Boston College Law Review

Volume 8
Issue 2 *Number 2*

Article 12

1-1-1967

Labor Law—Unfair Labor Practices—Union's Potential Conflict of Interest Relieves Employer of Duty to Bargain.—NLRB v. David Buttrick Co.

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policy statement in *Toolson* that any imposition of antitrust regulation on baseball should come prospectively from Congress and not retrospectively from the courts.[43]

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Labor Law—Unfair Labor Practices—Union's Potential Conflict of Interest Relieves Employer of Duty to Bargain.—*NLRB v. David Buttrick Co.*[1]—This unfair labor practice proceeding arose as a result of the refusal by the David Buttrick Company to bargain with the exclusive representative of its employees, Local 380, an affiliate of the Teamsters Union.[2] Local 380 petitioned the National Labor Relations Board to order the company to bargain in good faith. Buttrick refused on the ground that the Local was subject to a disqualifying conflict of interest. The company asserted that a Teamsters pension fund[3] had made substantial loans to the Whiting Milk Company, a direct competitor of Buttrick.[4] Since the General President of the Teamsters Union was also a trustee of that pension fund, he might, in order to protect the loans, compel Local 380 to act adversely to Buttrick's interests. The Local would then be in the position of having to choose between two courses of action: either to bargain in good faith in behalf of the employees it represented, or to obey the General President's orders.

The Board found that Local 380 was in no way affiliated with the pension fund and that it had not participated in the negotiations leading to the loans. It concluded that Buttrick had failed to show an *actual* conflict of interest in Local 380 and, therefore, ordered the company to bargain.[5] Upon Buttrick's continued refusal, the Board and Local 380 sought to have the order enforced by the Court of Appeals for the First Circuit.[6] That court HELD: An em-

[43] Id. at 357.

[1] 361 F.2d 300 (1st Cir. 1966).

[2] Labor Management Relations Act (Taft-Hartley Act) § 8(a)(5), 61 Stat. 140 (1947), 29 U.S.C. § 158(a)(5) (1964).

[3] This is the Central States, Southeast, and Southwest Areas Pension Fund. The fund was established as a trust to administer pension funds accumulated through collective bargaining agreements between employers and Teamsters locals in the central and southern states, and through various investments. The beneficiaries of the fund are the union-member employees of those employers who contribute to it; Local 380 derives no benefit from this fund. The fund is administered by a committee of 16 trustees, 8 selected by the contributing employers and 8 by the union-member employees. 361 F.2d at 302 n.2. The General President of the Teamsters Union is one of the eight union trustees of the fund. Brief for Local 380 as Intervening Petitioner, p. 5.

[4] In the early 1960's, Whiting was seeking money for expansion and reorganization purposes. The Chairman of the Board of Whiting asked a business agent of Local 380 to arrange an interview with the trustees of the fund. Local 380, however, played no part in the negotiations which led to highly-secured loans amounting to $4.7 million. 361 F.2d at 303.

[5] 154 N.L.R.B. No. 126, 60 L.R.R.M. 1181 (1965).

[6] The Board may seek enforcement of its orders in the court of appeals for the circuit in which the unfair labor practice occurred. 61 Stat. 146 (1947), as amended, 29 U.S.C. § 160(e) (1964).

ployer is justified in refusing to bargain with a union local that is subject to a *potential* conflict of interest. Therefore, the case was remanded for the Board to assess the *potentiality,* rather than just the *actuality,* of conflict of interest,[7] and to establish guidelines for the unions so that their future investment policies and practices will not create such potentiality.

In the past, the function of labor unions was to organize and represent groups of employees in their attempts to obtain from their employers better wages and working conditions, and other benefits.[8] As a result of their success in achieving these objectives, the unions have more recently assumed a second function, that of managing employee pension funds capitalized by employers.[9] Therefore, the unions now have a dual function: they are both bargaining agents and investment managers for their members. Occasionally, one function conflicts with the other, and either the Board or the courts are called upon to resolve the conflict.[10] The absence of any legislation dealing specifically with this dual function requires the Board and the courts to consider the broader policy aspects not only of labor law, but of other areas of the law as well.

