Denver Law Review

Volume 30 | Issue 8 Article 3

January 1953

Union Practices Prohibited by the Federal and State Labor Acts

Wayne D. Williams

UNION PRACTICES PROHIBITED BY THE FEDERAL AND STATE LABOR ACTS

WAYNE D. WILLIAMS
of the Denver Bar

This discussion deals briefly with federal and state jurisdiction over labor disputes, with union responsibility in unfair labor practice cases, and with assorted unfair labor practices under state and federal law, prominently, restraint, coercion, discrimination, and feather-bedding.

JURISDICTION OVER UNFAIR LABOR PRACTICES

The principle of federal supremacy suggests that the problem of jurisdiction over unfair labor practices ought to be approached by determining the scope of the federal law, and in that process finding out what remains for control by the states.

The Taft-Hartley Act was meant to apply the full reach of the federal commerce power, and it gives the national Board jurisdiction over all unfair labor practices "affecting commerce."

Nevertheless, to avoid taking the time of the Board to hear matters essentially local in nature, the Board, on October 3, 1950, announced that in general it will act only in cases where the dollar volume of interstate business done exceeds any of certain specified amounts, depending upon the kinds of transactions measured; and in cases involving public utilities, transit companies, instrumentalities of commerce, multi-state and national defense enterprises.[1] These requirements are not limitations upon the power of the Board, but rather are guides which the Board will usually observe in determining whether to exercise its jurisdiction.

Accordingly, the Board may take jurisdiction of a particular case which falls outside the field described by these standards, and the court may require the Board to do so, where the court finds that the effect upon commerce of the activity complained of in such a case is in fact substantial.[2]

In addition to the powers of regulation which the states have never surrendered over "local" commerce, whatever that now may mean, it appears that the courts are marking out a few areas of labor strife in which the states have jurisdiction concurrently with the federal government.

For example, the U. S. Supreme Court has upheld the right of a state, even in disputes affecting interstate commerce, to prohibit new labor techniques not protected under Taft-Hartley, at least where injury to property and intimidation of employees are present, and the court has explicitly reserved the question of the

[1] C.C.H. *Labor Law Reporter*, p. 1615.

[2] N. L. R. B. v. Kobritz, 193 F. 2d 8 (1st Cir. 1951); Joliet Contractors Association v. N. L. R. B., 193 F. 2d 833 (7th Cir., 1952).

power of the states to act when a labor dispute creates a real local emergency. In addition, several state courts have asserted jurisdiction to enjoin secondary boycotts in interstate as well as local commerce, and state courts have taken jurisdiction of injunction suits for violation of the collective bargaining agreement, which is not an unfair labor practice under Taft-Hartley. In two cases decided by the Supreme Court of Pennsylvania in February, 1953, it was held that Pennsylvania had no jurisdiction to enjoin picketing which constituted an unfair labor practice under Taft-Hartley (picketing to force employer discrimination), but did have jurisdiction to entertain a dispute involving picketing which Taft-Hartley neither protected nor prohibited.[3]

In general, however, the matters of selection and certification of bargaining units and representatives, the right to strike for which Taft-Hartley recognizes as legitimate, and the regulation of activities which are made unfair labor practices in Taft-Hartley, are all withdrawn from state jurisdiction so far as the federal commerce power extends. Thus, a state statute requiring a majority vote as prerequisite to a strike, requiring compulsory arbitration of all labor disputes involving public utilities, or authorizing state action in discrimination cases, is invalid when applied by a state to a dispute affecting interstate commerce.[4]

The question of state and federal jurisdiction over labor disputes deserves a great deal more time than we are able to give it, but perhaps the foregoing discussion at least suggests the problems that are encountered.

Union Responsibility

We come next to the question of the commission of unfair labor practices on labor's side, and the principles for determining responsibility for such practices. The Colorado statute provides that an unfair labor practice may be committed by any employee. Taft-Hartley is much more restrictive, and the unfair labor practices named in the federal act can be committed only by "a labor organization or its agents." Accordingly, some attention must be given to the principles from which the existence of an agency for a labor organization is determined.

The federal act provides that in determining the matter of agency "the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling." This provision was intended to substitute common law principles of agency for the declaration in the Norris-LaGuardia Act that unions could not be held responsible for the acts of their officers and members without actual participation, authorization or ratification after knowledge of the acts complained of.

