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Labor Law--Contract-Bar Rule--Ambiguous Union-Secretary Clause a Bar to Representation Election (Paragon Prods. Corp., 4 CCH Lab. L. Rep. (Lab. Rel.) (CCH N.L.R.B.) ¶ 10657 (Nov. 28, 1961))

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danger of conflicting remedies seems greatly diminished by the present attitude of the NLRB. Perhaps the only disturbing element in this opinion is the Court's attempt to establish a standard to determine when a case will be directed to the NLRB. The court's criterion demands that a dispute be channeled to the NLRB if it involves a substantial question in an area in which the NLRB has expressed its peculiar expertise. Such an *ad hoc* standard may give rise to two difficulties. Firstly, determining whether the NLRB has displayed its expertise in a given area may result in close questions for which the courts have no rigid guide. Secondly, since the NLRB has demonstrated its expertise in those areas in which it would have exclusive jurisdiction were it not for a contract breach, it may be that such a criterion will create a kind of pre-emption by judicial fiat. If the latter be true, the doctrine of concurrent jurisdiction propounded by the court may be more academic than real.

LABOR LAW — CONTRACT-BAR RULE — AMBIGUOUS UNION-SECURITY CLAUSE A BAR TO REPRESENTATION ELECTION. — Petitioner, United Mine Workers of America, brought a representation proceeding before the National Labor Relations Board during the insulated period of a current collective bargaining agreement between the intervenor, International Brotherhood of Electrical Workers, and the employer. The petitioning union alleged that the contract was not a bar to an election by the employees who were seeking another representative because the union-security provision did not on its face conform to the requirements of Section 8(a)(3) of the National Labor Relations Act. The Board, overruling major portions of its previously devised *Keystone* rule, *held* that since the union-security clause was not clearly unlawful it would constitute a bar to a representation election. *Paragon Prods. Corp.*, 4 CCH LAB. L. REP. (LAB. REL.) (CCH N.L.R.B.) ¶ 10657 (Nov. 28, 1961).

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however, on March 3, 1962, the United States Supreme Court, in Local 174, Teamsters Union v. Lucas Flour Co., 82 Sup. Ct. 571, 576-77 (1962), unequivocally declared that federal labor law must be applied in labor cases litigated in state courts. Since the federal viewpoint on concurrent jurisdiction is still unsettled (see text accompanying note 15 *supra*), this ruling on the supremacy of federal labor law does not necessarily mean that the outcome of the principal decision would have been changed.

The NLRA provides for a representation election when employees wish to replace their existing representative.[1] It was recognized, however, that to permit an election at any time during a contract term would not promote labor-management harmony or protect the parties from "raiding" by rival unions.[2] In order to maintain stability in labor relations, therefore, the Board found it necessary to formulate a general policy which prohibited a representation election during the term of a currently operative collective bargaining agreement.[3]

A significant exception to this general policy arose with respect to contracts containing union-security clauses, *i. e.,* provisions requiring union membership as a condition of continued employment.[4] Basically, such provisions have been held not to bar a representation election if they *expressly* and *unambiguously* require the employer to give preference to union members in hiring, laying off, or for purposes of seniority.[5] Neither will such clauses constitute a bar if they specifically withhold from nonunion employees, or new employees, the statutory thirty-day grace period within which they are not required to join the union.[6] Furthermore, such clauses will not bar an election if they expressly condition continued employment upon the payment of sums of money other than the "periodic dues and initiation fees uniformly required."[7]

The distinction between clearly invalid union-security clauses and those which are merely ambiguous has created problems in the application of the above-mentioned exception. In 1948, the Board, in *C. Hager & Sons Hinge Mfg. Co.,*[8] prevented a clearly

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[1] Labor Management Relations Act (Taft-Hartley Act) § 9(c)(1), 61 Stat. 144 (1947), 29 U.S.C. § 159(c)(1) (1958).

[2] See Daykin, *The Contract as a Bar to a Representative Election,* 10 LAB. L.J. 219 (1959); Freidin, *The Board, the "Bar," and the Bargain,* 59 COLUM. L. REV. 61, 63 (1959).

[3] National Sugar Ref. Co., 10 N.L.R.B. 1410 (1939), is apparently the first case to allow a contract to bar an election. This seems to have been a reversal of the former view which permitted employees to change their representative at any time during the contract term. See New England Transp. Co., 1 N.L.R.B. 130 (1936).

