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Dennis R. Lewis

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the question of characterization with the clarity and precision necessary to resolve future cases.

First, it is unclear whether the marital status of the serviceman at the time his interest becomes a vested right is the sole determinate of the character of the interest. Second, the court fails to consider the inherent differences between disability benefits and voluntary retirement benefits. Finally, while citing and approving authority that considers the marital status of the serviceman throughout his career, the opinion fails to apply that authority to the facts before the court.

As a result of *Busby*, it may be expected that similar cases will arise in which an application of the inception-of-title doctrine will lead to highly inequitable results.[50] It will be interesting to see if the courts will successfully distinguish *Busby* when such cases arise. There is little doubt that, until then, the courts will continue "to struggle with the problems inherent in retirement schemes."[51]

R. Dennis Anderson

Representation Without Certification: Applying the Gissel Criteria to Collective Bargaining Situations Involving Non-Certified Unions

In January of 1968, the local affiliate of Retail Clerks International Association began an organizational campaign directed at Gibson Products Company. At the first organizational meeting the union obtained signature cards from twenty of the thirty-four employees authorizing the union to act as their exclusive bargaining agent. Relying on the authorization cards, the union then requested that Gibson recognize the union as the exclusive bargaining representative of all its employees. The store manager scrutinized the authorization cards, finding that, with one exception, the signatures appeared to be valid. Nevertheless, Gibson refused to recognize the union on the basis of the authorization cards and proceeded to file a petition for a certification election with the National Labor Relations Board. Before an election could be held, the union complained to the Board that the company was guilty of committing unfair labor practices in violation of the National Labor Relations Act.[1] The Board heard the complaint and found the employer guilty of committing the following practices: (1) interrogating employees in regard to their union activities; (2) fostering the impression of surveillance; (3) threatening and imposing reprisals because of union activities; and (4) promising the employees

since, upon divorce, a district court may even divest a spouse of his separate property. *See also* Keton v. Clark, 67 S.W.2d 437 (Tex. Civ. App.—Waco 1933), *error ref.*

[50] It is submitted that while the apportionment principle cannot be resolved with the inception-of-title rule, its application would avoid these inequities.

[51] McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 23 Sw. L.J. 44 (1969).

[1] 29 U.S.C. §§ 151-68 (1964).

a contract equivalent to the one proposed by the union if the union were abandoned. Although no election had been held, on the basis of these findings the Board ordered the employer to cease and desist from these activities and, in addition, bargain collectively with the union.[2] The Board petitioned the court of appeals for enforcement of its order. The court of appeals refused to enforce that part of the order requiring Gibson to enter into collective bargaining negotiations with the union. The court remanded the case to the Board for a determination of current employee sentiment and to ascertain whether the use of a traditional remedy,[3] short of an order to bargain, would have cured the effect of the employer's unfair practices.[4] *Held, order affirmed*: A bargaining order may issue based on the nature and extent of the unfair labor practices at the time such practices caused the uncertified union's majority status to dissipate, and the effect of the employer's unfair practice as of the time of the order to bargain is not relevant. *Gibson Products Co.*, 185 N.L.R.B. No. 74 (1970), 1970 CCH NLRB ¶ 22,299.

I. THE EXCLUSIVE COLLECTIVE BARGAINING AGENT

Section 9(a) of the National Labor Relations Act[5] provides that employees in a bargaining unit may select an agent to represent them collectively in negotiations with their employer. The selected agent must be chosen by a majority of the employees within the bargaining unit. The agent then becomes the exclusive bargaining representative for all the employees within the unit. To facilitate the selection of the union that will act as the exclusive bargaining agent, the Act empowers the Board to conduct secret elections to determine if a union is desired.[6] After holding the election the Board will then certify that a particular union has been chosen as the exclusive agent of all the employees within the unit.[7]

The Act imposes upon the employer a duty to bargain in good faith with the selected agent in all matters that involve wages, hours, and other terms and conditions arising in the course of employment.[8] Although the Act sets forth a certification process based on a secret election, the employer must bargain in good faith with any union that enjoys the support

[2] Gibson Prods. Co., 172 N.L.R.B. No. 243 (1968).

