

## COMMENT ON RECENT DECISIONS

ADMINISTRATIVE LAW—NATIONAL LABOR RELATIONS BOARD—RIGHT OF EMPLOYEES TO CHANGE UNION AFFILIATION UNDER CLOSED SHOP CONTRACT—[Federal].—On July 22, 1935, respondent company entered into a contract for a term of one year with several local affiliates of the A. F. of L. At the same time an oral agreement<sup>1</sup> was reached which provided that all new employees would have to join the appropriate A. F. of L. affiliates, but the oral agreement expressly excepted old employees, who had been employed before June 22, 1935 and who had not authorized the A. F. of L. to represent them,<sup>2</sup> from being required to join any union. In July, 1936, this contract and the oral agreement were renewed for an additional year. In March, 1937, the A. F. of L. attempted to organize the plant completely. During this organizational endeavor, an A. F. of L. agent, accompanied by respondent's superintendent, approached a number of old employees who were exempt from the requirement of joining the union. When one of these employees refused to join, the A. F. of L. agent "fired" him, which action was approved by the superintendent. This discharge resulted in a number of employees' consulting a C. I. O. organizer and subsequently calling a sit-down strike in the machine shop. The C. I. O. representatives proposed a settlement providing for reinstatement of the discharged employee and a free choice of union affiliation.<sup>3</sup> This proposal was accepted by both the respondent and the representatives of the A. F. of L. But, before the plant was reopened, the respondent entered into a new contract with the A. F. of L. providing for a completely closed shop. This contract was entered into four months before the termination of the then existing contract. When the plant reopened, the company refused to reinstate 28

---

1. This oral agreement, the N. L. R. B. found, was not known to the employees at the time it was made nor were its terms ever made clear to the employees. The only ones with any real knowledge of its terms were the respondent and the representatives of the local affiliates of the A. F. of L. In re Electric Vacuum Cleaner Co. (1938) 8 N. L. R. B. 112, 116.

2. The affiliate of the A. F. of L. claimed a majority of the employees of the respondent on the basis of written authorizations signed by the employees giving the union the right to represent them. These authorizations did not specify how long the union had the power to represent the employees, but merely provided as a safeguard the right of withdrawal on thirty days' notice. This method of ascertaining which union had the majority is out-moded. Generally, at the present time, the union applies to the N. L. R. B. for certification as the union having the majority of employees. The N. L. R. B. then provides for an election by the employees to determine the question, under sec. 9 (c) of the National Labor Relations Act. National Labor Relations Act (1935) 49 Stat. 453, c. 372, 29 U. S. C. A. §159. See also, Administrative Procedure in Government Agencies, Monograph of the Attorney General's Committee On Administrative Procedure, Part 5, National Labor Relations Board (1941) 30 et seq.

3. Although the Board's findings did not make clear how this free choice of union affiliation was to be determined, it can safely be assumed that what was asked was a certification proceeding under sec. 9 (c) of the act.

former employees.<sup>4</sup> The C. I. O. petitioned the National Labor Relations Board, charging discrimination on the part of the company under section 7 of the National Labor Relations Act.<sup>5</sup> The Board found that the action of the company was discriminatory and ordered reinstatement of 22 employees and the payment of back wages to 24 employees.<sup>6</sup> In addition the Board ordered the company "to cease giving effect to any provision of the new 1937 contract."<sup>7</sup> On appeal to the Circuit Court of Appeals *held*: that the acts of respondent did not constitute unfair labor practices under the National Labor Relations Act, but were justified by section 8 (3)<sup>8</sup> of the act as a valid attempt to enforce the union contract. *National Labor Relations Board v. Electric Vacuum Cleaner Co.*<sup>9</sup>

---

4. Four employees were employed by the respondent prior to June 22, 1935, and had worked till the plant had closed down and never belonged to the A. F. of L. Fourteen other employees who were not taken back were also employed by the respondent prior to June 22, 1935, were members of the A. F. of L., but had become members of the United, (the affiliate of the C. I. O.) during the lockout. Five of the other employees who were not returned were employed by the respondent subsequent to June 22, 1935, had been members of the A. F. of L., but had also joined the C. I. O. during the lockout by the respondent.