---

[3] Garner, et al v. Teamsters' Union, 373 Pa. 19, 94 A. 2d 893 (1953); American Brake Shoe Co. v. District Lodge 9, International Association of Machinists, 373 Pa. 164, 96 A. 2d 884 (1953).

[4] For authorities in support of the above statements relative to jurisdiction, and a good, detailed consideration of the subject, see note, "Federal and State Jurisdiction over Labor Relations," 53 C.L.R. 258 (1953).

In applying the new standard, the federal Board has held a union responsible for acts of intimidation occurring in connection with picketing, when instigated by union officials who had been authorized to direct *lawful* picketing activities, for threats made by the members of a union strike committee, and for coercion of non-union members to join the union exerted by one holding general authority to solicit union membership.[5] The Board has, however, indicated that union membership alone is not sufficient to create an agency,[6] and has held that a union which aided in establishing a picket line was not responsible for the acts of some of the pickets who followed an employee away from the picket line and coerced him respecting the union's objectives.[7] In the case last mentioned, the Board pointed out that the activity of the picket had not been expressly authorized, and the union had not established any pattern of unlawfully coercive acts which would constitute implied authorization of the actions of the pickets.

Under what circumstances can the principle of *respondeat superior* reach beyond the local union to the international or parent body? The cases upon this question do not afford a precise guide. The mere affiliation of the local organization as a member of the parent body has been held not to be a sufficient basis for involving the responsibility of the latter, but if the parent organization actually undertakes to control the handling of a particular dispute, especially through one of its own officials on the scene, or finances it, there is likelihood that the Board will find international organization responsible in addition to the local union.[8]

Certain Unfair Labor Practices Considered

A comparison of the unfair labor practice provisions of the Colorado act with Taft-Hartley shows that the Colorado act is considerably broader than the federal act, and designates as unfair labor practices a number of activities which Taft-Hartley omits. Thus, the Colorado act makes it an unfair labor practice to violate any collective bargaining agreement, or to refuse to accept the final judgment of any tribunal having jurisdiction over employment relations, or to commit any crime or misdemeanor in connection with any controversy as to employment relations.

Most of the remaining activities on labor's side which are rendered unfair labor practices by the Colorado act have some counterpart in Taft-Hartley, and will be noted as we discuss the practices prohibited by Taft-Hartley.

Restraint and Coercion

The first of the practices prohibited by Taft-Hartley is specified in Section 8(b) (1) of the federal act, and consists of restrain-

[5] Perry Norvell Co., 80 N.L.R.B. 225 (1948); International Longshoremen's Union, 79 N.L.R.B. 1487 (1948).

[6] International Longshoremen's Union, *supra*, n. 5.

[7] Western, Inc., 93 N.L.R.B. 336 (1951).

[8] International Longshoremen's Union, *supra*, n. 5, and see note, "Union Responsibility for Acts of Officers," 49 C.L.R. 384 (1949).

ing or coercing employees in their rights to participate in or refrain from organizing, collective bargaining, and other concerted activities for mutual aid or protection, or restraining or coercing an employer in the selection of his own bargaining or grievance committee representatives. A proviso in the subsection preserves the right of unions to prescribe their own rules with respect to acquiring or retaining union membership. The effect of this proviso is that the union may deny membership to any employee upon any ground, except failure to pay an excessive or discriminatory initiation fee when there is in force a valid contract with the employer requiring union membership.

The real question under Section 8(b)(1) of the federal act is what is meant by restraint or coercion? Clearly, any overt violence forcing or causing employees affected by a particular dispute to stay away from their employment or to join the union amounts to restraint or coercion within the meaning of the act.

Three matters involving more doubtful questions of restraint or coercion must be considered. The first of these is whether mere words alone can ever amount to restraint or coercion. The most obvious case for responsibility is a threat of violence or injury to person or property, and it has repeatedly been held that such a threat is an unfair labor practice within the meaning of the section. But how about the statement, "Boss, I want you to fire those 2 men over there," when made by a union agent? If the firing would be *discriminatory* within the meaning of the act, the mere statement would probably be held to be coercive of the employees mentioned.[9] The mere existence of an illegal closed shop contract to which the union is a party has been held to restrain employees in the exercise of their right not to join the union, even though the restraint was not applied to any particular employees or applicants for employment.[10]

Apart from words which are threats of violence, or which constitute an attempt to cause an employer to discriminate against his employees unlawfully, mere speech does not constitute restraint or coercion within the meaning of Section 8(b)(1). Thus in the case of *Western, Inc.*, already cited, it was held that peaceful picketing during a strike which was called to enforce a secondary boycott did not constitute restraint or coercion, even though the purpose of the strike was unlawful.

