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Labor Law - National Labor Relations Board Order Requiring Payment of Fringe Benefits - NLRB v. Strong, 393 U.S. 357 (1969)

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prudence, for even while reaffirming the privacy and inviolability of an individual's home and his right to read or view what he pleases therein, the Court did nothing which might denigrate the rights of the public or inhibit the police power to enforce other statutory provisions regarding obscenity [16]

HALDANE ROBERT MAYER

Labor Law—NATIONAL LABOR RELATIONS BOARD ORDER REQUIRING PAYMENT OF FRINGE BENEFITS. *NLRB v. Strong*, 393 U.S. 357 (1969).

The respondent was a member of the Roofers Contractors' Association, a multi-employer association through which a contract with the roofer's union was in effect from August 1960, to August 1963.[1] He fulfilled all of his obligations under this contract. A new agreement was then negotiated for 1963-1967 which the respondent refused to acknowledge.[2]

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seizing the obscene films, matter of which no mention had been made in the warrant. This was a clear violation of the fourth amendment provision that no "warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Citing Marron v. United States, 275 U.S. 192 (1927), emphasis was given to the fact that an officer has no discretion when searching under authority of a warrant describing one item to seize another item. It was further noted that since Stanley was not under arrest at the time, this was not a case of a search and seizure incident to arrest. 89 S. Ct. at 1251.

16. Anticipating that an argument might be raised that statutes prohibiting possession are necessary and complementary to those prohibiting sale and distribution, i.e., without such statutes untold difficulties in proving intent to distribute or of accumulating evidence of distribution would result, the Court recalled that in Smith v. California, 361 U.S. 147, 155 (1959), a similar argument had been held insufficient to justify abuse of individual rights. While unconvinced that such difficulties will result from this decision, the Court said that "even if they did they would [not] justify infringement of the individual's right to read or observe what he pleases." 89 S. Ct. at 1243.

1. The contract was negotiated by the Roofers Local 36, United Slate, Tile, & Composition Roofers, Damp & Waterproof Workers Association and the Roofers Contractors' Association, of which the respondent had been a member since 1949. Joseph T. Strong, 152 N.L.R.B. 9, 10 (1965).

2. *Id.* Strong originally contended that since he had withdrawn from the Association, he was not bound by the contract which it negotiated. So long as appropriately timed, such withdrawal from a multi-employer association has been acknowledged by the Board. *See, e.g.*, Seattle Automotive Wholesalers Ass'n, 140 N.L.R.B. 1393 (1963); Cooks Local 327, 131 N.L.R.B. 198 (1961). However, an attempt to withdraw is not appropriately timed, and is therefore invalid, if made after the negotiation of a contract by the association on the employer's behalf. NLRB v. Jeffries Banknote Co., 281 F.2d 893 (9th Cir. 1960); Evening News Ass'n, 154 N.L.R.B. 1494 (1965); Cooke & Jones, Inc., 146 N.L.R.B. 1664 (1964); Fairbanks Dairy, Inc., 146 N.L.R.B. 893 (1964). In Retail Assoc's., Inc., 120 N.L.R.B. 388, 395 (1958), the Board held that when

The NLRB found that he had engaged in unfair labor practices,[3] and ordered him to refrain from such action and to pay the fringe benefits[4] which the new contract provided. Upon petition by the Board to enforce the order,[5] the respondent maintained that the Board had erred in including in its order the requirement that he pay the fringe benefits. The Court of Appeals for the Ninth Circuit modified the order by eliminating the requirement that the respondent pay the fringe benefits.[6]

The Supreme Court reversed and reinstated the original order that the respondent pay the fringe benefits.[7] The finding of the Court was based upon the statutory authority of the NLRB to effectuate the policies of the National Labor Relations Act,[8] and the public responsibility

"actual bargaining negotiations have begun, we would not permit, except on mutual consent, an abandonment of the unit upon which each side has committed itself, absent unusual circumstances." Such was the withdrawal attempt by Strong. His withdrawal letter of January, 1962, had no legal efficacy since the previous contract had not yet expired, and there was no provision for prior termination. Further, while negotiations for the 1963-67 contract were pending, Strong, although put on notice thereof took no subsequent steps to reinstitute his withdrawal proclamation. In fact, he proceeded to honor the new contract, and met fringe benefit requirements as provided by it for the months of August and September, 1963.

3. 152 N.L.R.B. at 13. The respondent's refusal to sign the contract negotiated on his behalf by the Association was a violation of 29 U.S.C. § 158(a)(1), (5) (1964):

> (a) It shall be an unfair labor practice for an employer—
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> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
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> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

Section 157 guarantees employees the right to organize and bargain collectively with their employers.

4. 152 N.L.R.B. at 14. Fringe benefits have been defined as "deferred, contingent compensation which the employees of signatories may be entitled to receive in addition to their wages, and which was procured for them by their bargaining agent ..." Hobbs v. Lewis, 159 F Supp. 282, 286 (D.D.C. 1958).