[4] Labor Management Relations Act (Taft-Hartley Act) § 8(a)(3), 61 Stat. 140-41 (1947), 29 U.S.C. § 158(a)(3) (1958), contains the statutory requirements for a valid union-security provision. Other types of contracts that will not bar a representative election are: (1) contracts not representative of all the employees in the appropriate bargaining unit; (2) contracts terminable at the will of the parties; (3) contracts executed before any employees are hired. See Daykin, *supra* note 2, at 220-21, 230.

[5] Paragon Prods. Corp., 4 CCH LAB. L. REP. (LAB. REL.) (CCH N.L.R.B.) ¶ 10657 (Nov. 28, 1961). Keystone Coat, Apron & Towel Supply Co., 121 N.L.R.B. 880, 883-84 (1958).

[6] *Ibid.*

[7] *Ibid.*

[8] 80 N.L.R.B. 163 (1948).

invalid union-security clause from barring an election. The Board did not concern itself with the question of whether the illegal provision had actually been used to compel immediate union membership or to circumvent the statutory grace period, and held that the mere existence of the clause was a sufficient restraint upon the employees' rights to prevent the contract from being a bar to the election.[9] The rationale of *Hager* was followed in subsequent cases where the Board took the position that clearly unlawful provisions would not bar an election unless there was a deferral or saving clause which clearly manifested an intent to defer their application until such time as they might lawfully become effective.[10]

At the same time, however, the Board utilized a different approach when dealing with disputes arising from *ambiguous* union-security clauses, *i. e.,* clauses susceptible of two interpretations—one lawful, the other unlawful. Several decisions clearly established that the Board, in construing the meaning of ambiguous union-security clauses, could consider extrinsic evidence and look both to the circumstances under which they were adopted and the practice of the parties under them.[11] In addition, when allegedly ambiguous union-security clauses were involved, the Board, in *A. Sandler Co.*,[12] took the position that it was not necessary that all the safeguards provided for in the statute be expressly incorporated into the agreement—thereby holding that "technical omissions" were permitted.[13] A further reflection of the liberal policy adopted with respect to such clauses was seen in the fact that, where alternative interpretations were possible, the Board presumed that the parties intended to comply with the requirements of the law.[14]

This early policy was severely criticized by Member Rodgers in a dissenting opinion in *A. Sandler Co.*[15] He felt that a union-security clause, which did not clearly conform to the statutory standards, served "as a potent instrument of coercion" against individual employees no matter what an examination of extrinsic

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[9] *Ibid.*

[10] Northwest Magnasite Co., 101 N.L.R.B. 85 (1952); American Dyewood Co., 99 N.L.R.B. 78 (1952); Wyckoff Steel Co., 86 N.L.R.B. 1318 (1949).

[11] Regal Shoe Co., 106 N.L.R.B. 1078 (1953); Bath Iron Works Co., 101 N.L.R.B. 849 (1952); O. B. Andrews Co., 86 N.L.R.B. 59 (1949). Compare Hess, Goldsmith & Co., 101 N.L.R.B. 1009 (1952). The majority of the Board in *Hess,* however, did not feel that the clause in issue was ambiguous.

[12] 110 N.L.R.B. 738 (1954).

[13] *Ibid.; accord,* Regal Shoe Co., *supra* note 11.

[14] Humboldt Lumber Handlers, Inc., 108 N.L.R.B. 393, 395 (1954).

[15] 110 N.L.R.B. 738, 740 (1954) (dissenting opinion).

evidence showed.[16] Therefore, by allowing the contract to bar an election, he argued that the Board was really approving this use of coercion. Furthermore, in answer to the argument that a representation proceeding should not be concerned with specific charges involving protection of employees' rights under section 8(a)(3), since Congress has provided a remedy in an adversary unfair labor practice action, this dissent stated:

> As a practical matter, unfair labor practice charges are not likely to be filed unless an unlawful union-security clause is actually enforced by discharge or other penalty. Meanwhile, the restraint against employees embodied in this contract is allowed to continue. By the majority decision herein, unions and employers are encouraged to execute illegal union-security provisions, for they are assured that their unlawful action, though grounds for a possible unfair labor practice case, will be otherwise overlooked or condoned.[17]

