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Labor Law - NLRB's Remedial Powers

J. P. Kelly

ment right to be informed. It was noted in the case that the Government, while not conceding the validity or propriety of the qualified privilege granted Caldwell, did not seek review of the district court's protective order due to the Justice Department guidelines issued subsequent to that order.]

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LABOR LAW—NLRB's REMEDIAL POWERS—The United States Supreme Court held that while the National Labor Relations Board does have power under the Labor Management Relations Act to require employers and employees to negotiate, it is without power to compel a company or a union to agree to any substantive contractual provision of a collective bargaining agreement.

H. K. Porter Co. v. NLRB, 397 U. S. 99 (1970).

Section 8(d) of the National Labor Relations Act, as amended,[1] provides:

> For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . .

On October 5, 1961, the United Steelworkers of America was certified by the NLRB as the bargaining representative of the approximately 300 production and maintenance employees of the H. K. Porter Company's Danville, Virginia plant. As of September, 1964, the union had sought and received one bargaining order against the employer[2] but no contract had yet been concluded between the parties. The three unresolved issues as of this date were wages, health insurance and "checkoff," the deduction by the employer of union dues from the paychecks of employees who authorized such a deduction. The 300 employees comprising the bargaining unit lived within a radius of 35 to 40 miles of the plant. Since the union had no clerical staff in Danville and its closest office was in Roanoke, approximately 85 miles away, it

1. Labor Management Relations Act (Taft-Hartley Act), 29 U.S.C. 151 (1947).
2. H. K. Porter Co., 56 L.R.R.M. 1016 (1964).

considered a checkoff as the only feasible means to obtain prompt and regular collection of monthly dues.

In September, 1964, the union again initiated unfair labor practice charges and the trial examiner, whose finding was adopted by the Board in July, 1965, found that the company's rejection of the checkoff was motivated by a desire to "frustrate agreement with the Union."[3] At the hearing, the company's representative admitted that it made deductions from volunteering employees' wages for a variety of charitable causes and that there would be no inconvenience involved in checking off union dues; that, in fact, the company did check off union dues at certain of its other plants and that the refusal to agree to a checkoff at the Danville plant was solely on the ground that the company was not going to aid and comfort the union at this location in the conduct of union business.

In May, 1966, the Court of Appeals for the District of Columbia sustained the Board's unfair labor practice finding and affirmed the Board's order to the company to cease and desist from the unfair labor practice and to bargain collectively with the union upon request.[4] The court indicated that the Board might possibly have required the company to agree to a checkoff provision as a remedy for the prior bad faith bargaining, and concluded that although its order would not include a specific reference to the company's obligation with respect to checkoff, in view of the Board's finding that the company's refusal was for the purpose of frustrating agreement "[t]o suggest that in further bargaining the company may refuse a checkoff for some other reason, not heretofore advanced, makes a mockery of the collective bargaining required by the statute."[5]

In the subsequent negotiations, the company and union each set forth completely different interpretations of the court's decree. The company held that the decree was merely yet another order that it bargain in good faith, this time on the question of dues collection. The company offered to discuss alternative arrangements for dues collection, but the union contended that the company was now obligated to agree to a contractual dues checkoff provision.

In February, 1967, the union sought a clarification of the decree. The motion for clarification was denied, but the court suggested that the Board test the competing interpretations of the decree through its

3. H. K. Porter Co., 153 N.L.R.B. No. 119, 59 L.R.R.M. 1462 (1965).
4. H. K. Porter v. NLRB, 363 F.2d 272 (D.C. Cir. 1966), *cert. denied* 385 U.S. 851 (1966).
5. 363 F.2d 272, 276 (D.C. Cir. 1966).

contempt process. In April, 1967, the union requested the Regional Director to initiate contempt proceedings. In June the regional director responded and declined to prosecute a contempt charge, finding that the employer had "satisfactorily complied with the affirmative requirements of the order." The court of appeals then granted the union's motion for clarification.[6]

