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Labor Law — Refusal-To-Bargain Charges After Representation Election

I. UNION'S REQUEST FOR RECOGNITION REFUSED

A union whose request for recognition has been refused has two courses of action open to it under the National Labor Relations Act.¹ The first is to file a refusal-to-bargain charge under section 8(a)(5).² A showing that the union represented a majority of the employees in the appropriate bargaining unit and that the employer's refusal was in bad faith³ entitles the union to a Board decree compelling recognition.⁴ Certain guidelines as to what constitutes a section 8(a)(5) violation have been established. In *Joy Silk Mills, Inc.*,⁵ an employer was found to have violated section 8(a)(5) when his refusal to bargain and insistence on a Board election was "due to a desire to gain time and to take action to dissipate the union's majority."⁶ In *Snow & Sons*,⁷ the refusal to bargain without a good faith doubt as to the appropriateness of the unit or the majority status of the union was held to be a violation of section 8(a)(5) even though the employer did nothing to dissipate the union's majority.

The alternative open to the union is to file a petition for a representation election to be conducted by the Board.⁸ This method offers the advantages of swiftness, economy and certification.⁹ Certification

¹ 49 Stat. 449 (1935), as amended, 29 U.S.C. §§ 151-167 (1958).

² National Labor Relations Act, 61 Stat. 140 (1947), 29 U.S.C. § 158(a)(5) (1958). "It shall be an unfair labor practice for an employer . . . (5) to refuse to bargain collectively with the representatives of his employees"

³ An employer need not bargain with an uncertified representative if he has grounds in good faith for doubting the union's majority status, but he is under a duty to bargain if he has adequate grounds for believing that the union does represent a majority. Failure to investigate a union's majority claim and bargain if it is substantiated is an unfair labor practice. The claim may be substantiated by the union through such means as obtaining a majority of authorization cards. *International Ladies' Garment Workers' Union v. NLRB*, 280 F.2d 616 (1960), *aff'd*, 366 U.S. 731 (1961).

⁴ When an employer is found to have committed the unfair labor practice of refusing to bargain, the Board has authority to order him to cease and desist from such refusal, to enter into negotiations, and upon request, if an agreement is reached, to sign a written contract. For a typical bargaining order, see *Burgie Vinegar Co.*, 71 N.L.R.B. 829 (1946).

⁵ 85 N.L.R.B. 1263 (1949), *enforced*, 185 F.2d 732 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 914 (1951).

⁶ *Joy Silk Mills, Inc. v. NLRB*, 185 F.2d 732, 741 (D.C. Cir. 1950).

⁷ 134 N.L.R.B. 709 (1961), *enforced*, 308 F.2d 687 (9th Cir. 1962).

⁸ National Labor Relations Act, § 9(c)(1), 49 Stat. 453 (1947), 29 U.S.C. § 159(c)(1) (1958).

⁹ Under the original Act, a cross-check, instead of an election, might furnish the basis for the certification of a union by the Board, if the parties, with the approval of the Board's Regional Director, enter into an agreement providing for a stipulated cross-check. However, under § 9(c)(1) of the act, 49 Stat. 453 (1947), 29 U.S.C., § 159(c)(1) (1958), the Board may determine a question of representation *only* by an election; cross-checks are no longer permitted. See generally Fockosch, *Labor Law* § 223 (1953).

protects the union through the election-bar rule¹⁰ and serves as a defense in certain situations.¹¹

The election procedure is always subject to the dangers of pre-election unfair conduct on the part of the employer. Not only may this prevent employees from exercising their free choice in the immediate election, it also may taint subsequent elections even though no further unfair labor practices occur. The section 8(a)(5) proceeding does not subject the union to this risk, but neither does it offer the advantages of certification. In addition, section 8(a)(5) proceedings are more complicated, time consuming and expensive than elections.