The rationale behind the dissent in *Sandler* was adopted in 1958 when the Board made substantial changes in its contract-bar rules.[18] In *Keystone Coat, Apron & Towel Supply Co.*,[19] the Board felt that the former view had a tendency to contribute to the undermining of the freedom of choice which is guaranteed by the act to the individual employees. Thus, the Board flatly stated that it would deny any bar effect to a collective bargaining agreement which contained a union-security clause that did not *on its face* conform to the requirements of the act.[20] This meant that for contract-bar purposes the union-security provisions must provide for an explicit grant to all old nonunion employees of the statutory thirty-day grace period within which they were not required to join the union. On the other hand, the Board maintained that the contract must not provide a clause that contained an agreement to defer, rescind, or amend the effectiveness of the union-security provision. Furthermore, in order to have the contract bar an election, the use of ambiguous language was absolutely forbidden.[21] Finally, to accomplish the desired result, and in order to prevent the protraction of these representation hearings, the Board decided that it would be better to exclude the introduction of any extrinsic evidence on the meaning of the clause in issue.[22] Thus, *Keystone* established a clear and simple rule that was to be

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[16] *Id.* at 741.
[17] *Ibid.*
[18] See Freidin, *The Board, the "Bar," and the Bargain*, 59 COLUM. L. REV. 61, 79 (1959).
[19] 121 N.L.R.B. 880, 884 (1958).
[20] *Id.* at 883. The Board also ruled that a provision declared unlawful in an unfair labor practice case would not be a bar.
[21] *Id.* at 884.
[22] *Id.* at 886.

mechanically applied in every representation case dealing with a union-security provision.[23]

Several cases subsequent to *Keystone* indicate just how rigidly the Board has applied this administrative rule. In *Aurora Gasoline Co.*,[24] a union-security clause did not explicitly grant to all nonunion employees the statutory thirty-day grace period. The Board held that this clause would not bar an election—despite the fact that all the employees were already union members. In *Food Haven, Inc.*,[25] an amendment was written into a pre-1958 contract so that it would conform to the *Keystone* rule. Nevertheless, this contract was held not to be a bar. It might well be speculated that such rulings prompted the modification of *Keystone* in the principal case.[26]

In the present case, the Board has decided once again to evaluate the principles underlying its contract-bar policy. The majority based its rejection of part of the *Keystone* rule on several considerations.

First, the Board regarded the *Keystone* doctrine as contrary to certain principles set forth by the United States Supreme Court. In an unfair labor practice case, the Court has indicated that, unless the contract was unlawful on its face, it should not be presumed that the union and employer intended to violate federal law.[27] Indeed, the Court stated:

> [I]n the absence of provisions calling explicitly for illegal conduct, the contract cannot be held illegal because it failed affirmatively to disclaim all illegal objectives.[28]

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[23] See Friedin, *supra* note 18, at 79.

[24] 128 N.L.R.B. 37 (1960).

[25] 126 N.L.R.B. 666 (1960).

[26] See Paragon Prods. Corp., 4 CCH LAB. L. REP. (LAB. REL.) (CCH N.L.R.B.) ¶ 10657, at 16502 (Nov. 28, 1961). However, it should be noted that at least on one occasion, the Board gave a liberal interpretation to *Keystone*. In Zangerle Peterson Co., 123 N.L.R.B. 1027 (1959), the Board stated that even though the contract at one point made reference to a requirement that membership in good standing according to the union constitution and bylaws was necessary for continued employment, this would not prevent the contract from being a bar since a reading of the contract in its entirety revealed the conformity with the act.

[27] NLRB v. News Syndicate Co., 365 U.S. 695 (1961), wherein the Court would not presume that a foreman, who was a union member, in charge of hiring would discriminate against nonunion job applicants.

[28] *Id.* at 699; accord, Local 357, Teamsters Union v. NLRB, 365 U.S. 667, 676 (1961); see NLRB v. Rockaway News Supply Co., 345 U.S. 71, 79 (1953), where the Court, while overruling the Board's contention that an invalid union-security clause automatically invalidates the whole contract, said: "The employment contract should not be taken out of the hands of the parties themselves merely because they have misunderstood the legal limits of their bargain, where the excess may be severed and separately condemned as it can here." See also RESTATEMENT, CONTRACTS § 236(a) (1932).

Secondly, the Board was of the opinion that the *Keystone* rule led to the anomaly of presuming the contract illegal in a representation proceeding, but declaring it perfectly lawful in an unfair labor practice case.[29] Thus, for example, in the *Aurora* case, the failure to provide for the thirty-day grace period rendered the contract illegal so as to permit a representation proceeding, while this same failure would not of itself constitute an unfair labor practice.

