Case Western Reserve Law Review

Volume 2 | Issue 2

1950

Labor Law--Closed Shop Agreements--Discharge for Rival Union Activity

Bernard R. Hollander

garded as incidental consequences of the exercise of power to aid navigation for which no compensation need be made.[21]

Holdings to the effect that only direct floodings of land amount to a "taking" whereas such injuries as impaired drainage are merely consequential, seem to be an instance of the courts' falling err to what Justice Cardozo called "the tyranny of labels."[22] In these cases the rule is given as the reason.[23] Some courts, however, have based similar holdings on a reluctance to require the government to foresee all the possible damage that may result from its improvement activities.[24]

The decision in the principal case has two practical effects. The first, following the rule in the *Cress* case, is that the paramount power to improve navigation goes no further than the bed of the stream which is bounded by its natural banks. The other is a broadening of the concept of a "taking" to include damages caused by an underground invasion of percolating waters as well as surface flooding. Both rules definitely restrict the United States in the full use of its dominant servitude in a navigable stream. Whether these restrictions are applicable only to the present facts or will be extended to others remains to be seen.

GORDON E. NEUENSCHWANDER

LABOR LAW — CLOSED SHOP AGREEMENTS — DISCHARGE FOR RIVAL UNION ACTIVITY

An employer and its employees' representative union entered into a closed shop agreement.[1] The contract was renewed after four years duration on July 24, 1945, for an indefinite period. On July 26, 1945, certain employees began open agitation for a change in bargaining representative. These employees were expelled from the representative union for rival union activity. Knowing this, the employer subseqeuntly discharged them on demand of the union in compliance with the closed shop agreement. The

[21] Goodman v. United States, 113 F.2d 914 (8th Cir. 1940). If a government project results only in temporary invasion or consequential injury, no implied obligation to compensate riparian owner can rise. Comment, *supra* note 13, at 673, 674.

[22] Palko v. Connecticut, 302 U.S. 319, 323, 58 Sup. Ct. 149, 151 (1937); Snyder v. Massachusetts, 291 U.S. 97, 114, 54 Sup.Ct. 330, 335 (1934).

[23] For an excellent example of this weakness, see Lynn v. United States, 110 F. 2d 586, 589, (5th Cir. 1940). See also United States v. Lynah, 188 U.S. 445, 23 Sup.Ct. 349 (1903).

[24] "The damages sustained by the owner must be within the contemplation or reasonably to be anticipated by the Government when the dam was erected." Atkinson v. United States, 68 F. Supp. 99, 101 (D. Minn. 1946); John Horstmann Co. v. United States, 257 U.S. 138, 42 Sup.Ct. 58 (1921).

[1] "The employees covered by this agreement shall be members in good standing of the Union and the Employer shall employ no workers other than members of the Union. " 70 N.L.R.B. 1202, 1214 (1946). Union security agreements are

employer was found by the National Labor Relations Board[2] to have violated sections 8(1) and 8(3) of the National Labor Relations Act[3] by reason of its "discrimination in regard to tenure of employment," thereby discouraging membership in the rival union and interfering with the right of the employees to choose their own bargaining representative. The Court of Appeals entered a decree enforcing the Board's order.[4] Certiorari was granted by the Supreme Court. *Held,* that since the employer had carried out the collective bargaining contract in good faith, he was not guilty of an unfair labor practice.[5]

The Court in the principal case was confronted with apparently conflicting provisions of the NLRA. By the proviso to section 8(3), an employer and the labor organization elected by the employees as their bargaining representative were permitted to require membership in the representative organization as a condition of employment. By section 7,[6] employees were given the right to change their bargaining representative.[7] However, the existing representative union could expel members participating in activities intended to result in a change of representative, and, once expelled, these employees were ineligible under the

---

classified as (1) *closed shop,* providing that only persons already union members shall be hired; (2) *union shop,* providing that all persons hired must become union members within a certain period of time; or (3) *maintenance-of-membership,* providing that all workers who are already union members must remain union members in good standing as a condition of employment. TELLER, LABOR DISPUTES AND COLLECTIVE BARGAINING § 398.58 (Supp. 1948).

[2] Colgate-Palmolive-Peet Co., 70 N.L.R.B. 1202 (1946).

[3] "§ 8. It shall be an unfair labor practice for an employer — (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 of this act. . (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* that nothing [in this act] or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined [in this act] as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9(a) in the appropriate collective bargaining unit covered by such agreement when made." 49 STAT. 452 (1935), 29 U.S.C. § 158(1), (3) (1946) (Wagner Act).

