

National Labor Relations Act--Limiting Employer's Freedom of Speech--Board's Conformity to Judicial Standards (N.L.R.B. v. Elkland Leather Co., Inc., 61 Sup. Ct. 170 (1940))

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impaired their rights existing under the contract at the time of execution thereof that to hold it applicable would clearly be a violation of the Constitution.⁹ The remedy, to be applied retroactively, must be substantial substitution for the rights acquired by each party at the time the obligations are incurred.

E. R. D.

NATIONAL LABOR RELATIONS ACT—LIMITING EMPLOYER'S FREEDOM OF SPEECH—BOARD'S CONFORMITY TO JUDICIAL STANDARDS.—Employees found written notices in their pay envelopes stating that as the plant was always going to operate as an "open shop" they need not join a union, and that the defendant company would deal individually with any employees so desiring.¹ Relations between defendant and employees became strained, and a strike ensued. A company union was fostered by the defendant who signed a contract with it.² Findings of fact made by a trial examiner were reversed by the National Labor Relations Board. The Board found the company guilty of unfair labor practices and ordered it to rehire the strikers, to cease giving effect to the contract with the company-dominated union and to post proper notices which would proclaim that defendant had violated the law. The entire order was affirmed in the Circuit Court of Appeals.³ On appeal, *held, certiorari denied*. *N. L. R. B. v. Elkland Leather Co., Inc.*, — U. S. —, 61 Sup. Ct. 170 (1940).

The defendant contended that the constitutional guaranty of free speech protected its "open shop" statement and, if the National Labor Relations Act sought to embrace that writing as an unfair labor practice,⁴ the Act was unconstitutional as contrary to the First Amendment.⁵ The right of free speech is a qualified, not an absolute right.⁶ Employees have a right to organize and to bargain collec-

⁹ *Barnitz v. Beverly*, 163 U. S. 118, 16 Sup. Ct. 1042 (1896).

¹ "You are under no obligation to join any union and cannot be forced to do so as this tannery will always operate as an open shop. This company will deal individually with any employee that wishes to do so at any time."

² *Elkland Leather Workers Association, Inc.*

³ 114 F. (2d) 221 (C. C. A. 3d, 1940).

⁴ 49 STAT. 452, 29 U. S. C. A. § 158 (1935) (It shall be unfair labor practice for an employer (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section seven . . .). 49 STAT. 452, 29 U. S. C. A. § 157 (1935) ("Employees shall have the right to self-organization, . . . to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining. . .").

⁵ U. S. CONST. AMEND. I ("Congress shall make no law abridging freedom of speech. . .").

⁶ *Robertson v. Baldwin*, 165 U. S. 281, 17 Sup. Ct. 326 (1897); *United States v. Toledo Newspaper Co.*, 247 U. S. 402, 38 Sup. Ct. 560 (1918); *Frowerke v. United States*, 249 U. S. 204, 39 Sup. Ct. 249 (1919).

tively with their employer,⁷ and these rights would be wholly ineffective if the employer, under the pretext of using his constitutional guaranty of free speech, were able to coerce employees and thus interfere with the rights guaranteed to them by the Act.⁸ General expressions of opinion by the employer, however, have been held not to hinder union growth.⁹ Congress did not intend to limit such general statements by the employer, because that would violate the First Amendment.¹⁰ The rule is different where threats are made by the employer to prevent union organization; such threats constitute an unfair labor practice and are not entitled to the protection of the First Amendment.¹¹ This sort of threat, written or parol, comes within the prohibition of the Act when made by employer,¹² his supervisory employees¹³ and probably by third persons.¹⁴

The company objected to the Board's order requiring the company to post notices. Any notice can be ordered by the Board, which aids in giving the employees a freedom in choosing their affiliations and an unhampered right to collectively adjust their relations with the employer.¹⁵ To further accomplish these purposes disestablishment of employer-dominated unions may also be necessary, and orders of the Board to such effect have been held to be proper.¹⁶ The findings of fact made by the Board do not have to conform

⁷ See note 4, *supra*.

⁸ *N. L. R. B. v. Rockford Mitten & Hosiery Co.*, 16 N. L. R. B. 53 (1939).

⁹ *Union Pacific Stages, Inc. v. N. L. R. B.*, 99 F. (2d) 153 (C. C. A. 9th, 1938); *N. L. R. B. v. Express Publishing Co.*, 111 F. (2d) 588 (C. C. A. 5th, 1940) (employer merely said, "Membership in a labor organization will not guaranty an employee employment"):

¹⁰ See note 5, *supra*.

¹¹ *N. L. R. B. v. Remington Rand, Inc.*, 304 U. S. 576, 58 Sup. Ct. 1046 (1938); *N. L. R. B. v. Good Coal Co.*, 310 U. S. 630, 60 Sup. Ct. 978 (1940); *N. L. R. B. v. Biles Lumber Co.*, 98 F. (2d) 18 (C. C. A. 9th, 1938); *N. L. R. B. v. Cowell Portland Cement Co.*, 108 F. (2d) 198 (C. C. A. 9th, 1939).