II. ELECTION OF A COURSE OF ACTION AND ITS CONSEQUENCES

Which course of action the union pursues has been influenced greatly by the Board's determination of the consequences of the choice. In *Aiello Dairy Farms*,¹² the Board held that the union had waived its right to make a section 8(a)(5) charge by participating in an election with knowledge of the employer's refusal to bargain. The Board reasoned that the union could not participate in an election to determine the question of representation, then revert to a section 8(a)(5) charge and argue that the employer never had a good faith doubt about the union's majority. The two procedures were considered inconsistent. The holding was supported further on the ground of sound administrative practice. "[T]he Board . . . should not be compelled to diffuse its energy and expend time and public funds in useless and repetitive proceedings."¹³

The *Aiello* case expressly overruled prior Board precedent established in *M. H. Davidson Co.*,¹⁴ which had been followed by several courts of appeals.¹⁵ The *Davidson* case had held that the union had not waived the right to charge a section 8(a)(5) violation when it participated in an election. The reasoning was that the election was a nullity if, in fact, no bona fide question of representation ever

¹⁰ A newly certified union usually has one year in which to bargain collectively undisturbed by representation claims, of rival unions. *Brooks v. NLRB*, 348 U.S. 96 (1954).

¹¹ For example, certification is a defense to inducement of employees of some other employer to engage in a strike or other concerted activity for purposes of compelling the primary employer to recognize the union, and is also a defense in a jurisdictional dispute. See *General Box Co.* 82 N.L.R.B. 678 (1949). In addition, under § 8(b)(7)(C), it is unlawful for a *noncertified* union to engage in recognition or organizational picketing if an election petition is not filed within a reasonable time, not exceeding thirty days. Certified unions are specifically excluded from the prohibitions of § 8(b)(7).

¹² 110 N.L.R.B. 1365 (1954).

¹³ *Id.* at 1368.

¹⁴ 94 N.L.R.B. 142 (1951).

¹⁵ See, for example, *Southeastern Rubber Mfg. Co.*, 106 N.L.R.B. 989 (1953), *enforced*;

existed, and the union was induced to seek the election by the employer's bad faith refusal to bargain. That is, the employer's bad faith refusal to bargain was determinative of the issue of representation, and the election that followed in which the union lost was of no effect whatever.

III. BERNEL FOAM PRODS. CO.¹⁶

The question of consequences of proceeding to an election rather than relying on refusal to bargain charges was again presented to the Board in *Bernel Foam Prods. Co.* The Textile Workers Union was attempting to organize Bernel's employees and obtained authorization cards from fifty-three of eighty-eight employees in the proposed bargaining unit. The union requested and was refused recognition. The union's offer to submit to a card-check also was refused. Bernel insisted that the union would not be recognized until it was certified following a Board conducted election. The union filed a representation petition and the election was scheduled. Four days prior to the election and also on the day of the election, Bernel engaged in certain practices¹⁷ which interfered with the employees' free choice of a bargaining representative. The election was held and the union lost by a vote of fifty-three to thirty-four. The union filed objections to the election,¹⁸ and, a few days thereafter, filed section 8(a)(5) charges based on the initial refusal to bargain. The Board overruled *Aiello*, saying that it did not serve to effectuate the policies of the National Labor Relations Act, and took jurisdiction of the section 8(a)(5) charge.¹⁹

In overruling *Aiello*, the Board held that the "choice" under *Aiello* was, at best, a "Hobson's choice."²⁰ If the union chooses to file

213 F.2d 11 (5th Cir. 1954); *Model Mill Co.*, 103 N.L.R.B. 1527 (1953), *enforced*, 210 F.2d 829 (6th Cir. 1954); *Howell Chevrolet Co.*, 95 N.L.R.B. 410 (1951), *enforced*, 204 F.2d 79 (9th Cir. 1953).

¹⁶ 146 N.L.R.B. 1277 (1964).

¹⁷ Four days prior to the election, Bernel's president promised the employees a job classification system and other benefits and suggested that they form a shop committee or union. On the day of the election, Bernel distributed leaflets promising that the job classification would be put into effect as soon as possible.