[4] Colgate-Palmolive-Peet Co. v. N.L.R.B., 171 F.2d 956 (1949).

[5] 338 U.S. 355, 70 Sup. Ct. 166 (1949).

[6] "§ 7. 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." 49 STAT. 452 (1935), 29 U.S.C. § 157 (1946) (Wagner Act).

[7] "There is no question but that the discharges had the effect of interfering with the employees' right, given by § 7 of the Act, to self-organization and to collective bargaining through representatives of their own choosing." Colgate-Palmolive-Peet Co. v. N.L.R.B., 338 U.S. 355, 360, 70 Sup. Ct. 166, 169 (1949).

closed shop agreement to continue in their employment. On demand by the representative union for the discharge of these employees, the employer either had to discharge the employees, risking a charge of unfair labor practice, or had to breach its agreement with the representative union.

Since 1942,[8] the NLRB had refused to permit an employer to discharge employees pursuant to a valid closed shop contract when, to the employer's knowledge,[9] the union had expelled the employees for seeking to change their bargaining representative at an appropriate time.[10] This NLRB policy, known as the *Rutland Court* doctrine, was approved in the Second,[11]

[8] Rutland Court Owners, Inc., 44 N.L.R.B. 587 (1942), 46 N.L.R.B. 1040 (1942). For a discussion of this and related cases see: 2 TELLER, LABOR DISPUTES AND COLLECTIVE BARGAINING § 324 (1940 and Cum. Supp. 1946); Cushman, *The Duration of Certifications by the NLRB and the Doctrine of Administrative Stability*, 45 MICH. L. REV. 1, 32 (1946); Frieden, *Some New Discharge Problems Under Union Security Covenants*, [1946] WIS. L. REV. 440, 448-51; Murdock, *Some Aspects of Employee Democracy Under the Wagner Act*, 32 CORNELL L. Q. 73, 94 (1946); Notes, *Effect of a Closed Shop Contract on Employer Practices Otherwise Unfair Under the NLRA*, 56 HARV. L. REV. 613, 617, (1943), *Change of Bargaining Representative During the Life of a Collective Agreement Under the Wagner Act*, 51 YALE L. J. 465, 467 (1942), *Discharge Based on Union Reprisal for Support of Rival Union Under the NLRA*, 56 YALE L. J. 1048, 1049 (1947), 33 VA. L. REV. 521, 522 (1947)

[9] Durasteel Company, 73 N.L.R.B. 941 (1947) (employer held to have knowledge where he knew employees were engaging in rival union activity, but made no effort to determine to what extent dual unionism motivated expulsion); Lewis Meier & Co., 73 N.L.R.B. 520 (1947) (where employer is advised by rival union of possible reprisals against its adherents, employer has duty to inquire as to expulsions); Colgate-Palmolive-Peet Co., 70 N.L.R.B. 1202 (1946) (employer should have realized from his general knowledge of the rival union activity the motivation of the expulsions); Portland Lumber Mills, 64 N.L.R.B. 159 (1945) (employer held to have knowledge when discharged employee had acted as observer for rival union in Board election and employer knew this, but did not inquire as to whether this was the sole reason for the employee's expulsion) *But cf.* Spicer Mfg. Corp., 70 N.L.R.B. 41 (1946) (knowledge by foreman not imputed to employer where employee did not specifically request that employer be informed); Diamond T Motor Car Co., 64 N.L.R.B. 1225 (1945) (knowledge by foreman of expelled employee's rival union activity not imputed to employer).

[10] Portland Lumber Mills, 64 N.L.R.B. 159 (1945) (one month before expiration of a year contract); Eureka Vacuum Cleaner Co., 69 N.L.R.B. 878 (1946) (two months before expiration of the contract and six weeks before operative date of an automatic renewal); Geraldine Novelty Co., 74 N.L.R.B. 1503 (1947) (two months before expiration of the original contract notwithstanding the existence of a renewal agreement which had been entered into by employer and representative union shortly after rival union activity began) Public Service Co-ordinated Transport, 77 N.L.R.B. 153 (1948) (four months before expiration of the contract and less than two months preceding automatic renewal date); Colgate-Palmolive-Peet Co., 70 N.L.R.B. 1202 (1946) (later in the same month as the signing of a renewal of a contract already in existence more than four years); Rheem Mfg. Co., 70 N.L.R.B. 57 (1946) (seven months after oral agreement by employer and union extending provisions of expired closed shop contract) *But cf.* Southwestern Portland Cement Co., 65 N.L.R.B. 1 (1945) (employee s activity a few months after signing of a contract was not at the appropriate time).