[3] The traditional method used to remedy the effect of unfair labor practices has been a cease-and-desist order issued by the Board. A cease-and-desist order directs the offending party to refrain from his unfair practices. The following represents a typical "bargaining order," the type of order issued in *Gibson*:

> (1) Cease and desist from . . . refusing to bargain collectively with [the organization involved], as the exclusive representative of its employees . . . .
>
> (2) Take the following affirmative action which the Board finds will effectuate the policies of the Act:
>
> (a) upon request bargain collectively [with the organization involved], as the exclusive representative of its employees [in respect to rates of pay, wages, hours of employment, and other conditions of employment].

Burgie Vinegar Co., 71 N.L.R.B. 829, 830 (1946).

[4] NLRB v. Gibson Prods. Co., 421 F.2d 156, 157 (5th Cir. 1969).

[5] 29 U.S.C. § 159(a) (1964).

[6] National Labor Relations Act § 9(c), 29 U.S.C. § 159(c) (1964).

[7] *Id.*

[8] National Labor Relations Act § 8(d), 29 U.S.C. § 158(d) (1964).

of a majority of the employees, without regard to whether the union has been certified by the Board through the election process.[9]

If an employer refuses to bargain collectively with the bargaining agent, the employer will be found to have committed an unfair labor practice in violation of the Act.[10] The Act empowers the Board to prevent or correct such violations.[11] Usually the Board prevents such practices by ordering the offending employer to refrain from committing the practices,[12] and by petitioning the court of appeals for enforcement of the order if the employer refuses to comply voluntarily.

II. Power of the Board To Order an Employer To Bargain Collectively With an Uncertified Union

While a cease-and-desist order is the traditional remedy used by the Board to insure compliance with the Act, the United States Supreme Court has approved the Board's use of an order that compels the employer to bargain collectively with a union, despite the fact that the union has not been certified through the election process and may not have majority support at the time the bargaining order is issued.[13]

Good Faith Doubt. As to the propriety of an order to bargain, the Board traditionally took the approach that if a majority of the employees actually authorized the union to act as their exclusive agent, and the employer did not in good faith have reason to doubt the existence of the union's majority support, the employer would be required to bargain with the uncertified union. This traditional approach was set out in *Joy Silk Mills, Inc.*[14] In *Joy Silk* the Board held that the employer would be guilty of an unlawful refusal to bargain if he committed independent unfair labor practices indicating that the company was cognizant of the majority status of the union and was unlawfully seeking to dissipate support for the union before an election could be held. Thus, independent unfair practices were presumptive of a bad faith refusal to recognize the union's majority status if the practices had the effect of dissipating the union's majority.

The Board modified its traditional approach in *Aaron Bros. Co.*,[15] recognizing that an employer's refusal to accept the authorization cards proffered by the union was not, in itself, evidence of bad faith. Thus *Aaron Bros.* placed the burden of proof on the union to show the employer's bad faith, recognizing that the employer has not violated his duty to bargain with the alleged majority representative "simply because he refuses to rely upon cards, rather than an election."[16] The Board went on to reaffirm that

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[9] NLRB v. Gissel Packing Co., 395 U.S. 575 (1969).
[10] National Labor Relations Act § 8(a)(5), 29 U.S.C. § 158(a)(5) (1964).
[11] National Labor Relations Act § 10(a), 29 U.S.C. § 160(a) (1964).
[12] *See* note 3 *supra.*
[13] UMW v. Arkansas Oak Flooring Co., 351 U.S. 62 (1956).
[14] 85 N.L.R.B. 1263 (1949).
[15] 158 N.L.R.B. 1077 (1966).
[16] *Id.* at 1078.

the commission of unfair practices was not in itself sufficient justification for the Board to issue an order to bargain—unless the practices were of such consequences as to cause a dilution of the union's majority status.