The court of appeals in a 2-1 decision stated that it did not read:

> . . . Section 8(d) as prohibiting the Board from ordering a company, which has repeatedly flouted its Section 8(a)(5) duty, to make meaningful and reasonable counteroffers, or indeed even to make concession where such counteroffers or such a concession would be the only way for the company to purge the stain of bad faith that has already soiled its position.[7]

and concluded that:

> Since the company had conceded that it had no business reason for refusing the checkoff, it would have been perfectly proper for the Board to order the company to grant one in return for a reasonable concession by the union on wages or insurance,—the two issues besides checkoff that remained in dispute. *Indeed, it is possible that in an appropriate case the Board could simply order the company to grant a checkoff.*[8] (Emphasis Added.)

Taking its cue from the court, on remand the Board issued an order directing the employer to grant the union's request for a checkoff provision without holding out for some "reasonable concession" in return.[9]

Recognizing that this is the first time in the 35-year history of the Act that the Board has ordered either an employer or a union to agree to a substantive term of a collective bargaining agreement, Justice Black, speaking for the majority of the Supreme Court held that:

> . . . while the Board does have power under the Labor Management Relations Act, . . . to require employers and employees to negotiate, it is without power to compel a company or a union to agree to any substantive contractual provision of a collective bargaining agreement.[10]

After reviewing both the legislative and judicial history of the Na-

6. United Steelworkers of America v. NLRB, 389 F.2d 295 (D.C. Cir. 1967).
7. *Id.* at 299.
8. *Id.*
9. 172 N.L.R.B. No. 72, *aff'd*, 414 F.2d 1123 (D.C. Cir. 1969).
10. H. K. Porter Co. v. NLRB, 397 U.S. 99, 102 (1970).

tional Labor Relations Act with respect to the Board's authority to compel agreement to specific contractual provisions, the Court disposed of the lower court's handling of the meaning of section 8(d) by noting that:

> We may agree with the Court of Appeals that as a matter of strict, literal interpretation of that section it refers only to deciding when a violation has occurred, but we do not agree that that observation justifies the conclusion that the remedial powers of the Board are not also limited by the same considerations that led Congress to enact § 8(d). It is implicit in the entire structure of the Act that the Board acts to oversee and referee the process of collective bargaining, leaving the results of the contest to the bargaining strengths of the parties. It would be anomalous indeed to hold that while § 8(d) prohibits the Board from relying on a refusal to agree as the sole evidence of bad faith bargaining, the Act permits the Board to compel agreement in that same dispute. The Board's remedial powers under § 10 of the Act are broad, but they are limited to carrying out the policies of the Act itself. One of these fundamental policies is freedom of contract.[11]

The Court, while noting that the Board's remedial powers under section 10(c) of the Act are broad, recognized that they are limited to carrying out the policies of the Act itself and that one of these fundamental policies is freedom of contract. The Court further reasoned that:

> . . . allowing the Board to compel agreement when the parties themselves are unable to do so would violate the fundamental premise on which the Act is based—private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract.[12]

In concluding its decision the Court clearly stated its position with respect to the proper source for answers to the Board's 8(a)(5) remedy dilemma:

> It may well be true; as the Court of Appeals felt, that the present remedial powers of the Board are insufficiently broad to cope with important labor problems. But it is the job of Congress, not the Board or the courts, to decide when and if it is necessary to allow governmental review of proposals for collective bargaining agree-

11. *Id.* at 107, 108.
12. *Id.* at 108.

> ments and compulsory submission to one side's demands. The present Act does not envision such a process.[13]

Justice Douglas, with whom Justice Stewart concurred, dissented. Justice Douglas noted that section 10(c) of the Act empowers the Board "to take such affirmative action . . . as will effectuate the policies of the Act" and concluded that:

> In those narrow and specialized circumstances, I see no answer to the power of the Board in its discretion to impose the checkoff as 'affirmative action' necessary to remedy the flagrant refusal of the employer to bargain in good faith.