Third,[12] and Ninth[13] Circuits, but was in effect, overruled in the Seventh.[14] Expressly rejecting the *Rutland Court* doctrine, the Supreme Court in the principal case stated that Congress had been aware of the interference which closed shop contracts would create with the employees' right to change their bargaining representative,[15] and that the proviso permitting such contracts could not be defeated through administrative amendment by the NLRB.

The decision in the principal case does not affect the Supreme Court's previous holding[16] that a union shop contract entered into by an employer with the knowledge that the representative union intended to request the discharge of former adherents of a rival union is invalid as a defense to charges of discriminatory discharges. So also, a union shop contract made by an employer with a company-dominated or company-assisted union is invalid and will not protect the employer from charges of discriminatory discharges.[17]

The significance of the principal case lies in its holding that, under the NLRA, the employer's carrying out a valid closed shop agreement in

---

For a discussion of Board policy with regard to duration of Board certification of unions see: Cushman, *The Duration of Certifications by the NLRB and the Doctrine of Administrative Stability,* 45 MICH. L. REV. 1 (1946); Murdock, *Some Aspects of Employee Democracy Under the Wagner Act,* 32 CORNELL L. Q. 73 (1946); Note, *Change of Bargaining Representative During the Life of a Collective Bargaining Agreement Under the Wagner Act,* 51 YALE L. J. 456 (1942).

[11] N.L.R.B. v. Geraldine Novelty Co., 173 F.2d 14 (2d Cir. 1949), *enforcing* 74 N.L.R.B. 1503 (1947); Colonie Fibre Co. v. N.L.R.B., 163 F.2d 65 (2d Cir. 1947), *enforcing* 69 N.L.R.B. 589 (1946), 71 N.L.R.B. 354 (1946); N.L.R.B. v. American White Cross Laboratories, 160 F.2d 75 (2d Cir. 1947), *enforcing* 66 N.L.R.B. 866 (1946).

[12] N.L.R.B. v. Public Service Transportation Co., 177 F.2d 119 (3d Cir. 1949), *enforcing* 77 N.L.R.B. 153 (1948). This decision was modified after the principal case was decided. The court had found as part of its decree that the discharged employee was protected under the *Rutland* doctrine. However, in view of the decision in the principal case, the court agreed with the contention of both the employer and the Board that its former decree should be modified to the extent of finding the discharge non-discriminatory. 50 A.L.C. 106 (3d Cir. 1950).

[13] N.L.R.B. v. Colgate-Palmolive-Peet Co., 171 F.2d 956 (9th Cir. 1949), *enforcing* 70 N.L.R.B. 1202 (1946); Local 2880, Lumber & Sawmill Workers v. N.L.R.B., 158 F.2d 365 (9th Cir. 1946), *enforcing* 64 N.L.R.B. 159 (1945).

[14] Aluminum Co. v. N.L.R.B., 159 F.2d 523 (7th Cir. 1946), *reversing* 68 N.L.R.B. 750 (1946); Lewis Meier & Co. v. N.L.R.B., 21 L.R.R.M. 2093 (7th Cir. 1947), *reversing* 73 N.L.R.B. 520 (1947).

[15] 338 U.S. 355 at 363, 70 Sup. Ct. 166 at 171.

[16] Wallace Corp. v. N.L.R.B., 323 U.S. 248, 65 Sup. Ct. 238 (1944), *affirming* 141 F.2d 87 (4th Cir. 1944), *enforcing* 50 N.L.R.B. 138 (1943), *rehearing denied,* 324 U.S. 885, 65 Sup. Ct. 682 (1945); Cliffs Dow Chemical Co., 64 N.L.R.B. 1419 (1945).

[17] Wallace Corp. v. N.L.R.B., *supra* note 16; Julius Resnick, Inc., 74 N.L.R.B. 184 (1947); Pacific Plaster & Mfg. Co., 68 N.L.R.B. 52 (1946); Tappan Stove Co., 66 N.L.R.B. 759 (1946); Lane Lifeboat & Davit Corp., 60 N.L.R.B. 473 (1945); McGough Bakeries Corp., 58 N.L.R.B. 849 (1944).