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understood by a tax conscious client when, in the words of Learned Hand, he realizes that:

It makes no difference to the taxpayer what his mistake, he awakes to learn that it is never safe to put his trust in officials he who deals with the government must dot his i's and cross his t's; and if he assumes that he may rely upon the ordinary rules which apply as between individuals, he is doomed to disappointment.⁶⁷

ROGER A. SCOTT

Union Domination by Employer— New Approach

INTRODUCTION

It has long been recognized that as between the employer and single employee, the employee is generally at the mercy of the employer concerning the bargaining as to wages, hours, working conditions and the many fringe areas.

By means of his own individual efforts, however, coupled with the organization of the worker into unions and the aid of national legislation, the employee has steadily climbed the scale of bargaining power until today he has an almost equal position across the bargaining table. For many reasons certain groups of management have seen fit to thwart the entrance of the workers into unions. Often management believes that a union will tend to disrupt the harmony which might exist between the employer and employees. Employers also submit that they can do more for their workers than can the unions. Of course, there is a segment of employers who fear union domination with regard to purely management matters.

The first method utilized by management in preventing the worker from unionizing was direct. The worker was discharged upon management's learning that he had sympathy toward a union, or had ideas of forming a union. Today, management, by virtue of the Wagner and Taft-Hartley Acts, is compelled to allow the worker to organize. There are now two avenues open to the workers. They may become part of a national union, i.e. CIO or AFL, or they may form their own independent union. From the employer's standpoint, it is obvious that he would prefer bargaining with a single independent group of his own workers. The difference in the strength and power of the two groups is obvious.

⁶⁷ *Angelus Mining Co. v. Nunan*, 144 F.2d 469, 472 (2d Cir. 1944).

Therefore, for various reasons, good and bad, the workers are aided by the employer in forming an independent group.

This aid ranges from merely illegal assistance to the point where the workers' organization is no longer independent and capable of honest collective bargaining, but a company dominated group. When this point is reached, management is, in effect, sitting on both sides of the bargaining table, and collective bargaining is a one-way street.

To effectuate illegal domination the employer has quite frequently relied upon the practice of instigating or aiding in the actual formation of the workers' group. Since such practice is made illegal by the Taft-Hartley Act, the NLRB and the courts have in the past maintained a strict policy of disestablishing such a group and completely barring management from recognizing it as the bargaining agent. However, an examination of recent cases indicates that the thinking and attitude of both the NLRB and the courts have undergone a change in dealing with this problem.

Certain factual guides or patterns have been established in determining whether there is employer domination. If a particular case fits a certain factual pattern, the organization is deemed to be dominated and will be disestablished. The purpose of this article will be to point up these proscribed factual guides and to show that the NLRB and the courts, though still using these guides, require greater evidence of company aid and support to find domination today. The importance of this trend is evident. It permits greater activity by the employer when his employees are organizing without such activity being regarded as illegal. The indirect effect of such activity upon future collective bargaining between the groups could be very significant, especially in situations in which the activity aids in the workers' forming an independent group and not as part of a national organization.

It must be noted that a group or a committee instigated or formed by the employer is merely one form of employer aid. However, it is manifest that if the NLRB and the courts have undergone a change in policy in this area, such policy will also be continued in determining the outcome of other situations. If there is required greater aid by the employer to find domination, it must follow that there will be required greater aid to find any type of illegal assistance at all.

FACTUAL PATTERNS ESTABLISHING DOMINATION

Section 8(a)(2) of the Taft-Hartley Act¹ provides,

It shall be an unfair labor practice for an employer to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it.

¹ 61 STAT. 136 (1951, 29 U.S.C. § 158 (1952))

The basic philosophy behind this section is to allow the employees complete freedom in deciding and choosing the organization to represent them in collective bargaining with management.² Without such freedom, collective bargaining becomes a delusion and the only party benefiting is the employer.³ With this as a premise the NLRB has always carefully scrutinized the activities of management in this area.

Intent of the employer is not important. The employer may act completely in good faith and give support and suggestions merely because he honestly wishes to aid the employees,⁴ or may intend to undermine and control the workers. In either situation, the action taken by the board will be the same.⁵ For it is the effect of such employer aid that is the determining factor and not the intent.