One of these employees who was not rehired had worked for the respondent for 11 years and had not joined the C. I. O. affiliate, although he had been discussing with other employees at the plant the desirability of joining. The complaints of the other four employees involved were dismissed. *In re Electric Vacuum Cleaner Co.* (1938) 8 N. L. R. B. 112, 119-121.

5. National Labor Relations Act (1935) 49 Stat. 452, c. 372, §7, 29 U. S. C. A. §157, "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection."

6. *In re Electric Vacuum Cleaner Co.* (1938) 8 N. L. R. B. 112, 128-129.

7. *Id.* at 128.

8. National Labor Relations Act (1935) 49 Stat. 452, c. 372, §8, 29 U. S. C. A. §158, "It shall be an unfair labor practice for an employer (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title. \* \* \* (3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this chapter \* \* \* shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this chapter as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 159 (a) of this title, in the appropriate collective bargaining unit covered by such agreement when made."

9. (C. C. A. 6, 1941) 120 F. (2d) 611. The statement of facts in the instant case is gathered from the Board's decision as well as from the court's decision. There seems to be some difference of opinion between the court and the Board as to whether the respondent was guilty of discriminatory acts or not; the Board found the respondent guilty of discrimination, *In re Electric Vacuum Cleaner Co.* (1938) 8 N. L. R. B. 112, 127, while the court could find no discrimination on the established facts. *N. L. R. B. v. Electric Vacuum Cleaner Co.* (C. C. A. 6, 1941) 120 F. (2d) 611, 617.

The whole question of the rights of employees to change union affiliation during the existence of a valid union contract is not settled either by the decisions of the Board or by the decisions of the courts.<sup>10</sup> It has been said that where there is an existing contract the Board will generally allow a hearing and will make provision for an election to determine which union has a majority of the employees, when such a change in union affiliation occurs; subject to the qualification that a petition for certification to the Board by a union newly formed by such a change in affiliation will not be heard within the year after the union contract is signed.<sup>11</sup> A perusal of some of the cases, however, shows much confusion on this issue. In *In re United Fruit Co.*,<sup>12</sup> the Board ruled that when a valid closed shop contract exists, discharge for joining a rival union is a defense

---

10. The C. I. O., A. F. of L., and the Labor Mediation Board have done little to clarify the problem, as all three have presented different solutions.

"The C. I. O. position, as stated by its counsel, Lee Pressman, is that a collective contract should not bar a change of representatives during its existence but that the Board should act only in case 'the union claiming the new majority' can show that the shift was 'overwhelming', even though it will need only a bare majority at the board election to be certified as the new representative. The position is open to the objection that it abandons the principle of majority rule, which is the only basis for recognizing a change of representatives during the existence of a contract. This position likewise raises difficult administrative problems in determining what is an 'overwhelming shift.'" Rosenfarb, *The National Labor Policy and How It Works* (1940) 272.

"One of the A. F. of L. proposals for amendment (of the National Labor Relations Act) provides that: 'Change of membership in or of affiliation with or withdrawal from a labor organization shall not impair the rights conferred by this Act on such exclusive bargaining agent until either (1) the term of any written contract made by it with an employer has expired or (2) one year from the date of execution of such contract (where the contract extends beyond one year) has elapsed, whichever is first reached. Such labor organization shall have an interest in its own right in said contract for said period.' This provision apparently seeks to enact into law the present position of the board on the issue." Rosenfarb, *The National Labor Policy and How It Works* (1940) 268.

"The position of the Labor Mediation Board, as revealed in the argument of Alex F. Whitney, the head of the Brotherhood of Railroad Trainmen, (2 N. L. R. B. 290) is that it will recognize a change of representatives during the existence of a contract, closed-shop or otherwise, unless the contracting union has been certified by the Mediation Board, in which case it will not intervene for a year after the certification." Rosenfarb, *The National Labor Policy and How It Works* (1940) 273.

11. 1 Teller, *Labor Disputes and Collective Bargaining* (1940) 528-529, §177. Even this authority cites thirteen exceptions to this rule. 2 Teller, *Labor Disputes and Collective Bargaining* (1940) 903-906, §335.