In *Buttrick,* the court's holding was substantially based on labor law policy with respect to the collective bargaining process, as set out by the Board in a previous conflict of interest case, *Bausch & Lomb Optical Co.*[11] In that case, the employer refused to bargain because the local union was also its business competitor.[12] The Board upheld the employer's refusal on the ground that "collective bargaining is a two-sided proposition; it does not exist unless *both* parties enter the negotiations in a good faith effort to reach a satisfactory agreement."[13] A labor union casts doubt on its good faith when it enters into bargaining while holding business interests adverse to those of its employer.[14] Asserting that the probability that a union would have to protect a loan made to a competitor of the employer with whom it is to bargain would likewise cast doubt on the union's good faith, the court

[7] The term "conflict of interest" is generally undefined and used indiscriminately. For purposes of clarity, the following types of conflict of interest are distinguished: (1) that state of events which exists when a person will probably acquire an interest or duty which conflicts with an already held interest or duty; (2) that state of events which exists when a person has interests or duties which conflict, although no action has been taken in favor of one or the other; (3) that state of events which exists when a person has interests or duties which conflict, and action has been taken in favor of one or the other. What the *Buttrick* court characterized as potential conflict of interest is the first category.

[8] See Cox, The Evolution of Labor-Management Relations Law, in Law and the National Labor Policy 1, 2 (1960).

[9] Note, Union Investment in Business: A Source of Union Conflicts of Interest, 46 Minn L. Rev. 573, 574 (1962).

[10] For a discussion of case law in the area, see id. at 576-82.

[11] 108 N.L.R.B. 1555 (1954).

[12] Id. at 1558-59.

[13] Id. at 1559.

[14] The majority in *Bausch & Lomb* believed this would cause the employer to suspect the local's motives and objectives, and thus would make successful bargaining virtually impossible. Id. at 1561. The concurring opinion did not discuss the collective bargaining process, but stated only that holding business interests was "not consistent with good-faith bargaining on the part of a union." Id. at 1563.

in *Buttrick* concluded that such probability relieves an employer of his duty to bargain.[15]

In establishing its standard as potential conflict, the court also considered the rationale of conflict of interest law. Generally, the law prohibits trustees and public officials from holding interests which conflict with their fiduciary or public duties.[16] The purpose of the federal conflict of interest statute,[17] for example, is to prevent government corruption by eliminating the temptations which give rise to it.[18] Thus, this law forbids the holding of interests which *actually do* conflict.[19] In *Buttrick*, the effect of the court's standard is to preclude locals from bargaining when they *may be* subject to a conflict of interest. In borrowing fiduciary principles from other areas of the law, the court has restricted union investments to a greater extent than the government has restricted its employees' investments. Thus, the court's analogy to federal conflict of interest law may be inapposite.

Having stated the standard to be one of potential conflict, the court applied the facts before it to that standard and suggested that Local 380 was subject to a potential conflict of interest.[20] It is doubtful, however, that the court's application yields the suggested conclusion. The only way that Local 380's alleged conflict of interest could harm Buttrick would be for the General President of the Teamsters Union to give preference to his duty as a trustee of the pension fund and order Local 380 to take action adverse to the interests of Buttrick. In addition, Local 380 would have to act in accordance with his orders. It is submitted that, under these circumstances, contrary to the court's analysis, the General President would have no power to lawfully compel Local 380 to carry out his orders,[21] and, therefore, that there is no potential conflict of interest.

To support its contention that Local 380 is subservient to the Teamsters Union, the court examined certain powers the General President may exert over Local 380.[22] First, the Teamsters constitution empowers him to put a local into trusteeship in the event the local acts "to jeopardize the interests of the International Union, or its subordinate bodies . . . ."[23] This power, however, is limited by Section 302 of the Labor Management Reporting and Disclosure Act of 1959:

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[15] 361 F.2d at 307.

[16] Reilly v. Ozzard, 33 N.J. 529, 166 A.2d 360, 89 A.L.R.2d 612 (1960). See generally Bogert, Trusts § 95 (4th ed. 1963).

[17] 76 Stat. 1124 (1962), 18 U.S.C. § 208 (1964), supplanting 62 Stat. 703 (1948). Compare Special Committee on the Federal Conflict of Interest Laws, Association of the Bar of the City of New York, Conflict of Interest and Federal Service 279 (1960).

[18] United States v. Mississippi Valley Generating Co., 364 U.S. 520, 550 & n.14 (1961), construing 62 Stat. 703 (1948).

[19] 76 Stat. 1124 (1962), 18 U.S.C. § 208 (1964).

[20] 361 F.2d at 308.

[21] It should be noted that the court limited itself to a consideration of the President's de jure powers over local affiliates. 361 F.2d at 303 n.5. Whether he could, in fact, and beyond the scope of the power given him by the union constitution, compel Local 380 to do his will is a wholly different problem. See generally James, Hoffa and the Teamsters—A Study in Union Power (1965).

[22] 361 F.2d at 308.

[23] Teamsters Int'l Const. art. VI, § 5(a) (1966).

