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Labor Law—Discriminatory Hiring Arrangements—The Brown-Olds Dues Reimbursement Remedy.—N.L.R.B. v. United States Steel Corporation (American Bridge Division)

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is a definite lack of price competition in the industry among the major distributors because they fear its destructive properties.[20] Consequently, gasoline distributors concentrate on a type of "non-price competition" with rivalries in advertising, service, and scientific developments. Or, they may engage in "indirect price competition" where the distributor improves the retailer's buildings and grounds without cost, or where tanks and pumps are loaned or given as a gift to the retailer. Preferential rental agreements are also included in the "indirect price competition" classification.[21] The above practices, which are unique in the gasoline field, do not appear to be the type of "fair and open competition" to which the statutes refer, in light of the "follow the leader" price policies of the industry. "In short, the intense competition, to which industry representatives so frequently allude, is . . . apparently of a limited, peripheral, exceptional character."[22]

Thus, the plaintiff in the instant case, is faced with a problem of proof which appears insurmountable. The impact of this decision will be felt in any future Fair Trade litigation in Pennsylvania by gasoline distributors. The extraordinary evidentiary requirement would, in effect, defeat any suit in this area *ab initio*. The court has taken a long step toward reading gasoline as a commodity out of the protection afforded by the Pennsylvania Fair Trade Law.

MORTON R. COVITZ

Labor Law—Discriminatory Hiring Arrangements—The Brown-Olds Dues Reimbursement Remedy.—*N.L.R.B. v. United States Steel Corporation (American Bridge Division)*.[1]—A complaint was issued by the Board against an employer and a union on a charge brought by an employee who claimed to have been discriminated against in hiring procedures. It was found that the employer and union had observed the provisions of an area-wide contract, which, in effect, gave the union indirectly almost complete control over the hiring and discharge of employees at the employer's plant. The hiring arrangement was declared unlawful because it limited employment to union members in good standing.[2] The Board found both

[20] Id. at 828: "Because of the threat of severe and destructive price competition majors try to avoid direct and open price rivalry. . . . In any event, all members of the industry feel the need 'to build a wall of insulation against the white heat of so-called free competition.'"

[21] Id. at 831.

[22] Id. at 845.

[1] 278 F.2d 896 (3d Cir. 1960), petition for certiorari filed in the Supreme Court, October Term, 1960.

[2] Such hiring schemes have often been held illegal. N.L.R.B. v. Local 420, Plumbers, 239 F.2d 327 (3d Cir. 1956); N.L.R.B. v. Philadelphia Iron Works, 211 F.2d 937 (3d Cir. 1954). By giving effect to such an agreement the employer violated §§ 8(a)(1) and (3) of the Act (which make it an unfair labor practice for an employer to discriminate in regard to hiring new employees or to use any illegal term or condition of employment which would encourage or discourage membership in a labor union, which

the employer and the union responsible for the arrangement[3] and ordered them to cease and desist from maintaining it in effect. Affirmatively the Board ordered both parties jointly and severally to make the complaining employee whole for any loss of wages incurred by him as a result of the discriminatory practices, and to reimburse all present and former employees[4] for the dues, initiation fees and other assessments, which they had paid to the union in order to secure or retain their jobs with the company under the illegal hiring scheme. On the Board's petition for enforcement of the order, HELD: the order will be enforced, except as to that part requiring reimbursement of dues and initiation fees to all present and former employees.

The Board's power to order affirmative relief is limited to such orders "as will effectuate the policies of this (Act)."[5] Moreover, the courts in construing this directive, embodied within the National Labor Relations Act,[6] have held that the Board's power to order relief is one essentially remedial in nature.[7]

How then is the remedial power of the Board to be described? Are the aforementioned standards distinct and independent criteria, both of which must be satisfied? The Supreme Court, in its attempts to define the remedial nature of the Board's authority, has broadened the traditional

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practices would constitute an interference with or restraint of the employees in the exercise of the rights secured to them by § 7 of the Act). 49 Stat. 452 (1935), as amended and supplemented, 61 Stat. 140 (1947), 29 U.S.C. §§ 158(a)(1) and (3) (1958). The union violated §§ 8(b)(1)(A) and (2) of the Act (which make it an unfair labor practice for a union to restrain or coerce employees in the exercise of their § 7 rights, or to cause or attempt to cause an employer to discriminate against an employee in violation of § 8(a)(3)). 49 Stat. 452 (1935), as amended and supplemented, 61 Stat. 140 (1947), 29 U.S.C. §§ 158(b)(1)(A) and (2) (1958).

[3] The provisions of the contract, observed by the union and employer, required the employer to hire a foreman, a member of and designated by the union, whenever seven or more employees were to be employed on any job by the company. It was found that the foreman had exercised complete control (excepting two specific instances) over the hiring and discharge of employees at the company's plant, securing personnel exclusively from a hiring hall maintained by the union. It was because of the foreman's dual capacity, as agent for both union and employer, that both parties were found to have been responsible for the unlawful hiring procedures. N.L.R.B. v. United States Steel Corp., supra note 1, at 898.

