

Labor Law--National Labor Relations Board--Order Requiring an Employer to Withdraw Recognition of a Company Union (National Labor Relations Board v. Pennsylvania Greyhound Lines, Inc., 303 U.S. 261 (1938))

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constitutionally be made the subject of federal control. * * *"²⁰ And the fact that petitioner's activities resulted in a strike which virtually eliminated its interstate and foreign shipments shows that the instant case conforms to that test.

B. M. B.

LABOR LAW—NATIONAL LABOR RELATIONS BOARD—ORDER REQUIRING AN EMPLOYER TO WITHDRAW RECOGNITION OF A COMPANY UNION.—The defendant, an employer, was found by the Board to have violated the National Labor Relations Act by organizing, supporting and dominating a company union.¹ Plaintiff charged that defendant's representatives had an active part in planning and devising the by-laws of the company union with the intention of defeating any subsequent collective demands of the employees. As a result, the company union did not serve as a collective bargaining agency but merely as an instrument to settle individual grievances. In addition, it was claimed that defendant's officers employed coercion and threats repeatedly to thwart the employees' efforts to freely seek self-organization of their own choosing. The Board ordered defendant to desist from its unfair labor practices; to withdraw recognition of the company union; and to post notices that the union has been so "disestablished". The Circuit Court of Appeals affirmed the "desist order", but set aside the "withdrawal order", holding that the Board acted without authority. The Supreme Court *held*, reversed. The "withdrawal order" is lawful under Section 10-c of the National Labor Relations Act² giving the Board power to order an employer who has been guilty of unfair labor practices, "to take such affirmative action * * * as will effectuate the policies of this Act." The facts when supported by evidence justify the Board's action to enforce a withdrawal order when it can draw an inference that the continued recognition of the company union would remain an obstacle to the employees' right of self-organization and to bargain collectively through representatives of their own choosing. *National Labor Relations Board v. Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 58 Sup. Ct. 571 (1938).

There are two germane elements which the court must consider in determining whether the Board's "withdrawal order" shall be en-

²⁰ Instant case at —, 58 Sup. Ct. at 661.

¹ 49 STAT. 452, 29 U. S. C. A. § 158 (1, 2) (Supp. 1935): "It shall be an unfair practice for an employer—1. To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in sec. 157 of this title; 2. To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it."

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

forced.³ First, the Board's "withdrawal order" must effectuate the policy of the National Labor Relations Act, which is to secure to the employees the right to organize and to bargain collectively through representatives of their own choosing free from employer interference. Second, the "withdrawal order" must be enforced when the Board draws an inference⁴ from the facts supported by evidence,⁵ that the continued recognition of the company union would violate the policy of the Act. The employer must withdraw recognition of the tainted company union although the employees had not elected a labor organization to represent them;⁶ and even if the employer had complied with the Board's order to desist from committing unfair labor practices;⁷ and although the illegal union had not received notice or a hearing.⁸ The effect of the instant case is that company unions which use subtle methods in pretending to comply with the policy of the Act will not be tolerated. An indication of how far the Supreme Court will go in enforcing "withdrawal orders" is exemplified in the case of *National Labor Relations Board v. Pacific Greyhound*.⁹ The facts

³ Instant case; *National Labor Relations Board v. Pacific Greyhound Lines*, 303 U. S. 272, 58 Sup. Ct. 577 (1938); *National Labor Relations Board v. J. Freezer and Son, Inc.*, 95 F. (2d) 818 (C. C. A. 4th, 1938); *National Labor Relations Board v. Wallace Mfg. Co.*, 95 F. (2d) 840 (C. C. A. 2d, 1938).

⁴ *Swayne & Hoyt, Ltd. v. United States*, 300 U. S. 297, 57 Sup. Ct. 478 (1937): "A determination by an administrative agency empowered to make administrative orders will not be set aside by the courts if there is evidence to support it even though upon a consideration of all the evidence the court might reach a different conclusion." See note 2, *supra*.

⁵ 49 STAT. 453, 29 U. S. C. A. § 160 (e) (Supp. 1935); *Washington, Virginia and Maryland Coach Co. v. National Labor Relations Board*, 301 U. S. 140, 57 Sup. Ct. 648 (1938); *National Labor Relations Board v. Thompson Products*, 3 N. L. R. B. 332, 97 F. (2d) 13 (C. C. A. 6th, 1938).

⁶ Instant case at 576: "We may assume that there are situations in which the Board will not be warranted in concluding that there was any occasion for withdrawal of employer recognition of an existing union before an election by employees under 9-c of the Act, even though it had ordered the employer to cease unfair labor practices. But here, defendants by unfair labor practices, have succeeded in establishing a company union so organized that it is incapable of functioning as a bargaining representative of employees. With no procedure for meetings of members or for instructing employee representatives, and with no power to bring grievances before the Joint Reviewing Committee without employer consent, the Association could not without amendment of its by-laws be used as a means of the collective bargaining contemplated by sec. 7; and amendment could not be had without the employer's approval."

⁷ *Id.* at 576: "Defendant contended that the case has become moot by reason of the fact that since the Board made its order it has certified the Brotherhood of Railroad Trainmen as representative of the motorbus drivers of the Pennsylvania Company for purposes of collective bargaining. The court answered the contention as untenable. That the Board's order, lawful when made does not become moot because changing circumstances indicate that the need for it may be less than when made."

⁸ *Id.* at 576: "As the order did not run against the Association it is not entitled to notice and hearing. Its presence was not necessary in order to enable the Board to determine whether Defendants had violated the Statute or to make an appropriate order against them."