Nor does mere name calling or vocally expressed resentment constitute restraint or coercion. For pickets to call working employees "skunks," "rats" and the like is not a violation of the act. Similarly, the threats "I'll get you" and "I know where you live," have been held to be too vague to constitute coercion under the act, but "You'd better watch out because there may be trouble later" was held coercive.[11]

---

[9] Cf. N. L. R. B. v. Jarka Corp., 198 F. 2d 618 (3d Cir., 1952).

[10] Jandel Furs, 100 N.L.R.B. No. 234 (1952).

[11] Perry Norvell Co., *supra*, n. 5; United Furniture Workers, 81 N.L.R.B. 886 (1949); United Mine Workers, 90 N.L.R.B. 436 (1950).

The second matter deserving special consideration arises from the fact that the words "restrain" and "coerce" imply that some result in the behavior of employees or of an employer must occur before restraint or coercion can be found to exist. Neither the Board nor the courts, however, have taken this view. Instead, and apparently on the basis of cases which arose under the Wagner Act, they have extended the act to hold that mere *attempts* at restraint or coercion are prohibited by Section 8(b)(1). Thus, where a union agent threatened an employee with injury if he continued to work, the union was held to have violated Section 8(b)(1), even though the employee disregarded the threat and continued to work.[12] Similarly, in the case of the illegal closed shop contract mentioned, restraint of employees or applicants for employment was found to exist even though no move had been made to apply or enforce the contract.[13]

Thirdly, it should be noted that it is restraint or coercion of *employees* which Section 8(b)(1)(A) prohibits. Notwithstanding this use of the plural, "employees," it has been held that restraint or coercion of a single employee violates the section, but this has been done without any specific consideration of the fact that the word is plural in the act.[14]

Suppose threats of violence are made to company officials who are not employees within the meaning of the act. May such threats amount to *coercion of employees* within the meaning of Section 8(b)(1)? In the *United Furniture Workers of America* case, the Board held that where union agents carrying clubs seized a foreman by the arm saying, "No one goes in this morning," and the occurrence was witnessed by employees, the employees had been coerced respecting their rights in violation of Sction 8(b)(1), because they might reasonably consider that similar threats would be made to them if they attempted to enter the plant.[15]

The Colorado act uses much the same terms as the federal act in connection with restraint or coercion, and uses the singular, "employee," instead of "employees," in describing restraint or coercion. In addition, the Colorado act specifically names as unfair labor practives many coercive practices, such as mass picketing, intimidation, and sabotage.

Causing Employer to Discriminate

The next unfair labor practice to be described is found in Section 8(b)(2) of the Taft-Hartley Act, and consists of causing or attempting to cause an employer to discriminate against an employee. The Colorado act contains a similar provision.

Employer discrimination against employees, under Section

[12] Progressive Mine Workers v. N. L. R. B., 187 F. 2d 298 (7th Cir., 1951).
[13] United Mine Workers, *supra*, n. 11.
[14] N. L. R. B. v. Kingston Cake Co., 191 F. 2d 563 (3rd Cir., 1951); N. L. R. B. v. United Construction Workers, 198 F. 2d 391 (4th Cir., 1952); Acme Mattress Co., 91 N. L. R. B. 1010 (1950).
[15] Cited *supra*, n. 11.

8(a)(3) of the act, is discussed in detail in another article in this issue, and there is no need to extend that discussion here. On the labor side, the unfair labor practice is *to cause or attempt to cause* an employer to make such a discrimination.

