, the court upheld the Board's bargaining order as an appropriate means of depriving the employer of any benefits of his unfair labor practices.

[25] The Court stated: "No court . . . has held that a borderline, unaggravated § 8(a)(1) violation, standing alone, occurring prior to an election, warranted a bargaining order." *Supra* note 23, at 79. The Court was careful to note, however, that it was not holding that a bargaining order could never issue in a section 8(a)(1) case, "but where there is at most

The dissenting opinion indicated that it is very difficult to establish degrees of election interference, and that if reliance is placed upon mere technicalities, no definite standard can be developed upon which to predicate future results.

Available statistics indicate that of 212 re-run elections held because of employer misconduct, the objecting union was successful in only thirty per cent, and that of the total votes cast, the union picked up only an additional two per cent.[26] It would appear from these statistics that re-run elections are not an adequate remedy for the aggrieved union. The Board has contended in the past that regardless of the length of delay before a re-run election, the employer's prior unfair labor practices are never quite forgotten, and that these practices influence the free choice of employees in any subsequent election.[27] Considering that the instant case reduces the availability of the bargaining order to instances of "aggravated" unfair labor practices by the employer, one can conclude that it represents a setback for unions in the courts. However, *Flomatic* was decided on narrow factual grounds, and will have an effect in only a small percentage of cases. When the facts are more substantial, and indicate more aggravated types of unfair labor practices by the employer, Board bargaining orders will be issued.

As a result of the instant case the employer and the union are on more equal bargaining terms. The goal of the NLRA was to equalize the bargaining position of both contestants, and the instant case is a refinement in that direction. The bargaining order will be issued only when the Board is fairly convinced that the employer's practices will be a continued influence in preventing the union from establishing their representative position in a second election.

REAL PROPERTY — STATUTE EXTINGUISHING REVERTER DECLARED UNCONSTITUTIONAL. — Plaintiffs had been holders of property subject to a possibility of reverter, which ripened in favor of defendants. Subsequently, plaintiffs sought a declaration that they owned the property in fee simple absolute and that the defendants,

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a moderate unbalancing of an election by an employer such as there was in this case, there is no adequate justification for putting the union in a position to unbalance it the other way to an extreme degree." *Id.* at 80.

[26] Pollitt, *NLRB Re-run Elections: A Study*, 41 N.C.L. REV. 209, 212 (1963). For an evaluation of the NLRB remedies generally, see McCulloch, *An Evaluation of the Remedies Available to the NLRB*, 15 LAB. L.J. 755 (1964).

[27] See Pollitt, *supra* note 26, at 223; Note, 72 YALE L.J. 1243, 1250, 1257 (1963).