All the courts of appeals did not follow the Board's approach to the issuance of a bargaining order. The Fourth Circuit in *NLRB v. S.S. Logan Packing Co.*[17] said that a bargaining order would be appropriate only in an extraordinary situation in which the coercive effect of the employer's unfair practice was so "outrageous and pervasive"[18] as to cause a dissipation of the union's majority, and the effect wrought by the unfair practice could not be remedied by a traditional cease-and-desist order.[19]

NLRB v. Gissel. In *NLRB v. Gissell Packing Co.*[20] the Supreme Court squarely met the issue of employer recognition of uncertified unions. The Court explicitly stated that the certification process was not the only method of imposing the duty to bargain upon the employer.[21] Authorization cards, when properly scrutinized to avoid fraud and misrepresentation,[22] were found to be one valid method of proving majority status that might lead to the imposition of a bargaining order by the Board. The Court in *Gissel* also faced the issue of determining the appropriate circumstances under which the Board would be justified in issuing an order to bargain with an uncertified union. The Court had held earlier in *NLRB v. Katz*[23] that, under certain circumstances, the Board was empowered to impose a duty to bargain upon the employer when a traditional cease-and-desist order proved ineffective.

In *Gissel* the Court held that the Fourth Circuit had erred in restricting bargaining orders to cases replete with "outrageous and pervasive" unfair practices. The Court ruled that a bargaining order could also be issued in less dramatic situations, "which nonetheless . . . have the tendency to undermine majority strength and impede the election processes."[24]

The Court made it clear that the propriety of issuing an order was not dependent upon the "bad faith" of the employer in refusing to bargain with an uncertified union.[25] Issuance depended instead upon findings that: (1) the practices were serious enough to dilute the union's majority status; (2) the effect of the unfair practices could not be remedied by traditional approaches; and (3) the issuance of the order would best protect employee sentiment.[26]

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[17] 386 F.2d 562 (4th Cir. 1967).

[18] *Id.* at 570.

[19] In NLRB v. Gissel Packing Co., 398 F.2d 336 (4th Cir. 1968), the Fourth Circuit reaffirmed its holding in *Logan*, setting the stage for an appeal by the Board to the Supreme Court.

[20] 395 U.S. 575 (1969).

[21] *Id.*

[22] *See* Cumberland Shoe Corp., 144 N.L.R.B. 1268, 1269 (1964), for the standards required by the Board to insure the integrity of the authorization cards.

[23] 369 U.S. 736 (1962).

[24] 395 U.S. at 614.

[25] Counsel for the Board stated in oral argument that the Board now considered the *Joy Silk* concept of good faith "largely irrelevant." *Id.* at 616.

[26] *Id.* at 614, 615. The Court offered the following guidance:

> In fashioning a remedy . . . the Board can properly take into consideration the extensiveness of the employer's unfair practices in terms of their past effect on the

The Fifth Circuit: American Cable. The Fifth Circuit applied the *Gissel* criteria in *NLRB v. American Cable Systems Inc.*,[27] setting forth those situations in which it would enforce an order to bargain. The court of appeals in *American Cable* said that, in light of *Gissel*, a bargaining order would be enforced only if the following elements were present:

> (a) the union had *valid* authorization cards from a *majority* of the employees in an appropriate bargaining unit; (b) the employer's unfair labor practices, although not 'outrageous' and 'pervasive' enough to justify a bargaining order in the absence of a card majority, were still *serious and extensive*; (c) the possibility of erasing the effects of past practices and of ensuring a fair election . . . by the use of *traditional remedies*, though present, is *slight*; and (d) *employee sentiment* can best be protected by a bargaining order.[28]

Thus, the Fifth Circuit's four-point test required both an examination into the circumstances that existed at the time the unfair practices were committed (points (a) and (b)), and an additional examination into the circumstances that existed as of the time a bargaining order was sought (points (c) and (d)).