Upon finding that there has been a violation of section 8(a)(2), the board must decide the degree of such violation.⁶ If it is found that the workers' group or union is completely dominated by the employer, the NLRB will order the group or union disestablished. Once complete disestablishment of the organization is ordered, the result is that the dominated group can not be recognized by the employer as the employees' representative nor certified as such by the board.⁷

However, there are many situations in which the employer may commit illegal acts in relation to the formation of the labor union but not to the extent that it can be said that he dominated the group.⁸ If this be

² *Wayside Press, Inc. v. NLRB*, 32 L.R.R.M. 2625 (9th Cir. 1953); 40 MICH. L. REV. 831 (1941-42).

³ *Northeastern Engineering*, 36 L.R.R.M. 1082 (1955); *Ben Corson Mfg. Co.*, 36 L.R.R.M. 1036 (1955); *Texas City Chemicals, Inc.*, 36 L.R.R.M. 1018 (1955); *Stow Mfg. Co.*, 31 L.R.R.M. 1635 (1953); *E. A. Laboratories, Inc.*, 23 L.R.R.M. 1162 (1948), *enforcement granted*, 28 L.R.R.M. 2043 (1951)

⁴ *Standard Coil Products Co.*, 35 L.R.R.M. 1013 (1954); *NLRB v. Polynesian Arts, Inc.*, 33 L.R.R.M. 2381 (6th Cir. 1954), *enforcing in part*, 30 L.R.R.M. 1312 (1952).

⁵ *Ibid.*

⁶ *Carpenter Steel Co.*, 21 L.R.R.M. 1232 (1948)

⁷ *Carpenter Steel Co.*, 21 L.R.R.M. 1232 (1948); *Matter of Pennsylvania Greyhound Lines Inc.*, 1 L.R.R.M. 303 (1935), *enforced*, 303 U.S. 261 (1938); 4 LAB. L.J. 516-517 (1953) It is to be noted that the disestablishment order is directed to the employer, not the union. Thus a dominated union, while dominated, could never be the representative, but once this stigma is removed, then it could be chosen by the workers as their bargaining agent. Such a group is carefully noted and rarely qualifies as the representative. See *Swift & Co. v. NLRB*, 4 L.R.R.M. 785 (10th Cir. 1939).

⁸ *Carpenter Steel Co.* 21 L.R.R.M. 1232 (1948); *Hershey Metal Products*, 21 L.R.R.M. 1237 (1948); *Matter of Pennsylvania Greyhound Lines Inc.*, 1 L.R.R.M. 303 (1935), *enforced*, 303 U.S. 261 (1938); 4 LAB. L.J. 516-517 (1953)

the case, recognition of the union by the employer is permitted by the NLRB after the illegal support has been removed.⁹

It is evident that the degree of punishment is extremely important to the employer. The suggestions and aid by the employer are generally given when the threat of a national union organizing his plant is present.¹⁰ Assuming that he has aided a committee or a small segment of the men to organize, he is in a much better position if the NLRB merely slaps his wrists, so to speak, by deeming the assistance illegal but not to the extent of domination. The independent group may still ultimately become the bargaining agent. Had the NLRB decided that they were simply puppets and disestablished the group, the national union's task of organizing would be greatly lessened.

Under both the Wagner and Taft-Hartley Acts, the NLRB, when confronted with this situation of a committee instigated or greatly aided by the employer, generally holds that such practice by the employer is an unfair labor practice and amounts to domination.¹¹ The general rule as enunciated by the board and the courts in the various cases as well set forth in *American Enka Corp. v. NLRB*,¹²

Where the employer himself assists in setting up the bargaining agency, provides the machinery by which the bargaining representative is chosen, allows the elections to be conducted on his premises and at his expense, and pays the representatives for time devoted to bargaining, he is manifesting too great a part in a matter with which he is supposed to have nothing to do.¹³

It must be recognized that the general rules and standards whereby the NLRB and courts determine domination are not clearly fixed but rather fall into general fact patterns. As the Supreme Court has stated:¹⁴

(T)he conclusion that (the workers') choice was restrained by the employer's interference must of necessity be based upon the existence of conditions or circumstances which the employer created or for which he was fairly responsible and as a result of which it may be reasonably inferred that the employees did not have that complete and unfettered freedom of choice which the act contemplates. Here no one fact is conclusive.¹⁵

⁹ *Marathon Electric Mfg. Corp.*, 32 L.R.R.M. 1645 (1953); *Fontaine Converting Works Inc.*, 22 L.R.R.M. 1149 (1948) Withdrawing all illegal support from the group, and allowing the independent group to organize by its own force, is generally the method by which the stigma of illegal support is removed.