¹⁸ An election will be invalidated whenever there has been interference with the employees' right to select a representative of their own choosing, whether or not the acts also constituted an unfair labor practice. For a case in which an election was invalidated though no unfair labor practice was committed, see *General Shoe Corp.*, 77 N.L.R.B. 124 (1948).

In cases where unions file objections together with unfair labor practice charges, the Board ordinarily consolidates both proceedings and passes upon objections and charges simultaneously. The Board may, however, rule on the objections in representation cases without deciding whether or not the conduct constitutes an unfair labor practice.

¹⁹ Following the guidelines of *Joy Silk and Snow & Sons*, the Board found Bernel guilty of violating § 8(a)(5).

²⁰ The "choice" has been characterized as one without an alternative. See *Pictorial Review Co. v. Helvering*, 68 F.2d 766, 769 (D.C. Cir. 1934); *New v. Smith*, 94 Kan. 6, 145 Pac. 880, 881 (1915).

8(a)(5) charges, it is faced with the time and expense of unfair labor practice proceedings. On the other hand, if the union seeks certification through an election, thereby waiving the 8(a)(5) violation, it risks losing its present majority as a result of pre-election campaigning by the employer. Of course, such campaigning by the employer might unlawfully interfere with the employees' freedom of choice, thereby violating section 8(a)(1) or destroying the requisite "laboratory conditions."²¹ Such activity would give the union the right to another election, but the effects of such practices may be difficult to eliminate.

The Board then considered whether or not the union actually was pursuing inconsistent remedies by following an election with an 8(a)(5) charge. The Board noted that a representation election "may establish the union's majority as of the day of the election, but it does not resolve the union's majority status on the date demanded for recognition and bargaining was made and refused."²² Further, though the union asserted as a formal matter that a question concerning representation exists, as a practical matter, the Board felt that the union had not actually altered its position that it represented a majority of the employees and was therefore entitled to recognition. The Board reasoned that in the election petition the union simply states the *employer's* assertion of such a question of representation and attempts to prove its invalidity.²³ For further support, the Board relied upon the argument in *Davidson* that an election which is a nullity can not be the basis of an irrevocable election of remedies.²⁴ In fact, the Board felt that a rerun election might not be a remedy at all because of the "lingering effect of unacceptable electioneering conduct."²⁵

The Board also considered the assertion that to allow the union to pursue both remedies would cause useless expenditure of public funds and result in repetitive proceedings. It held that permitting a section 8(a)(5) charge to follow an election was neither useless nor repetitive, and furthermore, "considerations of economy . . . must be subordinated to the overriding policies of the act."²⁶ This was fortified

²¹ See note 18 *supra*.

²² 146 N.L.R.B. at 1280.

²³ This reasoning appears questionable because under § 9(c)(1)(B) an employer may file a petition for representation by alleging that one or more individuals or labor organizations have presented a representation claim to him.

²⁴ "There is absolutely no basis for holding the participating union alone bound by an election which has been declared a nullity. Either the election is not a nullity or the union is not bound thereby." 146 N.L.R.B. at 1281.

²⁵ *Ibid*.

²⁶ *Ibid*.

by the rationale that to hold otherwise would be "punishing the wronged party for the misdeeds of the wrongdoer."²⁷

IV. CONCLUSION

That violations of the act should not be sanctioned for administrative convenience when the purpose of the act²⁸ would be defeated thereby is sound and supported by precedent in analogous situations. An example is the procedure followed in dealing with the problem of objections to election interference. In *Denton Sleeping Garment Mills, Inc.*,²⁹ the Board had ruled that objections to election interference are waived if brought after the election. This rule soon was modified in *Great A. & P. Tea Co.*,³⁰ in which the Board held that the parties could object to unlawful interference occurring between the Board's issuance of notice of hearing on the representation petition and the election, even though the objection was made after the election. When the rules of *A. & P.* and *Aiello* were applied together,³¹ a union, though aware of employer unfair labor practices, could proceed to an election and raise unlawful pre-election conduct objections after the election, but could not rely on refusal-to-bargain charges following that same election. The approach taken in *Bernel* complements the now well established precedent of *A. & P.* and lends consistency to Board procedure.