[4] The order was retroactive in effect to a period beginning six months before the filing and service, upon the parties, of the charges in the proceeding. N.L.R.B. v. United States Steel Corp., supra note 1, at 899.

[5] The Board's power to issue orders is set forth in § 10(c) of the Act. 49 Stat. 453 (1935), as amended and supplemented, 61 Stat. 146 (1947), 29 U.S.C. § 160(c) (1958).

[6] The National Labor Relations Act (Wagner Act) was passed in 1935, 49 Stat. 449 (1935), 29 U.S.C. §§ 151-68 (1958). The original statute was amended and supplemented by the Labor Management Relations Act of 1947 (Taft-Hartley Act), 61 Stat. 136 (1947), 29 U.S.C. §§ 141-87 (1958). The Act was further amended and supplemented by the Labor-Management Reporting and Disclosure Act of 1959 (Landrum-Griffin Act), 73 Stat. 519 (1959).

[7] N.L.R.B. v. Gullett Gin Co., 340 U.S. 361 (1951); Phelps Dodge Corp. v. N.L.R.B., 313 U.S. 177 (1941); Republic Steel Corp. v. N.L.R.B., 311 U.S. 7 (1940); Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197 (1938).

concepts of "remedial," associated with Equity's power of relief. In *Phelps Dodge Corp. v. N.L.R.B.*,[8] the Court, in interpreting § 10(c) of the Act, said:

> "Attainment of a great national policy through expert administration in collaboration with limited judicial review must not be confined within narrow canons for equitable relief deemed suitable by chancellors in ordinary private controversies."[9]

In the same opinion, the Court emphasized the fact that the Board was not established to adjudicate private rights, but rather to implement the public policies set forth in the Act.[10] Because of this broader conception of the Board's remedial power, it has been held that an order is valid, notwithstanding its incidental penal effect, if in other respects it effectuates the policies of the Act.[11]

With this understanding of "remedial," can the imposition of the total dues reimbursement remedy, the so-called Brown-Olds formula of relief,[12] be justified under the circumstances of the principal case?

In most Brown-Olds situations, the courts have generally insisted upon a demonstration of the coercion of employees with respect to their union affiliation, in order to justify the imposition of the broad dues reimbursement remedy.[13] Once it has been established that the employees were forced to join the union to secure or retain their jobs, the reimbursement order has the effect of restoring them to the position they would have enjoyed, at least financially, but for the illegal pressures brought to bear on them. They are restored to the status which the Act was designed to secure for them, namely, that in which they might exercise freely the right of self-organization.[14] In the principal case, that part of the Board's order requiring reimbursement of dues to all employees was deleted because of the absence of evidence of coercion with respect to the union affiliation of such employees.

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[8] Phelps Dodge Corp. v. N.L.R.B., supra note 7.

[9] Id. at 188.

[10] Id. at 192.

[11] N.L.R.B. v. Gullett Gin Co., supra note 7.

[12] J. S. Brown-E.F. Olds Plumbing and Heating Corp., 115 N.L.R.B. 594 (1956). The remedy derives its name from this case, although its origins antedate it. For a thorough discussion of the history and effects of the remedy, see Note, The Brown-Olds Dues Reimbursement Remedy, 45 Va. L. Rev. 1192 (1959). See also, Virginia Electric and Power Co. v. N.L.R.B., 319 U.S. 533 (1943).

[13] See, Appendix to the opinion in the principal case, supra note 1, at 901. The court summarizes in annotated form the decisions of the Courts of Appeals in all eleven circuits, involving the Brown-Olds remedy. These cases for the most part illustrate the courts' insistence on some demonstration of the "coercion" of the employees as a prerequisite to the validity of the broad dues reimbursement remedy. The court also prefaced its analysis of the decisions with an acknowledgement of the hopeless conflict in which the courts appear to be involved in respect to this area of the law.

[14] Section 7 of the Act in substance guarantees the employees the right to self-organization, to voluntary union affiliation, and to engage in other concerted activities in aid of collective bargaining or for mutual advantage or protection. 49 Stat. 452 (1935), as amended and supplemented, 61 Stat. 140 (1947), 29 U.S.C. § 157 (1958).

The question posed by this decision is whether the imposition of the Brown-Olds remedy, lacking evidence of coercion, comports with the remedial power of the Board, as conceived by the Supreme Court in the aforementioned decisions.