It is important to note that in other cases, *In re H. Margolin & Co.* (1938) 9 N. L. R. B. 852; *In re Alabama By-Products Corp.* (1939) 13 N. L. R. B. 427; *In re Heldman-Schild-Lasser, Inc.* (1939) 11 N. L. R. B. 1289; *In re F. E. Booth & Co.* (1939) 10 N. L. R. B. 1491, the Board has stated that it might make an investigation after the signing of the union contract for the purpose of negotiating a new contract when the existing contract expires. Such investigations are usually granted when the time for renewal of the contract is near.

12. (1939) 12 N. L. R. B. 404.

to charges of discrimination under the act. Again in *In re Ansley Radio Corp.*,<sup>13</sup> where a majority in the unit shifted allegiance from the contracting union to another union a few months after entering into a one year closed shop contract, the Board held that the contract justified the employer in discharging those who shifted their membership. Likewise, in *In re J. E. Pearce Contracting and Stevedoring Co.*,<sup>14</sup> a change of union affiliation by a majority of the respondent's employees during the life of a preferential contract was held by the Board not to terminate this contract, and the employer's refusal to bargain collectively with this new union was held not discriminatory under the act. Generally the courts have been more conservative than the National Labor Relations Board in recognizing change in union affiliation under an existing contract.<sup>15</sup> For example, in *In re M & M Woodworking Co.*,<sup>16</sup> the employer made a closed shop contract with a local affiliate of the A. F. of L. This local, shortly after signing the contract, withdrew from the A. F. of L. and affiliated with the C. I. O. The employer, faced with a boycott of his goods by the A. F. of L., discharged the employees who had transferred to the C. I. O. The Board held that inasmuch as the contract was with the local, the local was not changed by the change in affiliation, since its withdrawal from the A. F. of L. was in accordance with the latter's constitution, and the employer, therefore, could not legally require membership in the old A. F. of L. affiliate as a condition of employment. A majority of the Ninth Circuit Court of Appeals reversed the Board's order on the ground that the old A. F. of L. local remained in existence.<sup>17</sup> In *In re Peninsular and Occidental S. S. Co.*,<sup>18</sup> the Board found an employer guilty of discrimination for discharging em-

---

13. (1939) 18 N. L. R. B. 1028.

14. (1940) 20 N. L. R. B. 1061.

15. It is interesting to note that the court, in the instant case, relies on *N. L. R. B. v. Sands Mfg. Co.* (C. C. A. 6, 1938) 96 F. (2d) 721, aff'd 806 U. S. 332, as authority for the fact that the National Labor Relations Act does not prohibit an effective discharge for repudiation by the employee of his agreement. The court says, "The Board, therefore, erred as to its order finding the respondent guilty of discrimination with reference to 18 of the 24 employees named in the order because these 18 were members of A. F. of L. affiliates, were bound by the contract until June, 1937, and were compelled to be in good union standing in order to continue in respondent's employ." *N. L. R. B. v. Electric Vacuum Cleaner Co.* (C. C. A. 6, 1941) 120 F. (2d) 611, 616.

The *Sands Mfg. Co.* case did not involve a change of union affiliation under an existing contract, but a breach by a union of the seniority provisions of the collective bargaining contract which it had with the employer. The employer, after the union had chosen to allow the employer to call a lay-off of its employees rather than abide by the seniority provision of the contract, hired men who belonged to another union to work in his machine shop. The *Sands Mfg. Co.* case and the instant case have nothing in common either on the basis of factual similarity or on the labor problem involved.

16. (1937) 6 N. L. R. B. 372.

17. *M & M Wood Working Co. v. N. L. R. B.* (C. C. A. 9, 1939) 101 F. (2d) 938.

18. (1938) 5 N. L. R. B. 959.

ployees who had changed their union affiliation during the existence of a preferential contract. On appeal, the Fifth Circuit Court of Appeals<sup>10</sup> reversed the order and sustained the discharges on the ground that inter-union conflicts in maritime employment are too perilous to the public safety to be permitted.<sup>20</sup>