The question of particular interest here is, what meaning shall be given to the phrase "cause or attempt to cause?" During the course of Taft-Hartley through the Congress this phrase was "persuade or attempt to persuade." The conference report substituted the present phrase because, as Senator Taft explained, a prohibition of mere persuasion would be inconsistent with the free speech guarantees of the act. In practice, however, the phrase "cause or attempt to cause" has been construed as if the section still read, "persuade or attempt to persuade." Thus, peaceful picketing, an unenforced closed shop contract, or even a mere request for discharge of an employee have been held to constitute attempts to cause employer discrimination.[16]

Where a valid union shop contract is in existence the union may, of course, bring about the discharge of an employee for failure to pay valid dues or initiation fees without running counter to the act. Failure to pay a fine imposed by the union, however, is not a valid basis for requesting the discharge of an employee, although the union might lawfully terminate the employee's union membership for failure to pay the fine.

One further matter of special concern to unions in connection with Section 8(b)(2) practices is whether the section leaves them any methods by which an employer may be encouraged to observe the union's apprenticeship, experience or skill standards in the employment of workmen. The unions have attempted to approach this problem through the inclusion of provisions in the collective bargaining agreement requiring the employer to notify the union of any job vacancies as they occur, or providing for the establishment of a joint apprenticeship committee composed of representatives of the union and of the employer, or for the giving of competency tests to all applicants for specific employments. Any of these provisions in a collective bargaining agreement is probably lawful, so long as neither by the agreement nor by practices followed under the agreement is any discrimination made between members and non-members of the union.[17]

REFUSAL TO BARGAIN

Section 8(b)(3) of Taft-Hartley makes it an unfair labor practice for the union or its agent to refuse to bargain collectively. This subject, also, is discussed elsewhere in this issue, and I will simply attempt to fill in a few matters which arise particularly on labor's side of the bargaining table.

---

[16] Denver Building and Construction Trades Council, 90 N.L.R.B. 1768 (1950), enforcement granted, 192 F. 2d 577 (10th Cir., 1951); N. L. R. B. v. Jarka Corp., *supra*, n. 9.

[17] Compare, Evans v. International Typographical Union, 81 F.S. 675 (1948).

The question of refusal to bargain comes up at some stage of almost every contract negotiation, and the various demands and policies which form the subjects of collective bargaining are too numerous to mention. Generally speaking, however, any demand by the union for a contract provision which the employer cannot legally grant, or refusal to make any agreement at all, constitutes a refusal to bargain on the part of the union.

Once the contract is made, bargaining is required upon questions of its application and interpretation, but Taft-Hartley relieves the employer of the duty to bargain concerning *modifications* in an existing agreement until sixty (60) days from its expiration, at which time the union may serve a notice of proposed termination or modification of the contract, and initiate bargaining upon the subject of a new contract as provided in Section 8(d).

The act also relieves the employer of the duty, during the life of a contract, to discuss matters bargained for in the negotiations but not incorporated in the contract.

Unlike the Colorado act, Taft-Hartley does not define violations of a collective bargaining agreement to be unfair labor practices, although a right to sue for damages for the violation is conferred, and a strike for modification or termination of a contract in force is a refusal to bargain.[18] A proposal that breach of the collective bargaining agreement be made an unfair labor practice was rejected by the Congress.

The Colorado act does not render mere refusal to bargain an unfair labor practice, but does provide that violation of a collective bargaining agreement, and striking without giving the strike notice required by the act, are both unfair labor practices.

SECONDARY BOYCOTTS

Section 8(b)(4) of Taft-Hartley is discussed in Mr. Hornbein's article elsewhere in this issue.

REQUIRING EXCESSIVE OR DISCRIMINATORY FEES

Section 8(b)(5) renders it an unfair labor practice for the union or its agents, when there is a lawful union security contract in force, to exact initiation fees which the Board finds excessive or discriminatory. This section is self-explanatory. The Colorado act contains no matching provision concerning excessive or discriminatory fees.

FEATHER-BEDDING

The final unfair labor practice specified in Taft-Hartley is feather-bedding. Section 8(b)(6) of the act makes it an unfair labor practice for a union or its agents "to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed."

We have already considered the meaning of the phrase "to

[18] Section 8(d), Taft-Hartley Act.

cause or attempt to cause" in connection with employer discriminations, and the phrase probably carries the same meaning in connection with feather-bedding.

