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COMMENT ON RECENT DECISIONS

ADMINISTRATIVE LAW—N. L. R. B.—BLANKET CEASE AND DESIST ORDER—[United States].—The National Labor Relations Board found that respondent had violated sec. 8(5) of the Wagner Act¹ by refusing to bargain collectively with the authorized representatives of its employees, and ordered it to bargain collectively with them. On the theory that the infringement of sec. 8(5) of the act is also a violation of sec. 8(1), which incorporates by reference all the rights guaranteed to employees by the act, the board ordered respondent: 1. To cease and desist from (a) refusing to bargain collectively with its employees' authorized representatives, and (b) in any manner interfering with the rights granted by the statute to the employees; 2. To take affirmative action concerning (a) collective bargaining, upon request of its employees, and (b) the posting of notices stating that it would comply with the provisions of the order. The circuit court of appeals modified the order by striking out all of it except part 2(a). *Held*: on certiorari, decision reversed; that the board's order be reestablished with the exception of that part which required respondent to "cease and desist" from interfering with the rights of its employees other than that of collective bargaining. *National Labor Relations Board v. Express Publishing Co.*²

This is the first case in which the Supreme Court has passed expressly upon the authority of the National Labor Relations Board to issue blanket cease and desist orders going beyond express findings and extending to all the practices forbidden by the act. The board's contention that it had the authority had, however, previously come before the Court, and broad orders had been upheld in a number of labor cases. The majority opinion distinguished the present case on the ground that here the findings of the board were limited exclusively to the refusal by the employer to bargain collectively, whereas in the previous cases, more numerous types of violations had occurred.³ The issue had arisen in a number of lower court cases in which only a single violation had been found, and on it the circuit courts of appeals were widely split prior to the present case. Three views on the relation of the cease and desist order to the findings had been sustained,⁴

1. (1935) 49 Stat. 452, 29 U. S. C. A. (1939 Supp.) sec. 157.

2. (1941) 61 S. Ct. 693 (three justices dissenting).

3. *Virginian Ry. Co. v. System Federation No. 40* (1937) 300 U. S. 515, 543, 544; *N. L. R. B. v. Fansteel Metallurgical Corp.* (1938) 306 U. S. 240, 262; *Texas & New Orleans R. R. Co. v. Brotherhood Ry. & S. S. Clerks* (1939) 281 U. S. 548, 555, 567, 568, 571.

4. Blanket orders were upheld in the following decisions by circuit courts of appeals: *N. L. R. B. v. Biles-Coleman Lumber Co.* (C. C. A. 9, 1938) 98 F. (2d) 18; *N. L. R. B. v. Pure Oil Co.* (C. C. A. 5, 1939) 103 F. (2d) 497 (Sibley, J., dissenting); *N. L. R. B. v. Nat'l Motor Bearing Co.* (C. C. A. 9, 1939) 105 F. (2d) 652 (Haney, J., dissenting); *Arts Metal Const. Co. v. N. L. R. B.* (C. C. A. 2, 1940) 110 F. (2d) 143, reversing *N. L. R. B. v. Remington-Rand, Inc.* (C. C. A. 2, 1938) 94 F. (2d) 862; *Hartsheld Mills Co. v. N. L. R. B.* (1940) 111 F. (2d) 291. Similar orders of the board, based upon rather varied findings, were restricted by the circuit court of appeals of the 5th circuit in *Globe Cotton Mills v. N. L. R. B.* (C. C. A. 5,

although there probably was agreement on the general proposition that the remedy which the statute empowers the board to grant is to be adapted to the situation which calls for relief.⁵

The problem is not peculiar to the National Labor Relations Board, for it has arisen in connection with the Interstate Commerce Commission and the Federal Trade Commission.⁶ The principal case relies on decisions relating to these two bodies,⁷ although it has been objected that the National Labor Relations Act differs from the Federal Trade Commission Act, because it grants "power to restrain commission of the enumerated unfair labor *practices* rather than the *method* by which in the particular case they may be carried on," as provided by sec. 5 of the Trade Commission Act.⁸ This statutory distinction, whatever its merits, does not authorize the conclusion that because the board has power to enjoin unfair labor practices enumerated and defined by statute, it can issue a blanket order forbidding indulgence in all the various practices, upon a finding of one of them. Although the orders are preventive and not punitive in character, they are supposed to be based upon the findings which serve to adapt them to the particular situation.