III. Gibson Products Co.

The court of appeals in *NLRB v. Gibson Products Co.*[29] remanded the Board's 1968 order to be reconsidered in light of *American Cable.* Gibson admitted that the union had been the majority's choice in 1968, and that its unfair practices were serious enough to cause a dissipation in the union's majority. However, the court of appeals refused to enforce the bargaining order because the record failed to show whether the effects of the 1968 practices could be remedied through a traditional cease-and-desist order, and no finding was made in regard to whether or not the order protected current employee sentiment. The Fifth Circuit thus remanded the decision to the Board for more specificity on points (c) and (d) set out in *American Cable.*

On remand the Board refused to follow the guidelines of *American Cable.* The Board concluded that the Supreme Court's purpose in allowing a bargaining order to issue in *Gissel*-type cases was primarily to "deter future misconduct"[30] by the employer. Accordingly, the Board was of the opinion that "the situation must be appraised as of the time of the commission of the unfair labor practices . . . ."[31] If the approach in *American Cable* were followed and the taint of the 1968 practices had been eradicated

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> election conditions . . . . If the Board finds that the possibility of erasing the effects of the past practices and of ensuring a fair election . . . by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue.

Id.

[27] 414 F.2d 661 (5th Cir. 1969), *cert. denied*, 400 U.S. 957 (1970).

[28] *Id.* at 668 (emphasis added).

[29] 421 F.2d 156 (5th Cir. 1969).

[30] 1970 CCH NLRB at 28,761-62, quoting the Supreme Court in *Gissel*, 395 U.S. at 612.

[31] 1970 CCH NLRB at 28,782.

by employee turnover, or by an employer's refraining from additional unfair practices, or for any other reason, the Board feared that the employer "would in effect be reward[ed] and 'allow him to profit from [his] own wrongful refusal to bargain' "[32] unless a bargaining order were imposed. The Board noted that the Supreme Court in *Gissel* recognized that a "bargaining order is designed as much to remedy past election damage as it is to deter future misconduct."[33]

Explaining its refusal to adhere to the guidance of *American Cable*, the Board concluded that the propriety of issuing a bargaining order would be judged as of the time of the commission of the unfair labor practices and not in light of the subsequent events.[34] Thus, the Board affirmed its 1968 decision without specifically setting out whether the possibility of using traditional remedies was more than slight, and whether the order to bargain would best protect employee sentiment.

The Board was correct to point out that *Gissel* recognized that an employer might purposely undermine the union's strength initially, and then refrain from subsequent practices in an attempt to postpone or avoid having to recognize the union.[35] The Supreme Court did specifically note that unlawful conduct causing an election to be set aside can do more than delay the duty to bargain, "for figures show that the longer the time between a tainted election and a rerun, the less are the union's chances of reversing the outcome of the first election."[36] Nevertheless, the Board does not appear to take cognizance of the Court's instructions that "in fashioning a remedy . . . if the Board finds the possibility of erasing past practices . . . by the use of traditional remedies . . . is slight"[37] and that if "employee sentiment once expressed through cards would, on balance, be better protected"[38] only then should a bargaining order issue. In *American Cable* the Fifth Circuit said that the protection of employee sentiment was implicitly required by *Gissel* in order to avoid imposing a bargaining order upon a unit whose employees do not desire a union at the present time.[39] *Gissel* pointed out, however, that employee sentiment is not an end in itself because there is "after all, nothing permanent in a bargaining order, and if . . . the employees clearly desire to disavow the union,"[40] they can do so readily.

Still it is impossible to ignore that the Court in *Gissel* established employee desires and the punishment of employer misconduct as equally important goals.[41] Nor should it be ignored that the Court preferred the

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[32] *Id.*, quoting the Supreme Court in *Gissel*, 395 U.S. at 610.

[33] 1970 CCH NLRB at 28,761-62, quoting the Supreme Court in *Gissel*, 395 U.S. at 612.

[34] 1970 CCH NLRB at 28,762.

[35] The Court noted that "the damage will have been done and *perhaps* the only fair way to effectuate employee rights is to reestablish the conditions as they existed before the unlawful campaign . . . ." 395 U.S. at 612 (emphasis added).

[36] *Id.* at 611 n.30.

[37] *Id.* at 614.

[38] *Id.*

[39] 414 F.2d at 668.

[40] 395 U.S. at 613.

[41] *Id.* at 614.