But Jusice Douglas qualified this position by adding that:

> . . . once there is any business consideration that leads to a denial of a demand or any consideration of bargaining strategy that explains the refusal, the Board has no power to act. Its power is narrowly restricted to the clear case where the refusal is aimed solely at avoidance of any agreement.[14]

In *H. K. Porter* the Board attempted to direct the inclusion of a substantive contractual provision, checkoff, within a labor agreement. The checkoff provision was one on which the parties themselves were never able to reach agreement. In applying the provisions of the National Labor Relations Act, the majority of the Supreme Court concluded that while the Board's remedial powers under section 10 of the Act are broad, they are limited to carrying out the policies of the Act itself, and one of these fundamental policies is freedom of contract. That the freedom of contract allowed by the Act is not absolute is obvious, however. For example, the Act does not leave the employer free to choose any employee representative he wants, and the representative chosen by the majority of the employees represents the minority as well. Also, by virtue of sections 8(a)(3) and 8(e) of the Act, the freedom of the parties to contract with respect to union security or "hot cargo" provisions is precisely delineated and limited. What the Court is apparently saying therefore is that based on the legislative history of the Act it was the clear intention of Congress to allow the parties to bargain as freely as possible to arrive at a collective agreement and that the only encroachments of a substantive nature on this freedom to bargain which the Court will recognize are those which

13. *Id.* at 109.
14. *Id.* at 110, 111.

are set forth in the Act itself. If the provisions of the Act are insufficient to accomplish the purposes of the Act without further infringement on the rights of the employer and the employee representative to bargain freely, these further infringements must be enacted by Congress.

Although the action taken by the Board in this case was clearly beyond the scope of any previously prescribed 8(a)(5) remedy, it should be noted that its order involved a lesser infringement upon the bargaining process than would be involved if it were to adopt either the other alternative suggested by the court of appeals or the suggested position of the minority of the Supreme Court. As an alternative to simply ordering the company to grant a checkoff, the court of appeals suggested that the Board might order the company to grant a checkoff in return for a "reasonable concession" by the union on the other two items still in dispute, wages and insurance.[15] In setting itself up as arbiter of what would be a "reasonable concession" with respect to an item in dispute, the Board would have not only brought its presence into the negotiating room but taken the chair at the head of the table as well. The evaluation of the relative worth and merit of each party's position would seem to be clearly beyond the authority and competence of the Board and would represent no less than government dictation of the terms of collective bargaining. Rather than promoting the process of collective bargaining, it would destroy it. By contrast, the Board's simple and clear order that the company should grant a checkoff clause merely represented its opinion that the granting of this clause was now the only way available for the company to absolve itself of its 8(a)(5) violation. So too would the position of the minority of the Supreme Court bring the presence of the Board squarely into the negotiations of the parties for the minority would require the Board to determine the existence of ". . . any business consideration that leads to a denial of a demand or any consideration of bargaining strategy that explains the refusal . . ." and only once such an existence is determined would the Board be powerless to compel one party or the other to agree to an item in dispute. Since a negotiator for either party would always be able to argue that it simply chose not to agree to a specific substantive term in order to have it available as a bargaining "carrot" for some future negotiation, the minority's suggested approach would either be doomed to failure from the start if applied literally or would require a practical liberality in application by the

15. See note 8.

Board which would once again require the Board to superimpose its own judgment on the relative merits of the positions taken by the employer and employee representative with respect to the item in dispute.