¹⁰ *NLRB v. Jay Co.*, 34 L.R.R.M. 2589 (9th Cir. 1954); *Tri State Mfg. Co.*, 34 L.R.R.M. 1372 (1954); *Steadfast Rubber Co.*, 26 L.R.R.M. 1488 (1950)

¹¹ *Carpenter Steel Co.*, 21 L.R.R.M. 1232 (1948); *Matter of Pennsylvania Greyhound Lines Inc.*, 1 L.R.R.M. 303 (1935), *enforced*, 303 U.S. 261 (1938)

¹² 119 F.2d 60 (4th Cir. 1941)

¹³ *Id.* at 62.

¹⁴ *NLRB v. Link Belt Co.*, 7 L.R.R.M. 297 (1941)

¹⁵ *Id.* at 300.

In *Madix Asphalt Roofing Corp.*¹⁶ the union was formed in response to a speech by the president of the company, in which he suggested its formation and promised to support it. In addition he also hinted that a bonus and week's vacation would be given if such plan were adopted. Subsequent to its immediate formation, he allowed the group to hold meetings and transact business on company time and property. The group was held to be dominated by the employer and ordered to be disestablished.

A similar pattern of control may be seen although an employee formed the committee. In *Majestic Metal Specialties, Inc.*,¹⁷ an employee initiated a plan to form a shop council, but only after he had consulted with and obtained permission from the employer's office. Not only were all meetings, organizational and regular, held on the employer's premises, but the employer also furnished luncheon at meetings. Further, all stenographic aid and services were gratuitous. The NLRB ruled that the group must be disestablished on the basis of such strong evidence. Probably one of the more important factors taken into consideration in finding domination was that the assistant to the employer's president was permanent chairman of the council. Another factual thread stressed by the board was the fact that, as is the case in many of these so-called "independent" groups, the group was created when an outside union was attempting to organize.¹⁸

Using these factual patterns as a guide, the board has found domination where the employer not only furnished the original impetus for the organization, but there were present such additional factors as:

(A) employer also prescribed the nature, structure, or functions of the organization,¹⁹

(B) the organization never developed any real form at all as evidenced by lack of a constitution, by-laws, dues or a treasury, meetings and assets,²⁰

(C) representatives of management actually took part in the meetings or activities of the committee or attempted to influence its policies.²¹

¹⁶ 24 L.R.R.M. 1342 (1949)

¹⁷ 27 L.R.R.M. 1332 (1951)

¹⁸ *Globe Products Corp.* 31 L.R.R.M. 1305 (1953); *Superior Engraving Co.*, 24 L.R.R.M. 1044 (1949).

¹⁹ *Standard Coil Products Co.*, 35 L.R.R.M. 1013 (1954), *enforced*, 224 F.2d 465 (1st Cir. 1955), *cert. denied*, 350 U.S. 902 (1955); *Ed Taussig, Inc.*, 34 L.R.R.M. 1037 (1954).

²⁰ *Ben Corson Mfg. Co.*, 36 L.R.R.M. 1036 (1955); *Stow Mfg. Co.*, 31 L.R.R.M. 1635 (1953), *enforced*, 217 F.2d 900 (2d Cir. 1954), *cert. denied*, 348 U.S. 964 (1955).

²¹ *California Cotton Cooperative*, 35 L.R.R.M. 1390 (1954); *Tri State Mfg. Co.*, 34 L.R.R.M. 1372 (1954).

If the facts of a particular case were not such as to fit into one or more of these fact patterns, then the board would rule that the employer had merely given illegal assistance and had not dominated the group. An excellent case to point up the board's distinction between domination and illegal assistance is *Matter of William Fogel*.²² Two separate, successive independent groups were involved. With regard to the first group, the company permitted its personnel manager to initiate the organizing plans and to assist in organizing activities by attendance at a meeting and payments to employees for the time spent on behalf of the organization. The union was allowed use of company property and the employer served refreshments. This group, the board ruled, was clearly dominated. Later, when an outside union was attempting to organize, a second independent group was formed. The illegal acts of the employer consisted of hasty recognition of the group, without proof of majority status, and its ready execution of a contract providing benefits theretofore denied during negotiations with the nationally affiliated union and during pendency of a representation petition before the board. Such illegal acts were held not to amount to domination. One of the deciding factors, as seen by this case, is the aid of the employer in forming or initiating the committee. Generally such aid is most indicative of domination.