No greater weight should be given to another argument⁹ in favor of blanket orders; viz, that the board's authority to issue them is supported by the language of the committees of both the House and the Senate in reporting the Wagner bill,¹⁰ which classified secs. 8(2), 8(3), 8(4) and 8(5) as species of the generic "unfair labor practice" defined in sec. 8(1). It does not follow that a cease and desist order against the *genus* may be based

1939) 103 F. (2d) 91. This case was criticized by the National Labor Relations Board in its 1939 *Annual Report*, p. 120, and by Comment (1941) 9 Geo. Wash. L. Rev. 360, which questions the authority of the case, since the court enforced only the affirmative part of the order, thus violating sec. 10(c) of the act. Contra: *N. L. R. B. v. Swift & Co.* (C. C. A. 7, 1940) 108 F. (2d) 988; *Solway Process Co. v. N. L. R. B.* (C. C. A. 5, 1941) 117 F. (2d) 83, 86. An extreme view seems to have been taken by Haney, J., dissenting in *N. L. R. B. v. National Motor Bearing Co.*, supra, who apparently asserts that the board lacks the power to issue such broad orders in *any* case. The instant case came to the Supreme Court from the 5th circuit, (1940) 111 F. (2d) 588.

5. *N. L. R. B. v. Mackay Radio & Tel. Co.* (1938) 304 U. S. 333; *N. L. R. B. v. Penn. Greyhound Lines, Inc. et al* (1938) 303 U. S. 261.

6. Henderson, *The Federal Trade Commission* (1924) 76: "The examples show that the Commission has constantly to steer a course between Scylla and Charybdis in drafting its orders. If the order is too general, it goes beyond the practice which respondent is found to have used. If it is too narrow, it can be evaded by a slight modification of the practice."

7. *New York, New Haven & Hartford R. R. Co. v. I. C. C.* (1905) 200 U. S. 361, 404; *F. T. C. v. Beech Nut Co.* (1922) 257 U. S. 441.

8. *N. L. R. B. v. Nat'l Motor Bearing Co.* (C. C. A. 9, 1939) 105 F. (2d) 652, 661 (emphasis supplied). Federal Trade Commission Act (1914) 38 Stat. 719 c. 311, sec. 5, amended (1925) 43 Stat. 939, c. 229, sec. 2, 15 U. S. C. A. sec. 45.

9. *Arts Metal Const. Co. v. N. L. R. B.* (C. C. A. 2, 1940) 110 F. (2d) 148.

10. Sen. Rep. 573 (1935) 74th Cong., 1st Sess., 9; H. R. Rep. No. 1147 (1935) 74th Cong., 1st Sess., 17.

upon a finding of only a single species of unfair labor practice. Yet this argument moved the circuit court of appeals of the second circuit to overrule a previous contrary decision.¹¹

Arguments of broader scope are advanced by the dissenting opinion in the principal case,¹² centering on the proposition that "Congress has invested the board, not us, with discretion to choose and select the remedies necessary or appropriate for the evil at hand." Furthermore, it is said that to restrict the cease and desist order would imperil the policy of the act, for the employer may resort to unfair labor practices not covered by a narrow order and the dispute may thus be prolonged instead of settled.¹³ The latter consideration seems more persuasive than the former, which appears to conflict with the language of sec. 10 (e) and (f) of the act, conferring upon the courts the power to enforce, modify, or set aside, in whole or in part, the orders of the board.¹⁴ It is suggested that to accept the reasoning of the minority opinion would be to deprive this section of substantial content.

The practical considerations supporting the minority view, although they certainly have much weight, can hardly over-balance the apparent purpose of Congress to require *specific findings* for each unfair labor practice as a prerequisite to the issuance of a cease and desist order with respect to it.¹⁵ Sec. 10 (a) of the act provides for the issuance of a cease and desist order for *any* such practice, which sec. 10 (b) requires to be stated in the complaint. Sec. 10 requires findings with respect to "any such" practice and authorizes an order requiring the respondent to cease and desist from "such" practice. The contrary view might subject the employer to enforcement proceedings¹⁶ which, as applied to unfair practices covered by an order but not actually found in the administrative proceedings, would in effect be substituted for original proceedings before the board. Before a contempt citation could issue against the respondent in the enforcement proceeding, the board would, it is true, have to supply evidence of the violation of the court's order enforcing the board's order;¹⁷ but summary process for con-

11. *N. L. R. B. v. Remington-Rand, Inc.* (C. C. A. 2, 1938) 94 F. (2d) 862.