In subsequent applications of *Bernel* the Board has held that the union cannot rely on section 8(a)(5) charges after an election free from employer interference. In *Irving Air Chute Co.*,³² and again in *Koplin Bros. Co.*,³³ the Board limited the application of *Bernel* to situations in which "the election [was] set aside upon meritorious

²⁷ *Ibid.*

²⁸ National Labor Relations Act, 49 Stat. 449 (1935), as amended, 29 U.S.C. § 151 (1958) concerning findings and declaration of policy reads in part:

[I]t is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection. (Emphasis added.)

²⁹ 93 N.L.R.B. 329 (1951).

³⁰ 101 N.L.R.B. 1118 (1952).

³¹ In *Franchester Corp.*, 110 N.L.R.B. 1391 (1954), the seemingly inconsistent rules of *Aiello* and *A. & P.* were applied side by side.

³² 1964 CCH NLRB ¶ 13554 (Nov. 12, 1964). This case was decided subsequent to *Bernel*.

³³ 1964 CCH NLRB ¶ 13608 (Dec. 7, 1964). This case was decided subsequent to *Bernel*.

objection filed in the representation case.³⁴ The Board stated in *Koplin*:

In the *Bernel* case, however, the election was set aside on the basis of meritorious objections. Where, as here, the election has not been set aside on such basis and its validity stands unimpaired, we will presume that the election, which the Union lost, truly expressed the employees' desires as to representation. . . . [citing *Irving Air Chute*.]

We therefore hold in this case that the Union is not entitled to a bargaining order even assuming the validity of its authorization cards.³⁵

A meritorious objection would include either an unfair labor practice or a violation of the laboratory conditions. Limiting the application of *Bernel* to cases involving employer election interference seems to reach a just result, but still hints of the doctrine of waiver in spite of language to the contrary in *Bernel*.³⁶ Thus, the effect of the *Bernel* rule is apparently not as far reaching as might at first appear. Three possible results may follow from proceeding to an election after the employer has violated section 8(a)(5). First, the union can win the election and be certified thereby. Second, the union may lose the election due to unlawful employer pre-election conduct; and, as in *Bernel*, it may then rely on the section 8(a)(5) violation or seek a new election. Third, the union may lose the election even though the employer engages in no unfair election conduct. In this latter event, the union, under the doctrine of *Koplin* and *Irving Air Chute*, will, in effect, have elected its exclusive remedy and thereby have waived the right to rely on section 8(a)(5) charges. This conclusion is consistent with Board reasoning that *unlawful* pre-election conduct by the employer makes the election a nullity when the union loses, for, conversely, a valid election cannot be a nullity.

In light of the three results obtainable under the *Bernel* rule, a union would be well advised to rely initially on section 8(a)(5) charges; then, if it so desires, to file a certification petition. Although the processing of a section 8(a)(5) charge is slower and more expensive than the election procedure, it does not subject the union to the

³⁴ 1964 CCH NLRB ¶ 13554, at 21806 (Nov. 12, 1964).

³⁵ 1964 CCH NLRB ¶ 13608, at 21933 (Dec. 7, 1964).

³⁶ In the last analysis, the Aiello rule seems to be predicated on the erroneous legal premise that the statutory obligation of an employer to bargain collectively with a union representing a majority of its employees is subject to waiver by a union. This view was adequately refuted by the United States Court of Appeals for the Fifth Circuit, in *Southeastern Rubber Mfg. Co.*, [213 F.2d 11, 15 (5th Cir. 1954)] a case decided under the Davidson rule, where it said: "This Court has recently held that 'the statutory requirement of good faith bargaining is not subject to waiver through action or inaction of parties to a labor controversy', for the Board's duty to enforce the public policy underlying the Act transcends private rights and ordinary principles of contract law." 146 N.L.R.B. at 1282.