In reaching a conclusion opposed to that of the Board, the court in the instant case engaged in devious reasoning. It first determined that closed shop contracts were recognized and permitted by section 8 (3) of the National Labor Relations Act.<sup>21</sup> Once such a contract was entered into, the court said, "they [the employees who had authorized the A. F. of L. affiliate to represent them] were both ethically and legally bound not to disrupt the contract."<sup>22</sup> Any act, therefore, which would, in any way, be likely to endanger the complete effectiveness of the contract, would be prohibited. Joining another union, or even talking about joining another union, would tend to decrease the efficiency of the contract, and would, therefore, justify the employer in discharging any employee who engaged in such activities. The Board, it is important to note, did not treat the 1936 contract as a closed shop contract, but as a preferential contract.<sup>23</sup> The court, however, said: "It is immaterial whether the men considered the contract as establishing a closed shop or preferential shop. The contracts were in the nature of closed shop agreements, for eventually, as old men [who were exempted from having to join the A. F. of L.] dropped out, if the contracts were renewed a genuine closed shop would be established."<sup>24</sup> The court's attitude toward the contract, therefore, is that since it was "almost" a closed shop agreement it should be treated as "if it were one." Armed with this reasoning the court then said that the employees who signed authorizations gave the A. F. of L. power to enter into collective bargaining agreements in their behalf, and that these employees were bound to support these agreements.<sup>25</sup> But the court went further and held that because the 1936 contract was in the nature of a closed shop agreement, employees who did not belong to the A. F. of L., who had not signed authorizations and who were not required to join the A. F. of L. could be discharged solely because they "advocated" membership in another union.<sup>26</sup> This line of reasoning is pernicious. If it is fol-

19. *Peninsular & Occidental S. S. Co. v. N. L. R. B.* (C. C. A. 5, 1938) 98 F. (2d) 411, cert. den. *N. L. R. B. v. Peninsular & Occidental S. S. Co.* (1938) 305 U. S. 653.

20. In this case there was a possibility of mutiny through inter-union strife and this may have influenced the court's decision. It would be wiser, perhaps, to restrict the decision of this case to those cases involving similar situations on the high seas.

21. (1935) 49 Stat. 452, c. 372 §8, 29 U. S. C. A. §158.

22. (C. C. A. 6, 1941) 120 F. (2d) 611, 616.

23. *In re Electric Vacuum Cleaner Co.* (1938) 8 N. L. R. B. 112, 116.

24. *N. L. R. B. v. Electric Vacuum Cleaner Co.* (C. C. A. 6, 1941) 120 F. (2d) 611, 615.

25. See *id.* at 617.

26. Although the court did not state this as a fact in its decision, the effect of the court's decision was to uphold the employer in not rehiring

lowed, it would prevent either a majority or a minority of employees, once a contract has been made with a particular union, from participating in any move to change union affiliation.<sup>27</sup> Thus, a union could perpetually enter into a new contract before the termination of the old contract and effectively<sup>28</sup> silence any dissident voices among its ranks or among non-union employees. What if the employees decided that a different form of union, either craft or industrial, would more effectively meet their needs? What if the officers of the union looked upon their positions as vested interests and were not actually furthering the interests of the members?<sup>29</sup>

If maintenance of industrial peace is the peg upon which the Board and the courts are to hang their decisions, it would seem advisable not to freeze the relations between employer and employees for any given period.<sup>30</sup> The reason for this is that a majority of the members of a union are not going to want to change affiliation to satisfy mere whims; the desire to change will almost universally be motivated by some underlying economic question or by the fact that the existing union is not working satisfactorily. Unions should be free to function democratically. Prohibiting changes in union affiliation during the life of an existing contract and denying even the mere advocacy of such change seems to stifle the democratic processes of the unions, and is bound to lead to intra-union strife and instability generally in labor conditions. It might be argued that the employer is entitled to the security of having the contract enforced against his employees for the duration of the time specified in the contract.<sup>31</sup> Such a security

---

an employee who had not changed union affiliation, but who had merely discussed the possibility of his doing so with the other employees. It is interesting to note that the court, in the instant case, seemed prejudiced against the employees who advocated change in union affiliation, referring to them as "agitators" and to their activities as "agitation." *N. L. R. B. v. Electric Vacuum Cleaner Co.* (C. C. A. 6, 1941) 120 F. (2d) 611, 614, 617.

