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National Labor Relations Act--Enforcement and Review of Orders--Application to Adduce Additional Evidence (Southport Petroleum Company v. N.L.R.B., 62 Sup. Ct. 452 (1942))

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settled, however, that a corporation may be liable for a tort or wrongful act of its officer or agent, although the wrongful act is dependent upon motive, intent or malice.[7] The master will be responsible for the acts of the servant which were within the general scope of his employment, while engaged in his master's business, and done with a view toward furthering that business, whether the act be done negligently, wantonly or even willfully.[8] The principle of immunity of municipal corporations can find no justification in sound social policy and is one that is productive of great injustice and hardship to individuals with but slight advantage to society. Loss and damage inflicted in the course of the operation of governmental institutions ought obviously to be counted in the cost of government and carried by society rather than that unfortunate individual upon whom the loss accidentally falls.

R. K.

NATIONAL LABOR RELATIONS ACT—ENFORCEMENT AND REVIEW OF ORDERS—APPLICATION TO ADDUCE ADDITIONAL EVIDENCE. —In August, 1938, the petitioner, a Texas corporation, was ordered by the National Labor Relations Board to cease and desist from unfair labor practices [1] and to take certain affirmative action.[2] In June, 1939, the petitioner entered into a written stipulation with the Board agreeing to obey the order except in so far as it related to back pay, and the Board in turn agreed to accept such performance as suffi-

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Dec. 315 (1847), it was held that a corporation is not liable for a tortious act committed willfully and maliciously by its servant, even though it was done under orders from the president and general manager.

[7] White v. International Textbook Co., 173 Iowa 192, 155 N. W. 298 (1915).

[8] Mott v. Consumer's Ice Co., 73 N. Y. 543 (1878); Doscher v. Superior Fire Proof Door and Sash Co., 221 App. Div. 63, 222 N. Y. Supp. 629 (1st Dep't 1927).

[1] Section 8 of the National Labor Relations Act defines unfair labor practices by the employer. *See* 49 STAT. 452 (1935), 29 U. S. C. A. § 158 (Supp. 1941).

[2] The order of the Board required the petitioner to cease and desist from: (a) Discouraging membership in Oil Workers International Union, Local No. 227, or in any other labor organization, by discharging its employees or by otherwise discriminating in regard to employment. (b) In any other manner interfering with, restraining or coercing its employees in the exercise of rights of self-organization, labor union membership, collective bargaining, etc. as guaranteed by Section 7 of the Act. The affirmative directions of the order were: (a) Offer to reinstate three employees found to have been discriminatorily discharged. (b) Pay them back pay for the period from the time of discharge to date of reinstatement, less earnings during such period. (c) Post appropriate notices at its Texas City refinery where the alleged unfair labor practices had been committed.

cient compliance with its order. However, the petitioner never obeyed the affirmative directions of the order, whereupon in April, 1940, the Board filed its petition with the Circuit Court of Appeals for enforcement of the order.[3] About four months thereafter, the petitioner made application to the court to adduce additional evidence before the Board [4] which, it contended, should relieve it from complying with the order. The application stated that subsequent to the entry of the Board's order, the petitioner disposed of all its assets to its four stockholders as a liquidating dividend; that it had dissolved and that the two stockholders who received the Texas City refinery where the unfair labor practices allegedly took place, conveyed it to a newly formed Delaware corporation whose stockholders were at no time stockholders of the Texas corporation. While this application was pending, the petitioner filed an answer to the Board's enforcement proceeding, praying that the petition be dismissed on the ground that it had been dissolved. The Circuit Court of Appeals sustained the Board's order,[5] thereby denying, in effect, the petitioner's application to adduce additional evidence. On *certiorari* to the Supreme Court, *held,* affirmed, two justices dissenting. *Southport Petroleum Company* v. *N. L. R. B.,* 314 U. S. —, 62 Sup. Ct. 452 (1942).