What is, then, an exaction for services which are not performed or not to be performed? This question was the subject of two very interesting cases decided recently by the U. S. Supreme Court. Both of the majority opinions were written by Justice Burton. The Chief Justice and Justice Clark dissented in both cases, and they were joined in one case by Justice Douglas and in the other by Justice Jackson. The *American Newspaper Publishers Association* case [19] came to the Court through the 7th Circuit upon an original complaint before the NLRB, charging that a union practice of insisting that newspaper publishers pay typographers for reproducing advertising type, duplicating the asbestos mats from which advertising is customarily printed, constituted an unfair labor practice under the feather-bedding provision of Taft-Hartley.

In the other case, the *Gamble Enterprises* [20] case, a practice of the musicians' union was involved.

Prior to Taft-Hartley a local theatre in Ohio had paid the minimum union wage to a local band composed of members of the union every time a traveling or "name" band played at the theatre, but the local musicians played no music. After Taft-Hartley, the union first demanded that the theatre manager pay a local band to be in the pit while the "name" band played from the stage of the theatre, the local musicians to play overtures, intermissions, and "chasers." The employer declined to do this, and the union refused to allow the "name" band to be scheduled. Later, the union offered to withdraw its objection to traveling band appearances if the theatre would guarantee to pay the local musicians to play at the theatre on a number of unspecified occasions in proportion to the number of traveling band appearances at the theatre. This offer was also refused, and a complaint by the theatre before the NLRB resulted.

In both of these cases the Supreme Court held that no violation of Taft-Hartley had been committed by the union, and the basis of the decisions was that each of the union practices questioned called for the performance of some service by the members of the union. In reaching this result, the court examined very fully, and sets forth in detail in the *American Newspaper Publishers* opinion, the legislative history of this provision of Taft-Hartley and concluded,

> However desirable the elimination of all industrial featherbedding practices may have appeared to Congress, the legislative history of the Taft-Hartley Act . . . demonstrates that when the legislation was put in final

[19] American Newspaper Publishers Ass'n v. N. L. R. B., ... U.S. ....., 73 S.Ct. 552 (1953).

[20] N. L. R. B. v. Gamble Enterprises, Inc., ... U.S. ....., 73 S.Ct. 560 (1953).

form, Congress decided to limit the practice but little by law.[21]

The Court held that the fact that the employer did not want the services performed, and that they were not necessary to his business, were immaterial. The only caution thrown out by the Court was the statement, "There is no reason to think that sham can be substituted for substance" [22] under Section 8(b)(6), but the Court explained that when the union demand contains a bona fide offer of competent relevant services, no unfair labor practice has been committed in making the demand.[23]

By dictum, the Court announced that had the musicians' union continued its former practice of merely requiring the payment of a wage when no service was performed, a violation would have been committed.

A further facet of the feather-bedding problem arises from union demands for call-in pay, paid rest periods and vacation pay. Such demands as these involve cases in which no services are performed, but it seems clear that the demands are lawful in the light of Senator Taft's explanation in the Senate that demands of this sort are not "in the nature of an exaction." They are, it should be noted, demands for payment of wages to employees whom the employer himself has selected and who regularly perform the work of the business. In neither the *American Newspaper Publishers* case nor the *Gamble Enterprises* case did the majority opinion discuss the meaning of the phrase "in the nature of an exaction."

The Colorado act as to feather-bedding is again much broader than Taft-Hartley, and renders it an unfair labor practice to demand from the employer pay for any employee not required by him or necessary for his work. Keeping in mind the legislative history of the feather-bedding provision of Taft-Hartley, it seems clear, however, that Colorado lacks jurisdiction to apply this provision in any situation affecting interstate commerce.

BACK ISSUES OF DICTA NEEDED

Many law libraries throughout the country now subscribe to *Dicta* and bind each volume. The demand for early issues of *Dicta* to complete the sets on the shelves of these libraries is heavy. Especially needed are all issues of the first five volumes which were published under the name of the *Denver Bar Record*. We urge any reader who might be considering the destruction of back issues of *Dicta* in connection with an office housecleaning to communicate with the editor at 702 Midland Savings Building in Denver. Arrangements will be made to pick up any accumulation of back issues which any reader might offer.

[21] American Newspaper Publishers Ass'n v. N. L. R. B., *supra*, n. 19, at p. 555.

[22] N. L. R. B. v. Gamble Enterprises, Inc., *supra*, n. 20, at p. 563.

[23] *Ibid.*