5. Orders of the NLRB are not self-enforcing. The Board may petition a Federal Court of Appeals for enforcement; any party aggrieved by a final order of the Board may similarly obtain review of that order. 29 U.S.C. § 160(e),(f) (1964).

6. NLRB v. Strong, 386 F.2d 929 (9th Cir. 1967).

7. NLRB v. Strong, 393 U.S. 357 (1969).

8. 29 U.S.C. § 160(c) (1964):

> If upon the preponderance of the testimony taken the Board shall be of the opinion that any person has engaged in unfair labor practice, then the Board shall cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter

of the Board to reimburse employees for losses suffered due to an unfair labor practice.[9]

In enforcing the Act in unfair labor practice cases, the NLRB does not merely issue "cease and desist" orders, but also requires "affirmative action." [10] Its power is not limited to ordering reinstatement of employees with or without back pay.[11] An order requiring an employer to compensate employees for back wages and welfare fund payments pursuant to the contract has been termed reasonably calculated to remedy the employer's violation of the Act.[12] Further, an order to reimburse employees for "any losses they may have suffered" as a result of their employer's violation is within the authority of the Board.[13] Its power to issue orders has been characterized by the Supreme Court as remedial, not punitive.[14] Such power is to be exercised to supplement its author-

9. The Court cited Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941), as authority to support its decision. In that case, the Board ordered the employer to pay a sum equal to what the employees would have normally earned, less any amount earned during their unemployment period, and any losses willfully incurred. *Id.* at 197 *See* United Steelworkers v. American Int'l Aluminum Corp., 334 F.2d 147 (5th Cir. 1964).

10. 29 U.S.C. § 160(c) (1964).

11. *Id.* The only order specifically mentioned in § 160(c), "reinstatement of employees with or without back pay," emphasizes the power of the Board not only to prevent further unfair labor practices, but also to rectify violations already committed. Since the sole limitation of the section is to "effectuate the policies of [the Act]," Congress has seen fit not to establish preordained remedies for each offense. Rather, the Board has been permitted to set the tenor of its own authority, subject to judicial review upon enforcement, by appropriate and specific treatment based upon the unique circumstances of each case. *See* Virginia Elec. & Power Co. v. NLRB, 319 U.S. 533 (1943), in which an employer was ordered to reimburse his employees in full for amounts which had been deducted from their wages and paid to their union, which was dominated in formation and administration by the employer. *See* note 15 *infra. Cf.* NLRB v. Sunshine Mining Co., 125 F.2d 757 (9th Cir. 1942); Swift & Co. v. NLRB 106 F.2d 87 (10th Cir. 1939).

12. In NLRB v. George E. Light Boat Storage, Inc., 373 F.2d 762 (5th Cir. 1967), the employees were wrongfully discharged because of union activity. The order required not only payment of back wages but also interest thereon.

13. In Ogle Protection Serv., Inc., 149 N.L.R.B. 545 (1964), the employers were ordered to perform on the contract retroactively from the date on which it was to go into effect since the violated contract had an automatic renewal clause. *Accord,* Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941).

14. Consolidated Edison Co. v. NLRB, 305 U.S. 197 (1938). *See, e.g.,* NLRB v. H & H Plastics Mfg. Co., 389 F.2d 678 (6th Cir. 1968), in which the court held that only when the Board abused its discretion to formulate an appropriate remedy may the federal courts deny enforcement; NLRB v. United Nuclear Corp., 381 F.2d 972 (10th Cir. 1967), in which the court held that an order of the Board should stand unless it can be shown that it was an attempt to achieve ends other than those which can be said to effectuate the policies of the Act. *See generally* Elam v. NLRB, 395 F.2d 611 (D.C. Cir. 1968); Stark Ceramics, Inc. v. NLRB, 375 F.2d 202 (6th Cir. 1967);

ity to suppress violations, and to mitigate consequences of violations.[15]

An order to enforce a collective bargaining agreement, or to adjudicate a contractual dispute, is beyond the authority of the Board,[16] but its authority to effectuate the policies of the Act may be concurrent with the authority of the law to remedy a breach of contract.[17] Although arbitration and court action are the principal sources of contract interpretation in these cases, the Board may still take affirmative action to

Operating Eng'rs Local 138 v. NLRB, 321 F.2d 130 (2d Cir. 1963); NLRB v. Ford Motor Co., 119 F.2d 326 (5th Cir. 1941).

15. The Board is authorized to remedy violations by unions as well as by employers. 29 U.S.C. § 158(b)(1)(A) (1964):

> (b) It shall be an unfair labor practice for a labor organization or its agents—
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> (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title

Section 157 guarantees employees the right to organize and bargain collectively with their employers.