27. In the instant case, one employee was not rehired, who had not changed union affiliation under the existing contract but had merely discussed the possibility of changing his union affiliation. The question necessarily arises, granted that an employee cannot actually change union affiliation during the life of the contract, can he be discharged for mere advocacy of change of affiliation? The Board's position seemed to be stated in *In re Ansley Radio Corp.* (1939) 18 N. L. R. B. 1028, 1042-1043, where it was said that it was discriminatory to discharge employees for mere talk and advocacy of change in affiliation during the life of an existing union contract in the absence of an express provision in the existing union contract, requiring abstention from such advocacy or talk.

28. In the instant case, the 1937 contract was renewed four months before the expiration of the 1936 contract. Thus, under the instant court's decision forbidding any change of union affiliation or mere advocacy of change during the existence of the contract, there is no telling how often the A. F. of L. representatives could renew this contract in like manner.

29. *Nick v. U. S.* (C. C. A. 8, 1941) 122 F. (2d) 660.

30. Rosenfarb, *The National Labor Policy and How It Works* (1940) 268.

31. *Id.* at 272. "It is no answer to say that, if the employees want to change their representatives during the existence of a contract, they can wait until the contract expires. Time is of the essence in industrial relations. Discontent among the rank and file with their representatives during

would be an illusion. Efficient productivity is more likely to arise when employees are operating through a union which they want to represent them than when they are forced to accept a union which no longer has their support. The solution seems to lie in a change in the concept of the collective bargaining contract. Such a contract should run with the majority of the employees in a given collective bargaining unit instead of with the union obtaining the contract.<sup>32</sup>

H. M. F.

---

CONSTITUTIONAL LAW—FREEDOM OF PRESS AND RELIGION—LICENSE TAX ON PERIODICALS—[Arizona].—Appellant was convicted of selling religious periodicals without having paid for a license as required by municipal ordinance. *Held*: The ordinance did not violate constitutional guarantee of freedom of religion or freedom of speech and press. *State v. Jobin*.<sup>1</sup>

Freedom of speech, press, and religion are protected against invasion by state action by the 14th Amendment to the United States Constitution extending the restrictions of the 1st Amendment to the states. These rights are, of course, subject to the reasonable exercise of the state's police power.<sup>2</sup> In recent years many cases have arisen testing state and municipal power to restrict the distribution of handbills, pamphlets, and other literature. The requirement of a permit from a designated public official for the distribution of literature has been held to be unconstitutional as a violation of freedom of speech and press.<sup>3</sup> However, where the issuance of the permit is *non-discretionary* in the public official and is merely for the purpose of reasonable regulation and insuring obedience to the general laws, the

---

the existence of a contract would be effectively stifled by the contracting union through discharges obtained by the time the contract expired, and meanwhile disaffection would break out into industrial strife if employees would have to deal with the employer through representatives who do not represent them. It must be remembered that collective bargaining does not end with the signing of a contract. Negotiation as to grievances is part of the process of collective bargaining. The grievance machinery would sputter and halt if the employees had no confidence in their representatives."

32. Rosenfarb, *The National Labor Policy and How It Works* (1940) 275.

1. (Ariz. 1941) 118 P. (2d) 97.

2. *Davis v. Beason* (1890) 133 U. S. 333 (polygamy); *Ex parte Westellison* (1927) 38 Okla. Crim. Rep. 207, 259 Pac. 873, (unnecessary noise in announcing contents of newspapers in selling); but cf. *De Jonge v. Oregon* (1937) 299 U. S. 353, (criminal syndicalism); *Herndon v. Lowry* (1937) 301 U. S. 242 (attempt to incite insurrection).

3. *Lovell v. City of Griffin* (1938) 303 U. S. 444; *Schneider v. State of New Jersey* (1939) 308 U. S. 147; *State ex rel. Wilson v. Russell* (Fla. 1941) 1 So. (2d) 569; *Village of South Holland v. Stein* (1940) 373 Ill. 472, 26 N. E. (2d) 868, 127 A. L. R. 957; *Commonwealth v. Pascone* (1941) 308 Mass. 591, 33 N. E. (2d) 522; *Harder v. Shahadi* (1940) 125 N. J. L. 153, 14 A. (2d) 475; *Star Co. v. Brush* (1918) 172 N. Y. S. 320, 104 Misc. 404. *Accord*: *Hague v. C. I. O.* (1939) 307 U. S. 496; *Cantwell v. Connecticut* (1940) 310 U. S. 296, 128 A. L. R. 1352.