An application for leave to adduce additional evidence is addressed to the sound discretion of the court. It is not a matter of right. The application must show two things: (1) that the additional evidence is material and (2) that there were reasonable grounds for failure to adduce it in the hearing before the Board. To be material, the additional evidence must tend to rebut the propriety of the order by showing lack of due process. Hence, if the additional evidence has no such tendency, or if the application is made in bad faith for the purpose of delaying enforcement of the Board's order, the application will be denied.[6]

In the instant case, the additional evidence failed to meet these

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[3] 49 STAT. 453 (1936), 29 U. S. C. A. § 160 (Supp. 1941).

[4] 49 STAT. 453 (1936), 29 U. S. C. A. § 160(e) (Supp. 1941): "* * * If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript * * *."

[5] N. L. R. B. v. Southport Petroleum Co., 117 F. (2d) 90 (C. C. A. 5th, 1941). The Circuit Court of Appeals held that, conceding that dissolution of the corporation took place, it would have no effect on the enforcement of the Board's order because under the Texas statutes, Articles 1388–1390, 3 Vernon's Texas Annotated Civil Statutes, a corporation upon dissolution, is continued in existence for a period of three years for the purpose of suing and being sued.

[6] Berkshire Employees Ass'n of Berkshire Knitting Mills v. N. L. R. B., 121 F. (2d) 235 (C. C. A. 3d, 1941); Bethlehem Steel Co. v. N. L. R. B., 120 F. (2d) 641 (App. D. C. 1941); N. L. R. B. v. Aluminum Products Co., 120 F. (2d) 567 (C. C. A. 7th, 1941); N. L. R. B. v. Sunshine Mining Co., 110 F. (2d) 780 (C. C. A. 9th, 1940).

tests, the court holding that the evidence in the application was immaterial. The bare allegations that the Texas corporation had discontinued operations, and that the refinery was taken over by the Delaware corporation whose stockholders were never stockholders of the Texas corporation, did not negative the possibility that the stock in the Delaware corporation represented but an insubstantial part of its total capitalization, with the balance and real control held by the Texas corporation or by nominal or "dummy" holders. Operation might have been carried on under a disguise intended to evade the order, without any change of actual ownership, or any *bona fide* dissolution. At any rate, these matters were addressed to the discretion of the reviewing court and this court has found that the allegations in the petitioner's application did not overcome these possibilities. In addition, the court stated that the Board's order ran not only to the petitoner, but also to its "officers, agents, successors and assigns",[7] and in view of the fact that the petitioner has not shown that there was a change in its relation to the refinery, the order of the Board, even with respect to its affirmative directions, may be sustained on that ground.

P. F. C.

SALES—FACTORS' ACT—PLEDGE OF RING WITH PAWNBROKER BY DEALER TO WHOM IT WAS DELIVERED BY ANOTHER DEALER ON MEMORANDUM.—One Gouldon, a factor, received a ring from the plaintiff, a jeweler, under a memorandum agreement which expressly reserved title in the plaintiff and further provided that title should not pass until the plaintiff should be apprised of a selection. The factor pledged the ring with the defendant, a pawnbroker who took the ring in good faith, and appropriated the proceeds. In an action by the plaintiff to recover the ring or its value, the Appellate Division[1] held that the defendant is precluded from establishing by parol evidence a custom whereby delivery to a factor or agent was for the purpose of sale and thus to enable the defendant to come within the protection of the Factors' Act;[2] on the grounds that by adding in his

[7] This is the usual form of order. *See* N. L. R. B. v. Link Belt Co., 311 U. S. 584, 61 Sup. Ct. 358 (1941); N. L. R. B. v. Waterman Steamship Corp., 309 U. S. 206, 60 Sup. Ct. 493 (1940); N. L. R. B. v. Falk Corp., 308 U. S. 453, 60 Sup. Ct. 307 (1940); N. L. R. B. v. Newport News Shipbuilding & Dry Dock Co., 308 U. S. 241, 60 Sup. Ct. 203 (1939); Consolidated Edison Co. v. N. L. R. B., 305 U. S. 197, 59 Sup. Ct. 206 (1938).

[1] Mann v. R. Simpson & Co., Inc., 257 App. Div. 329, 13 N. Y. S. (2d) 423 (1st Dep't 1939).

[2] N. Y. PERS. PROP. LAW § 43: "Every factor or agent entrusted with the possession of * * * any merchandise for the purpose of sale * * * shall be the true owner thereof, so far as to give validity to any contract made by such