12. (1941) 61 S. Ct. 693, 702, 703.

13. Whereas the minority opinion alleges that uncertainty would result from the holding of the majority, the limitation of the scope of the order has been advocated in the "interest of certainty" in *Singer Mfg. Co. v. N. L. R. B.* (C. C. A. 7, 1941) 8 L. R. R. 163, which conforms to the majority holding.

14. The board's findings are conclusive "if supported by evidence"—which is to be read as requiring "substantial evidence": *Consolidated Edison Co. v. N. L. R. B.* (1938) 305 U. S. 197, 229. Cf. Attorney General's Committee on Administrative Procedure, *Final Report* (1941) 89.

15. For the contrary view, see Comment (1940) 53 Harv. L. Rev. 472, concluding that the board has power to issue blanket orders, but that it should discontinue its practice as a matter of "sound discretion."

16. The order of the board must be enforced through a proceeding before the circuit court. Subsequent violations of the board's order become, therefore, violations of the court's decision, and are subject to a contempt proceeding. Cf. Rosenfarb, *The National Labor Policy and How It Works* (1940) 622-23.

17. Cf. Comment (1941) 41 Col. L. Rev. 915. A further critical suggestion is based on broad grounds of policy. It advocates the use of blanket

tempt of court cannot be said to be the equivalent of the carefully safeguarded statutory proceeding of the board, which the court proceeding is intended to follow.¹⁸

Originally the board itself recognized that a blanket order was not a general necessity;¹⁹ but subsequently, however, it changed its interpretation of the statute²⁰ and "consistently held that a violation by an employer of any of the four subdivisions of sec. 8 other than subdivision (1) is also a violation of subdivision (1)," without stating its reasons for this change in policy. The early interpretation of the board would probably be in line with the holding of the majority opinion: broad orders are not excluded by the Supreme Court. What is condemned is the practice of issuing such orders merely because the board has found a single violation of the act. Such orders may still be lawful, but only when there is a relation between the findings of the board and the other practices enjoined, and when the circumstances of the particular case require it.

In an appraisal of this decision, it seems proper to note that the court²¹ is more likely to uphold a broad cease and desist order based upon a violation of the subdivisions of sec 8 other than subdivision (5), since they have a more direct relation to right of self-organization granted to employees by sec. 7 of the act²² and protected by the other provisions of sec. 8.

P. R.

CONSTITUTIONAL LAW — CIVIL LIBERTIES — INTERSTATE PASSENGERS — RACIAL DISCRIMINATION—[United States].—Plaintiff, a colored man, purchased first class railroad accommodations from Chicago, Illinois to Hot Springs, Arkansas. In Memphis, Tennessee he transferred to a sleeper. Shortly after entering Arkansas, the conductor, in accordance with railroad custom and an Arkansas statute requiring "equal but separate and sufficient accommodations,"¹ compelled him under threat of arrest to move to the in-

orders, stressing their convenience and arguing that the board's sanctions are insufficient to effectuate the policy of the act. It may perhaps be remarked that this end would require more than any possible cease and desist order could accomplish. The suggested means are therefore inadequate to achieve the end sought.

18. Administrative process may be extremely careful, rather than summary, and may even become more cumbersome than a court's proceeding. Attorney General's Committee on Administrative Procedure, *Final Report* (1941) 89.

19. 1 National Labor Relations Board, *Annual Report* (1936) 121.

20. (1941) 8 L. R. R. 32, referring to the previous *Annual Reports*. Cf. 2 Teller, *Labor Disputes and Collective Bargaining* (1940) secs. 281 and 360, and Lien, *Labor Law and Relations* (1938) sec. 136.

21. Cf. N. L. R. R. v. Friedman-Harry Marks Clothing Co. (1937) 301 U. S. 58; Consolidated Edison Co. v. N. L. R. B. (1938) 305 U. S. 197.

22. "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." National Labor Relations Act (1935) 49 Stat. 449, sec. 7, 29 U. S. C. A. (supp. 1940) sec. 157.

1. Ark. Digest of the Statutes of Arkansas (Pope. 1937) sec. 1190.