⁹ 303 U. S. 272, 58 Sup. Ct. 577 (1938) (this case was decided a few hours after the instant case).

there differ from the instant case in that the company union lacked the formal provisions and by-laws for insuring employer control of the company union.¹⁰ Nevertheless, it was an effective instrument as it thwarted three successive attempts by defendant's employees to seek self-organization free from company domination. The Board argued that the mere order to cease unfair labor practices would not set free the employees' impulse to seek the organization which would most effectively represent them. The Supreme Court held that the facts justified the Board's action in compelling nonrecognition of the company union. The court recognized that the defendant was equipped "with a device by which its power may now be made effective unobtrusively, almost without further action on its part."¹¹ The effect of this decision is that the Supreme Court will not even tolerate a company union that has the slightest influence upon the employees' impulse to seek a labor organization of their own choosing. However, the employees have the right to form a company union if they wish to do so, the only requirement being that the employer shall keep out of it.¹² In *Consolidated Edison v. National Labor Relations Board*,¹³ the employer contracted with the Brotherhood union to handle its employees' labor problems. Defendant company proclaimed the Brotherhood was the sole bargaining agency of the Edison employees and employed coercion and persuasion to force them to join. The Circuit Court of Appeals in comparing this case with the instant case said, "the

¹⁰ Instant case at 575: "The by-laws and regulations provided that all motorbus operators, maintenance men and clerical employees, after three months service, automatically became members of the Association, and that only employees were eligible to act as employee representatives. No provisions were made for meetings of members, nor was a procedure established whereby employees might instruct their representatives, or whereby those representatives might disseminate information or reports. Grievances were to be taken up with regional committees with final review by a Joint Reviewing Committee made up of an equal number of regional chairmen and of management representatives, but review in those cases could not be secured unless there was a joint submission of the controversy by employee and management representatives."

"Change of the by-laws without employer consent was precluded by a provision that amendment should be only on a two-thirds vote of the Joint Reviewing Committee, composed of equal numbers of employer and employee representatives."

The court said, commenting on the by-laws, "Although the Association was in terms created as a bargaining agency for the purpose of providing adequate representation for defendant's employees by securing for them satisfactory adjustment of all controversial matters, it has functioned only to settle individual grievances."

¹¹ See note 8, *supra*. Instant case at 578: "A mere order to cease unfair labor practices would not set free the employee's impulse to seek the organization which would most effectively represent him. Even though the employees would not have freely chosen the company union as an initial proposition, the employee, once having chosen, may by force of a timorous habit, be held firm to his choice. The employee must be released from these compulsions."

¹² *Cf. National Labor Relations Board v. Pennsylvania Greyhound Lines, Inc.*, 91 F. (2d) 178 (C. C. A. 3d, 1937).

¹³ 95 F. (2d) 390 (C. C. A. 2d, 1938).

Brotherhood is not dominated, supported or interfered with by defendant. It is not immediately obvious that the employees' right to self-organization will be injured by allowing the contracts to be carried out * * *." However, since the Board has found no reason for "disestablishing" the Brotherhood it would seem entirely lawful for defendant and the Brotherhood to make new contracts on behalf of its own members after the employees had been notified that the old contracts were no longer binding and that they were free to join or refrain from joining any labor organization." Thus it is certain that every case will be decided on its own particular facts to determine whether the Board's "withdrawal order" will effectuate the policy of the National Labor Relations Act.¹⁴

The question as to whether the Board is empowered to dissolve illegal company unions remains unanswered in the instant and *Pacific Greyhound* cases.¹⁵ It is claimed that the Board has no authority to compel dissolution of the company unions.¹⁶ Following the Supreme Court's decisions, the Board has used ambiguous language in stating whether the company union shall be dissolved or shall not be recognized as the sole bargaining agency of the employees. In a few decisions the Board spoke of disestablishing the illegal union, meaning to have it "dissolved",¹⁷ yet in other cases the Board has used the term "disestablish" and meant that the union shall not be recognized.¹⁸ Regardless of the loose terms used, it would seem in view of the court's attitude toward ill-nurtured unions, that it would not be difficult for the court to sanction such power of dissolution in interpreting the policy of the Act.

J. F. W.

¹⁴ See note 2, *supra*.

¹⁵ 303 U. S. 272, 58 Sup. Ct. 577 (1938).

¹⁶ Note (1937) 51 HARV. L. REV. 359.

¹⁷ In the following cases the Board did not use the terms "withdraw recognition" and "disestablish" synonymously. *Douglas Aircraft Co., Inc.*, 6 N. L. R. B., No. 108 (1938) (C. C. A. 9th, 1938) (the Board decreed "to withdraw recognition from and to disestablish the management-dominated organization"); *Ballston Stillwater Knitting Co., Inc.*, 6 N. L. R. B., No. 71 (1938) (C. C. A. 2d, 1938) ("The company is ordered to cease unfair labor practices; and to withdraw recognition from, and to disestablish the management-dominated organizations" (italics ours)); *Falk Corp.*, 6 N. L. R. B., No. 103 (1938) (company ordered "to withdraw recognition from and to disestablish the management-dominated organization").

¹⁸ The Board used the terms "withdraw recognition" and "disestablish" synonymously in the following cases: *Wheeling Steel Corp. v. National Labor Relations Board*, 1 N. L. R. B., 699, 94 F. (2d) 1021 (C. C. A. 6th, 1938); *National Labor Relations Board v. Highway Trailer*, 3 N. L. R. B., 591, 88 F. (2d) 59 (C. C. A. 7th, 1938); *Calco Chemical Co., Inc. and American Cyanamid Co.*, 6 N. L. R. B., No. 125 (1938); *Fansteel Metallurgical Corp.*, 5 N. L. R. B., No. 124 (1938); *Cummins Engine Co.*, 6 N. L. R. B., No. 101 (1938).