> Trusteeships shall be established and administered by a labor organization over a subordinate body only in accordance with the constitution and bylaws of the organization which has assumed trusteeship over the subordinate body and for the purpose of correcting corruption or financial malpractice, assuring the performance of collective bargaining agreements or other duties of a bargaining representative, restoring democratic procedures, or otherwise carrying out the legitimate objects of such labor organization.[24]

The establishment of a trusteeship by the General President in order to coerce Local 380 to bargain in such a way as to injure itself and the employer with whom it bargains would not be "legitimate" within the meaning of the statute.[25] A trusteeship is a device whereby an international union may control a subsidiary local in the event of the local's wrongdoing; it is not a device for a contrary purpose, *e.g.*, to enable a union to compel the unwilling local to carry out the international's illegitimate objectives.[26]

The second power examined by the court is that the President can order the local to submit its collective bargaining agreements to the review of the union, and in the event that such agreements provide for working conditions and wages which do not measure up to those prevailing in the local's area, can compel the local to await the approval of the union.[27] Should Local 380, in order to assist Buttrick to continue or reestablish business, decide to accept less than average wages in its area, the union would be able to review that decision. The General President's duty as a trustee of the fund might prompt him, on review, to protect Whiting. But the court does not state how the President might protect Whiting, and the power to *review* the local's agreements does not include or establish the power to *compel* the local to injure Buttrick.

Third, the President has the power to order Local 380 to arbitrate[28] and to refrain from a strike.[29] The court attempted to show by hypothesis that these powers establish and include the power to compel Local 380 to injure Buttrick: if Local 380 were to demand higher than average wages and would be willing to strike for them, the President, in order to protect Whiting from the possible chain effect of wage escalation, might order Local 380 either to arbitrate or not to strike.[30] Such an order, however, would benefit Buttrick as well as Whiting.[31] Therefore, in hypothesizing, the court contradicted its fundamental assumption that the Teamsters Union would seek to injure Buttrick in order to benefit Whiting.

The court failed, moreover, to realize that Local 380 would be unwilling

[24] 73 Stat. 531 (1959), 29 U.S.C. § 462 (1964).

[25] Compare United Bhd. of Carpenters v. Brown, 343 F.2d 872, 882-83 (10th Cir. 1965). See generally Cox, Internal Affairs of Labor Unions Under the Labor Reform Act of 1959, 58 Mich. L. Rev. 819, 850 (1960).

[26] See Bureau of National Affairs, The Labor Reform Law 42-43 (1959).

[27] Teamsters Int'l Const. art. XII, §§ 11(a), (d) (1966).

[28] Id. art. VI, § 3.

[29] Id. art. XII, § 1(c).

[30] 361 F.2d at 308.

[31] Whatever might be the General President's motives, the effect of his order would be to protect Buttrick from the harmful consequences of a strike by Local 380.

to acquiesce in the President's orders because it would be contrary to its interests to do so. Unlike the trustee or the public official at whom conflict of interest laws are directed, and unlike the competitor-local in *Bausch & Lomb*, Local 380 has nothing to gain and much to lose by acting in accordance with the President's demands.[32] In addition, the court did not consider that Local 380 has a statutory right to refuse to acquiesce in the demands of the Teamsters Union. Section 2(a) of the LMRDA states that the policy of the act is "to protect employees' rights to organize, choose their own representatives, bargain collectively, and otherwise engage in concerted activities for their mutual aid or protection . . . ."[33] Ordering Local 380 to bargain to the detriment of Buttrick would be an infringement upon the collective bargaining rights of Local 380 and a violation of section 2(a).[34] Furthermore, under the Labor Management Relations Act of 1947, Local 380 would be violating its duty of good faith if it engaged in collective bargaining with the sole objective of injuring Buttrick.[35] The Teamsters Union cannot lawfully compel Local 380 to breach its statutory obligation.[36]

While the court strongly suggested that a potential conflict of interest existed in Local 380, it nevertheless left the Board some latitude to reach a contrary conclusion. In ordering the Board to "assess the potential . . . of conflict of interest,"[37] the court authorized it to apply the facts to the court's standard of potentiality, and if warranted, to reach a conclusion which differed from that of the court. However, if, upon rehearing, the Board should decide that Local 380 might be subject to a conflict of interest, it should, in accordance with the court's opinion,[38] set out guidelines for the large national unions with respect to their investment policies and practices.[39] In proposing

[32] Local 380 . . . could not in any way realize a profit by driving the Company out of business; in fact, it would suffer a definite loss by so doing. Local 380 is a labor organization which exists for the sole purpose of representing employees by means of the collective bargaining process. Driving the Company out of business would not only decrease Local 380's membership and thereby diminish its collective bargaining strength and ability, but also it would tend to give the impression to other employees that membership in Local 380 might similarly lead to the eventual elimination of their jobs and thereby impede Local 380's organizational efforts in the future.