In addition, it was stated that "certain objectionable effects of the *Keystone* decision as reflected by the Board's experience" [30] required some modifications of the rule. The Board pointed out, moreover, that the *Keystone* rule had an extremely "unsettling" influence upon established collective bargaining relations in view of the fact that a substantial bulk of the contracts containing union-security provisions could not meet this strict test.

The Board retained the restrictive approach of denying the admissibility of extrinsic evidence, but it made two significant departures from *Keystone*: (1) an ambiguous union-security clause will now bar representation proceedings unless it has been previously declared unlawful in an unfair labor practice case; (2) a properly executed rescission or amendment which clearly defers the effectiveness of an unlawful clause will also bar an election.[31]

The dissenting members objected to the majority opinion on several grounds.[32] They maintained that the *Keystone* rule did not involve a presumption of illegality, but simply reflected an administrative judgment that the contract-bar doctrine should not be invoked to deny employees the exercise of their statutory right unless the union-security clause was clearly in conformance with the statute. In addition, the dissent pointed out that there are other "rules holding that a contract . . . would be no bar, even though the reasons for holding the contract no bar could under no circumstances form the basis for unfair labor practice findings." [33] As illustrations of this statement, the dissent referred to the typical schism [34] and expanding unit [35] situations which would not con-

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[29] Paragon Prods. Corp., *supra* note 26, at 16502.

[30] Paragon Prods. Corp., 4 CCH LAB. L. REP. (LAB. REL.) (CCH N.L.R.B.) ¶ 10657, at 16502 (Nov. 28, 1961).

[31] *Id.* at 16504.

[32] *Id.* at 16505 (dissenting opinion).

[33] *Id.* at 16504-05 & n.15 (dissenting opinion).

[34] A schism is created, for example, where the employees' disaffiliation from the local union is caused by a basic intra-union conflict over policy. Since this situation leads to confusion as to the proper bargaining representative of the employees, the Board has ruled that no genuine interest of stability would be served by barring an election. Hershey Chocolate Corp., 121 N.L.R.B. 901 (1958).

[35] A substantial increase of the number of employees in a particular

stitute bars to a representation election or amount to unfair labor practices. Furthermore, the dissent emphasized that the Supreme Court decisions do not necessitate a change in the Board's contract-bar policy, since Congress has given the Board a wide area of discretion in handling representation matters.[36]

Both the majority and dissent recognize the same basic consideration in the formulation of contract-bar rules, namely, balancing the dual and sometimes conflicting objectives of fostering stability in labor relations and protecting the employees' right to select representatives of their own choosing. Because the insertion of a clearly unlawful union-security clause into the contract is in conflict with the basic policy of the act, the Board's application of the contract-bar rules has never allowed this type of clause to act as a bar. However, in dealing with ambiguous union-security provisions the Board had permitted the introduction of extrinsic evidence. To the extent that this was done, it created a distortion in the representation proceeding by turning it into a quasi-unfair labor practice case. *Keystone* recognized this and rejected the introduction of extrinsic evidence. In addition, however, *Keystone* established a mechanical rule that resulted in harsh decisions like *Aurora Gasoline Co.* and *Food Haven, Inc.* Furthermore, in certain cases *Keystone* placed the Board in the anomalous position of having to declare a union-security clause illegal for bar purposes but legal in an unfair labor practice proceeding.

The approach utilized in the present case establishes a good working compromise between the two extremes. On the one hand, it preserves the basic integrity of the representation proceeding by denying the admission of extrinsic evidence, while, on the other, it promotes the basic policy of the Board by not barring an election if the union-security clause is clearly invalid.

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unit during the contract term is referred to as an expanding unit. The present Board rule declares that such an increase is deemed to exist if less than thirty per cent of the present workers or if less than fifty per cent of the present job classifications were in existence when the contract was executed. General Extrusion Co., 121 N.L.R.B. 1165 (1958).

[36] Paragon Prods. Corp., *supra* note 30, at 16505 n.16 (dissenting opinion); see NLRB v. Grace Co., 184 F.2d 126 (8th Cir. 1950), wherein the court referred to the Board's contract-bar rule as "a procedural rule which the Board in its discretion may apply or waive as the facts of a given case may demand in the interest of stability and fairness in collective bargaining agreements. The Board is not the slave of its rules." *Id.* at 129.