¹² *N. L. R. B. v. Remington Rand, Inc.*, 304 U. S. 576, 58 Sup. Ct. 1046 (1938); *N. L. R. B. v. Titan Metal Mfg. Co.*, 308 U. S. 615, 60 Sup. Ct. 260 (1939); *N. L. R. B. v. Union Drawn & Republic Steel*, 109 F. (2d) 587 (C. C. A. 3d, 1940).

¹³ *N. L. R. B. v. Oregon Worsted Co.*, 96 F. (2d) 193 (C. C. A. 9th, 1938); *N. L. R. B. v. Mexico Textile Mills*, 110 F. (2d) 565 (C. C. A. 5th, 1940); *N. L. R. B. v. Hartsell Mills Co.*, 111 F. (2d) 291 (C. C. A. 4th, 1940).

¹⁴ *N. L. R. B. v. Brown Shoe Co., Inc.*, 1 N. L. R. B. 803 (1936); see *N. L. R. B. v. Elkland Leather Co.*, 114 F. (2d) 221, 223 (C. C. A. 3d, 1940); 3 N. L. R. B. REP. (1938) 59-60 (the anti-union statements issue from business people of the town economically dependent upon the employer).

¹⁵ *N. L. R. B. v. Falk Corp.*, 308 U. S. 453, 60 Sup. Ct. 569 (1940); *National Licorice Co. v. N. L. R. B.*, 309 U. S. 350, 60 Sup. Ct. 569 (1940); *Republic Steel v. N. L. R. B.*, 311 U. S. 7, 61 Sup. Ct. 77 (1940); *N. L. R. B. v. Union Drawn & Republic Steel*, 109 F. (2d) 587 (C. C. A. 3d, 1940).

¹⁶ *N. L. R. B. v. Titan Metal Mfg. Co.*, 308 U. S. 615, 60 Sup. Ct. 260 (1939); *N. L. R. B. v. Newport News Shipbuilding Co.*, 308 U. S. 241, 60 Sup. Ct. 203 (1940); *Republic Steel v. N. L. R. B.*, 311 U. S. 7, 61 Sup. Ct. 77 (1940); *N. L. R. B. v. Union Drawn & Republic Steel*, 109 F. (2d) 29 (C. C. A. 3d, 1940).

strictly to judicial standards,¹⁷ but have to substantially comply with the evidence.¹⁸ The findings must be stated by the Board itself,¹⁹ and it may not delegate this duty to a trial examiner.²⁰ Though it may treat his findings as a recommendation,²¹ the Board may reverse them when no exceptions are taken.²²

B. F.

NATIONAL LABOR RELATIONS ACT—UNFAIR LABOR PRACTICE—REFUSAL TO SIGN WRITTEN AGREEMENT AS A REFUSAL TO BARGAIN COLLECTIVELY.—In the campaign preceding an election by petitioner's employees of an organization to represent them in collective bargaining, petitioner's supervising employees participated in behalf of the Heinz Employees Association, a plant organization. Their activities ranged from disparaging remarks about the outside union to threats of discharge, if the union were recognized. Following a complaint by a representative of the union, petitioner instructed the supervising employees to refrain from interfering in the campaign, and they did. However, petitioner failed to notify its employees that it repudiated the participation of its supervising employees in the organization of the association, and so had not removed the belief of the employees that petitioner would favor those joining the association, or that support of the union would result in reprisals. Since the election, in which the union was designated by a majority as their bargaining representative, petitioner has consistently recognized and bargained with the union. Although petitioner has reached an agreement with the union concerning wages, hours and working conditions of the employees, it has refused to sign any contract embodying the terms of the agreement. After a complaint by the union, the National Labor Relations Board directed petitioner to cease the unfair labor practices in which petitioner had engaged in connection with the association, to disestablish the association, to recognize and bargain collectively with the union, and to sign a written contract embodying any agreement which petitioner might reach respecting wages, hours and working conditions of petitioner's employees. On *certiorari* to review a judgment¹ of the

¹⁷ International Ass'n of Mach. v. N. L. R. B., 110 F. (2d) 587 (App. D. C. 1939).

¹⁸ N. L. R. B. v. Sands Mfg. Co., 306 U. S. 332, 59 Sup. Ct. 508 (1939); N. L. R. B. v. Oregon Worsted Co., 94 F. (2d) 671 (C. C. A. 9th, 1938); International Ass'n of Mach. v. N. L. R. B., 110 F. (2d) 587 (App. D. C. 1939).

¹⁹ 49 STAT. 453, 29 U. S. C. A. § 160(c) (1935).

²⁰ N. L. R. B. v. Elkland Leather Co., Inc., 114 F. (2d) 221 (C. C. A. 3d, 1940).

²¹ N. L. R. B. v. Oregon Worsted Co., 94 F. (2d) 671 (C. C. A. 9th, 1938).

²² See note 21, *supra*.

¹ 110 F. (2d) 843 (C. C. A. 6th, 1940).