Brief for Local 380 as Intervening Petitioner, pp. 33-34.

[33] 73 Stat. 519 (1959), 29 U.S.C. § 401(a) (1964).

[34] Cf. NLRB v. Thompson Prods., Inc., 162 F.2d 287, 293 (6th Cir. 1947) (dictum); DeBardeleben v. NLRB, 135 F.2d 13, 15 (5th Cir. 1943) (dictum). Section 2(a) restates the policy of the National Labor Relations Act of 1935, § 7, 49 Stat. 452, as amended, 29 U.S.C. § 157 (1964).

[35] See 61 Stat. 140 (1947), 29 U.S.C. § 158(d) (1964); NLRB v. National Shoes, Inc., 208 F.2d 688 (2d Cir. 1953); Cox, The Duty to Bargain in Good Faith, 71 Harv. L. Rev. 1401, 1411-14 (1958).

[36] See note 21 supra.

[37] 361 F.2d at 309.

[38] Ibid.

[39] The Board "has discretion to place appropriate limitations on the choice of bargaining representatives should it find that public or statutory policies so dictate." NLRB v. Jones & Laughlin Steel Corp., 331 U.S. 416, 422 (1947). Therefore, the Board could decide that a union holding business interests adverse to those of the employer with whom it is to bargain is not "the unit appropriate for the purposes of collective bargaining." 61 Stat. 143 (1947), 29 U.S.C. § 159(b) (1964).

such guidelines, the Board should take care to protect the diverse interests of large national unions, local unions, employees, and employers.[40]

One solution the Board might propose is that the large national unions not invest in any industry in which they negotiate.[41] Unions, such as the Teamsters, which negotiate in virtually all industries, should limit their investments to government bonds, savings bank notice accounts, and other such noncommercial investments.[42] This solution, however, fails to protect the unions' right to obtain the highest yield on their capital.[43] Although this right is not absolute,[44] a solution which does protect it would be more satisfactory.

As an alternative, the Board might propose that the large national unions detach themselves from the management of pension funds, and that wholly independent investment trusts be established to administer the funds.[45] These trusts would be managed by professional trustees and so structured as to allow for diversified commercial investments.[46] Further, union funds could be commingled with the funds of other investors, as in a mutual fund, in order to render it more difficult for the unions to have knowledge of the particular companies in which their investments might reside. This loss of control and dispersion of investment capital would minimize significantly the possibility of a union conflict of interest. Moreover, under this solution, the employee-beneficiaries of pension funds would enjoy a greater return on capital than they would if investments were limited to noncommercial areas.[47] Some national labor leaders might refuse to follow this solution, since it requires their wholesale surrender of investment control.[48] It should be noted, however, that any such refusal could well be an invitation to more rigid controls imposed by federal legislation.[49] To avoid this, the unions might best protect themselves by voluntarily conforming their investment policies to the Board's eventual guidelines.

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[40] The court noted the following interests that require balancing: (1) the rights of the large national unions to invest and to organize and represent those employees who select them; (2) the rights of local unions to organize and represent the employees who select them, and to come to the bargaining table free from the suspicion that they are motivated by any other objective than to bargain in good faith; (3) the right of employees to choose freely their bargaining representatives; and, (4) the right of employers to bargain in an atmosphere conducive to a good-faith settlement of grievances. See 361 F.2d at 305-07.

[41] For example, the UMW would not be allowed to invest in basic mining and metals industries.

[42] See Note, supra note 9, at 574.

[43] 361 F.2d at 305. See generally Brown, Personal Property 6-7 (2d ed. 1955), dealing with the right of free alienation of personal property.

[44] Reasonable restrictions may be made on the right to transfer property. Ibid.

[45] Statement of Position and Supporting Brief of Respondent on remand to the NLRB, pp. 19-20.

[46] Ibid.

[47] See Note, supra note 9, at 574. See generally Clendenin, Introduction to Investments 7-12 (2d ed. 1955); Dowrie & Fuller, Investments 56, 195-202 (2d ed. 1950).

[48] See generally James, Hoffa's Manipulation of Pension Benefits, Ind. Rel., May 1965, p. 46.

[49] Cook, The Right to Manage, 9 Lab. L.J. 187, 212 (1958). See Note, supra note 9, at 598.