The requirement of a showing of coercion as a condition precedent to the validity of Brown-Olds relief seems to render the Board proceedings akin to an adjudication of private rights, a view specifically repudiated by the Supreme Court.[15] To declare any remedy exceeding the redress of private wrong a penalty is to view the Act as giving rise only to private rights and to ignore its more important and asserted public purpose.[16] The measure of "remedial" should not be the amendment of private injury alone, but rather the reparation of the wrong suffered by the public as a result of the private injury. The acceptance of such a criterion would not only be more in keeping with the public objectives of the Act, but also would relieve the Board of its presently conceived burden of strict compliance with the artificial remedial-punitive dichotomy, which in many instances confounds its attempts to effectuate the true policies of the Act. Under this approach, the element of coercion in Brown-Olds cases would be superseded by a concern over what remedy would best subserve the objective of dissipating the tainted effects on the public of an unlawful labor practice. That an order, devised to achieve such an end, might incidentally smack of a penalty, would not detract from its essentially remedial purpose. The oft expressed fear that the Board would thus be enabled arbitrarily to set up any system of penalties by merely declaring the bona fide intent to effectuate the Act's policies is unwarranted. The judiciary, in reviewing Board actions, would not be unwary of these possibilities, and it is unlikely that any such apprehended scheme by the Board, assuming it was so disposed, would survive the scrutiny of the courts.

The views herein submitted seem to find some support in the language of the Supreme Court in the *Seven-Up Bottling Co.* case:[17]

> "It is the business of the Board to give coordinated effect to the policies of the Act. We prefer to deal with these realities and to avoid entering into the bog of logomachy . . . , by debate about what is 'remedial' and what is 'punitive.' It seems more profitable to stick closely to the direction of the Act by considering what order does . . . , and what order does not, bear appropriate relation to the policies of the Act."[18]

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[15] Phelps Dodge Corp. v. N.L.R.B., supra note 7, at 192.

[16] Section 1 of the Act describes the policies and purposes of the legislation. It was designed to achieve several integrated ends, one of which was the proscription of labor and management unfair labor practices "which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce." 49 Stat. 449 (1935), as amended and supplemented, 61 Stat. 136 (1947), 29 U.S.C. § 151 (1958). For a discussion stressing the public purposes of the Act and the need for a clarified definition of the Board's power, see Note, 50 Yale L.J. 507, 511 (1941).

[17] N.L.R.B. v. Seven-Up Bottling Co., 344 U.S. 344 (1953).

[18] Id. at 348.

At any rate, the Supreme Court's determinations in the several Brown-Olds cases[19] presently pending before it, whether or not in accord with the views submitted above, will be, at least, conclusive of the issues herein portrayed.

RALPH C. GOOD, JR.

Negotiable Instruments—Rights of a Payee in a Misdelivered Check.—***Denver Electric & Neon Service Corp. v. Gerald H. Phipps, Inc.***[1]**—** Defendant Phipps drew two checks payable to plaintiff electric company which were unaccountably delivered to another electric company. The recipient company endorsed the checks in its own name and deposited them in its depositary bank. The bank, in turn, collected the amounts of the checks from the drawee bank. Payee instituted suit, joining the drawer, the drawee bank, the collecting bank and the recipient company as parties defendant. The claim against the drawer was posited on two grounds: (1) on a negligence theory for misdelivery of the checks; and (2) on an indebtedness in the total amount of the checks "on an account stated."[2] The claims against the collecting bank, the drawee bank and the recepient company were grounded in theories both of conversion and money had and received.[3] Defendant-drawer moved for dismissal of the claim against him. The trial court granted the motion and the Supreme Court of Colorado affirmed. HELD: By suing the collecting bank, the payee ratified and adopted the payment and collection of the checks, and, having thus acquired a right to recover from the collecting bank in the amount represented by the checks on a theory of money had and received, can make no present showing of damage on which to predicate a negligence claim against the drawer.[4] In addition, a count alleging indebtedness in the amount of the checks "on an account stated" is essentially an action on the checks, and, as such, insufficient where the checks have been in law discharged with the payee's ratification and adoption of their payment and collection. *United States Portland Cement Co. v. United States National Bank*[5] is approved, and

[19] Local 60, United Brotherhood of Carpenters v. N.L.R.B., 273 F.2d 699 (7th Cir. 1960), cert. granted, 363 U.S. 837 (1960) (This case is contra the holding in the principal case.); N.L.R.B. v. Local 357, International Brotherhood of Teamsters, 275 F.2d 646 (D.C. Cir. 1960), cert. granted, 363 U.S. 837 (1960). The Board has filed petitions for writs of certiorari in the principal case, as noted supra note 1, and in the case of N.L.R.B. v. American Dredging Co., 276 F.2d 286 (3d Cir. 1960). All of these cases involve the Brown-Olds remedy. The Supreme Court's determinations in the United Brotherhood of Carpenters case, which was argued before it on March 1, 1961, should produce the conclusive declaration of the proper limits of Brown-Olds relief.

[1] 354 P.2d 618 (Colo. 1960).

[2] Id. at 620. In the words of the court: "Claim 9 merely alleges an indebtedness based upon an account stated by Phipps for the total sum represented by the two checks."

[3] Under an amended complaint claims against the drawee bank were eliminated.

[4] The dismissal of the negligence count was without prejudice to a latter refiling if damage could then be shown.

[5] 61 Colo. 334, 157 Pac. 202 (1916).