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LABOR LAW—INTERPRETATION OF THE ANTI-FEATHERBEDDING PROVISION OF TAFT-HARTLEY ACT

A typographical union, in accordance with an old trade union practice, insisted that newspaper publishers pay printers for reproducing "bogus set."¹ The issue was whether this conduct constituted an unfair labor practice within the meaning of the "anti-featherbedding" provision of § 8(b)(6) of the amended National Labor Relations Act,² held, in an opinion by Mr. Justice Burton that the charges under § 8(b)(6) should be dismissed, since that provision condemned only the exactment by a union of pay from an employer in return for services not performed and not to be performed, but not the exactment of pay for work done by an employee with the employer's consent. Mr. Justice Douglas, dissented on the ground that the reproduction of advertising matter set up only to be thrown away was not a service performed for the publisher. Mr. Justice Clark, with the concurrence of Mr. Chief Justice Vinson, dissented on the ground that § 8(b)(6) condemned union pay demands for services which the employer does not want, does not need, and is not even willing to accept, such as the contrived and patently useless job operations involved. *American Newspaper Publishers Ass'n v. National Labor Relations Board*. 73 Sup. Ct. 552 (1953).

It is unnecessary to argue the question of whether or not setting "bogus" is a form of "featherbedding." Mr. Justice Burton resolves that question with: "Even now the issue before us is not what policy should be adopted by the Nation toward the continuance of this and other forms of featherbedding. The issue here is solely one of statutory interpretation: Has Congress made setting "bogus" an unfair labor practice?"³

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1. In 1890, when newspaper advertisement was set in type, it was impressed on a cardboard matrix, or "mat." These mats were used by their makers, reproduced and distributed to other publishers at little or no cost. The latter used the mats as molds for metal castings from which to print the same advertising matter. This procedure by-passed all compositors except those making the original forms. Facing this loss of work the International Typographical Union secured an agreement with newspaper publishers to permit their respective compositors, at convenient times to set up and make duplicates as though the original mat had not been used. For this "made work," which came to be known as setting "bogus," the printers received their regular pay. Furthermore, if there was an accumulation of such matter which the regular employees could not conveniently handle, the publisher could not refuse to hire additional printers. Ordinarily the reproduced compositions are promptly consigned to the "hell box" and melted down.
 2. 61 Stat. 140-142 (1947), 29 U.S.C. § 158(b)(6) (Supp. 1946).
 3. *American Newspaper Pub. Ass'n v. N.L.R.B.*, 73 Sup. Ct. 552, 554 (1953).

Next to be considered is Mr. Justice Burton's statement: "Thus where work is done by an employee, with the employer's consent, a labor organization's demand that the employee be compensated for time spent in doing the disputed work does not become an unfair labor practice."⁴ Consent connotes willingness. There may be an agreement without the consent of one of the parties thereto. Mr. Justice Douglas, in his dissent flatly says: "But the agreement was under compulsion."⁵ It is inconceivable that an astute employer would voluntarily agree to a practice that would result in economic waste and a detriment to him with the added undesirable element of increased fatigue to the employee. It would be far better to pay for something that was not done. At least, in such a case there would be a saving of material and the elimination of useless exertion.

It will be noted that in the first quotation of the preceding paragraph that the word "services" is not used, but that the word "work" has been substituted for the term used in the Act. It is submitted that the two are not synonymous.

Was there a literal interpretation of § 8(b)(6)? Webster's New International Dictionary, 2d ed. 1935, lists "work" and "labor" as synonyms and gives as the meaning of the latter: "1. Physical or mental toil; bodily or intellectual exertion especially when fatiguing, painful or irksome, or unavoidable;". The dictionary lists more than thirty meanings for the word "service", most of them not applicable here. After these latter are weeded out, there remains: "Service, n. Performance of labor for the benefit of another, or at another's command; act or instance of helping, or benefiting; conduct contributing to the advantage of another or others . . .". Wherefore, the conclusion may be drawn that there was not a literal interpretation of the pertinent section of the Act in that the ordinary and apparent sense of the words was not accepted but rather that they were given a selected meaning not in accord with recognized authority.

Obviously there may be labor without service, *i.e.* labor that is of no benefit to one other than the one performing it. This leads to the proposition that the practice of setting "bogus" does not fall within the accepted definition of "services" and that, therefore,

4. *Id.* at 557.

5. *Id.* at 558.

§8(b)(6) of the Taft-Hartley Act condemns such practice in so much as no benefit accrues to the individual publisher who pays for the useless labor even though the legislative history might tend to show that "featherbedding" was not condemned in all its forms.

The majority opinion states: "The publishers who set up the original compositions find it advantageous because it burdens their competitors with costs of mat making comparable to their own."⁶ It is very doubtful that a publisher, compelled to agree to a practice that he "does not want, does not need, and is not even willing to accept," considered the possibility of such a remote, nebulous and indirect benefit arising from a disservice to others of the American Newspaper Publishers Association. There are some eight hundred members of that association and hence any advantage that the original publisher might gain would be difficult of proof. At best it is only a conjecture that some benefit inures to him. At any rate, the compositors setting "bogus" are *not* his employees.

It is suggested that if it was the intent of Congress to condemn the practice of "bogus set" as an unfair labor practice, and indications seem to support such an inference, § 8(b)(6) should be amended by the addition of a subsection in the nature of the following:—

"the term 'services' as used in this section means—the performance of labor by an employee or employees from which the employer thereof derives some measure of benefit reasonably related to such performance."

Thus, if a particular employer is not benefited in any manner by the labor of his employees, there is no service rendered and demand for or receipt of pay through coercion under such circumstances would constitute an unfair labor practice.

Until such time as the Congress sees fit to declare otherwise, the National Labor Relations Board will probably follow the court's interpretation in the instant case.⁷

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6. *Id.* at 554.

7. For further references see: 52 Col. L. Rev. 1020 (1952).
61 Harv. L. Rev. 274 (1948).