In Carpenters Local 160 v. NLRB, 365 U.S. 651 (1961), the Board was not permitted to require a union to refund dues paid to it by members, absent a showing that it had coerced them to join or remain members, but in NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240 (1939), an order requiring an employer to withdraw recognition from his employees' organization was held valid where there was evidence that the employer was responsible for the formation of the organization. Such conduct by an employer is contrary to the Act. 29 U.S.C. § 158(a)(2) (1964):

> (a) It shall be an unfair labor practice for an employer—(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it

See Virginia Elec. & Power Co. v. NLRB, 319 U.S. 533 (1943).

An employer's denial of seniority rights of its employees, who go on strike after the employer's wrongful refusal to recognize their union, constitutes a violation of the Act. An order requiring the employer to accord strikers their seniority rights was held reasonable and appropriate in NLRB v. Wheeling Pipe Line, Inc., 229 F.2d 391 (8th Cir. 1956). *See, e.g.*, NLRB v. Newark Morning Ledger Co., 120 F.2d 262 (3d Cir.), *cert. denied*, 314 U.S. 693 (1941).

16. *See, e.g.*, NLRB v. Hyde, 339 F.2d 568, 572-73 (9th Cir. 1964); United Steelworkers v. American Int'l Corp., 334 F.2d 147, 152 (5th Cir. 1964)

17. Although 29 U.S.C. § 185(a) (1964), confers jurisdiction to the federal district courts in suits for violation of collective bargaining contracts, the authority of the Board is not displaced if the violation is also contrary to the policies of the Act. Smith v. Evening News Assn., 371 U.S. 195, 197-98 (1962). *See, e.g.*, NLRB v. C & C Plywood Corp., 385 U.S. 421 (1967); Carey v. Westinghouse Elec. Corp., 375 U.S. 261, 268 (1964); Teamsters Local 174 v. Lucas Flour Co., 369 U.S. 95, 101 n.9 (1961). For example, discharge of an employee for union membership may be a breach of contract. However, it is also an unfair labor practice which may be remedied by reinstatement with or without back pay under § 160(c) of the Act, even though the Board order prescribes the same remedy reserved by the contract. In NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 30-31 n.7 (1967), the court lent support to this rationale: "[T]he complaint stated an unfair labor practice. The fact that the conduct complained of might also have supported an action under [29 U.S.C. § 185] did not deprive the Board of jurisdiction."

remedy an unfair labor practice which is in violation of the Act.[18] However, it has at times declined to exercise its jurisdiction to deal with unfair labor practices where federal labor policy would best be served by leaving the parties to other processes of law [19]

The holding of the Supreme Court in *NLRB v. Strong*[20] has served to modify the authority of the Board by enlarging the base from which "affirmative action" as provided in Section 160(c) to effectuate the policies of the Act may be taken.[21] Although specific reference is made therein only to remuneration for prior services, the fact that fringe benefits do not constitute direct compensation was not considered fatal to the issue.[22] Such benefits are receivable in addition to direct compensation, and an unfair labor practice may cause pecuniary loss to an employee in both areas. Thus, once an employer's action is determined to be an unfair labor practice, the Board may now take remedial action by ordering payment of lost fringe benefits, considered now to constitute "back pay" [23]

NICHOLAS STUART REYNOLDS

Federal Criminal Procedure—HABEAS CORPUS PROCEDURES—DISCRETION TO DENY SUCCESSIVE HABEAS CORPUS APPLICATIONS WITHOUT A HEARING. *Hilbrich v. United States*, 406 F.2d 850 (7th Cir. 1969)

In 1963 petitioner was convicted of bank robbery His appeal, based on the contention that he was not brought before the United States Commissioner with the requisite dispatch, and that his confession

18. Smith v. Evening News Assn., 371 U.S. 195, 197-98 (1962). It should be noted that Congress established the judicial remedy of 29 U.S.C. § 185 (1964), in lieu of a proposal to make breach of a collective bargaining agreement itself an unfair labor practice. Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 452 (1957). *See* Mendelsohn, *Enforceability of Arbitration Agreements Under Taft-Hartley Section* 301, 66 YALE L.J. 167 (1956).

19. In Spielberg Mfg. Co., 112 N.L.R.B. 1080 (1955), the Board recognized the arbitrator's award in an attempt to encourage voluntary settlement of labor disputes. In Consolidated Aircraft Corp, 47 N.L.R.B. 694 (1943), the Board refused to exercise jurisdiction where the parties had not exhausted their rights and remedies under the contract.

20. 393 U.S. 357 (1969).

21. In a recent case, the court alluded to NLRB v. Strong, 393 U.S. 357 (1969), to affirm the authority of the Board to determine back pay due wronged employees. NLRB v. K & H Specialties Co., Inc., 407 F.2d 820 (6th Cir. 1969).

22. 393 U.S. at — n.4.

23. *See* 29 U.S.C. § 160(c) (1964).