In order to appreciate the significance of *H. K. Porter,* it is useful to briefly examine the manner in which it has been applied during its short period of existence by the National Labor Relations Board. The Board has applied *H. K. Porter* to the long pending *Ex-Cell-O Corp.* case[16] where the employer was found to have violated 8(a)(1) and (5) of the Labor Management Relations Act by refusing to bargain with a newly certified union and where the refusal admittedly was for the purpose of obtaining court review of the employer's contention that the representation election won by the union should have been set aside and the certification of the union was therefore invalid. In addition to recommending the standard bargaining order as a remedy, the trial examiner ordered the company to compensate its employees for monetary losses incurred as a result of its unlawful conduct. In a 3-2 opinion the Board "reluctantly" reversed the compensation order of the trial examiner while recognizing that its current remedies designed to cure violations of section 8(a)(5) are "inadequate." The Board recognized that *Ex-Cell-O* was arguably distinguishable from *H. K. Porter* in that in the former case the requested remedy merely would require an employer to compensate employees for losses they incurred as a consequence of their employer's failure to agree to a contract he would have agreed to if he had bargained in good faith while in the latter case the remedy operates prospectively to bind an employer to a specific contractual term.[17] The Board majority found such a distinction to be more illusory than real. In each situation the employer is required by the Government to submit to demands of the other side to which it never itself had freely asserted.

It would seem that there is considerably more merit to the order of the trial examiner in *Ex-Cell-O* than there was to the Board's position in *H. K. Porter.* In the *Ex-Cell-O* remedy there is far less infringement upon the actual process of collective bargaining and the Board minority cogently argues that in *Ex-Cell-O* the remedy would be designed to compensate employees for the injuries caused to them by virtue of the company's unfair labor practice, but it would not require the employer to accept the measure of compensation as a term of any contract which

16. Ex-Cell-O Corp., 185 N.L.R.B. No. 20, 74 L.R.R.M. 1740 (1970).
17. 74 L.R.R.M. 1740, 1743 (1970).

might result from subsequent collective bargaining. According to the Board minority, the *Ex-Cell-O* remedy does not "write a contract" between the employer and the union, for it would not specify any new or continuing terms of employment nor prohibit changing any existing terms or conditions. While the minority's argument has a certain technical appeal, it appears to be clearly objectionable on at least two substantial grounds:

1. Any compensatory remedy established for the period during which employees incurred losses because of the employer's unlawful refusal to bargain would certainly serve as the springboard for further union demands. It would be unreasonable to believe that a union would eventually agree to terms that would provide fewer benefits to the employees than were dictated by the Government as part of a compensatory remedy; the Government is therefore dictating at least the minimal terms of the subsequent agreement.

2. Since the National Labor Relations Act does not compel agreement but only compels that the parties bargain, the granting of a remedy which presupposes that if the parties had bargained there would have in fact been an agreement goes far beyond the obligation imposed on the parties by the act itself. Who is to say and by means of what standards that a collective labor agreement would have resulted from bargaining in any specific situation?

It would appear that the current conflict concerning the Board's remedial powers for 8(a)(5) violations has been stabilized for at least the immediate future. On December 8, 1970, the Supreme Court denied certiorari in the case of *Tiidee Products*[18] which involved the issuance of a compensatory remedy similar to that involved in the *Ex-Cell-O* case. Justice Stewart, who dissented in *H. K. Porter*, was of the opinion that certiorari should be granted.[19]

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18. Tiidee Products, Inc., 174 N.L.R.B. No. 103, 426 F.2d 1243 (D.C. Cir. 1970), *cert. denied*, — U.S. — (1970).

19. In closing, it should be noted that there are certain limits beyond which the holding in *H. K. Porter* clearly does not go. The case can be and should be distinguished from a host of other decisions where the Board has been sustained in placing limitations upon the general bargaining activities of the parties but where in each case the Board's activity falls far short of dictating specific contract terms where the parties have themselves been unable to agree to such terms. Such cases would include but not be limited to those which hold that:

a. a party may not, pursuant to the express requirements of Section 8(d), refuse to execute written contracts incorporating agreements already reached nor obviate such agreements by delaying through litigation such execution until after the