Recent cases illustrate that the NLRB and the courts are permitting more activity by the employer in aiding his employees in forming their unions than was previously allowed. To make the acts of the employer illegal or to place the case into one of the categories of domination requires much stronger evidence of the employer's participation and support than had been required in past decisions.²³

In the case of *National Labor Relations Board v. Wemyss*,²⁴ the employer's plant was being organized by a national union. At various times the representative of the union asked to speak to the workers, but the employer evaded the situation. During that same time, a worker decided that an independent group should be formed and asked to hold an election on the employer's premises to determine if there was employee support for such formation. The employer not only consented but he decided who was eligible to vote, and arranged the whole program. The independent group won. The NLRB held that such action constituted domination. On appeal, the court of appeals²⁵ agreed that the employer had illegally assisted the group but reversed the NLRB on the

²² 82 N.L.R.B., 1302 (1949).

²³ *Multi-Color Co.*, 37 L.R.R.M. 1098 (1955); *Bowman Transportation, Inc.*, 36 L.R.R.M. 1021 (1955); *Plastic Age Co.*, 35 L.R.R.M. 1431 (1955).

²⁴ 31 L.R.R.M. 1350 (1953).

²⁵ 34 L.R.R.M. 2124 (9th Cir. 1954).

point of domination. The court minimized the employer's actions in forming the group and held that the question of whether the organization was dominated depended upon the state of mind of the employees, i.e. whether the organization existed as a result of a free choice or whether fear of the consequences by the employer prompted the formation.

In *Ephraim Haspel*²⁶ the employer gave the workers a choice by telling them that, "it is either local 66 or a shop union, you can decide which you want." The employees then held a meeting in which supervisors participated. Later the employer made available the use of the premises for union meetings, paid union officers for time spent consulting their legal advisers, permitted notices to be posted on the bulletin board, and quickly recognized the group as representative. The NLRB ruled that it was a violation of the Taft-Hartley Act to aid the union in this manner and also to limit the workers to two choices. However, the board stressed, as was done in the *Wemyss* decision, that the employer did not unlawfully dominate the independent union since according to the evidence no management representative took part in the activities of the union or attempted to enforce its policies.

However, in *Nutone, Inc.*²⁷ it is evident that one member of the board believes, as does this writer, that the approach of the board has undergone a change. In this case the national union was actively opposed by a group of employees called the "loyalty group." Following the national union's defeat, this group led a movement to form an independent union as the employer had suggested in his anti-union propaganda. Notice to all employees was mimeographed by the supervisor using company paper and equipment, and was distributed throughout the plant in the usual manner which the company used to distribute its own literature. Distribution was done during working hours and by both foremen and employees. The company also issued and distributed a second bulletin which contained instructions concerning election of a permanent committee. Elections were held on the regular working shifts and foremen counted the ballots. The employees were paid for attending the meetings held on the job. The NLRB majority ruled that the employer had illegally assisted but had not dominated the group, stressing that no substantial evidence appeared indicating that management took any part in meetings or activities, or attempted to influence the group's policies.

In a sharp dissent, member Murdock emphasized that the group was purely a creature of management and that the employees had no opportunity to accept or reject the group, but only to vote for it. In con-

²⁶ 34 L.R.R.M. 1280 (1955).

²⁷ 36 L.R.R.M. 1165 (1955).

cluding, he stated that it was the first time in the history of the board that it had found that an employee representative plan which the employer had foisted upon the employees did not result in a dominated group.

The two most recent cases would seem to substantiate the view that more evidence is required to find domination by the employer. In *Adhesive Products, Corp.*²⁸ the trial examiner found that the employer dominated the workers' group. Holding a meeting with his workers, the employer rejected the national union and said the workers could have any other group, but he preferred to have them reorganize a defunct committee. After much individual persuasion, he finally convinced them of the merits of having an independent group and signed the workers to a contract. The employer also offered other assistance such as a free meeting place, stenographic aid and printing service. The NLRB rejected the position taken by the trial examiner, ruling that the defendant was not in a position to control the organization and did not actively participate in the internal affairs of the group. The board required the employer to withhold recognition until certification.

In the decision of the *Coppus Engineering Corp.*,²⁹ it would appear that a court of appeals has gone further than the NLRB in requiring evidence of employer aid and support to find domination. In this case the NLRB had ordered the group of the workers disestablished on the following facts but this holding was reversed by the court of appeals.³⁰ A national union had held an election to determine its status and lost. Following this loss, the employer suggested that the workers have a permanent grievance committee. He also gave immediate recognition to the group without asking for proof of its representative status, although he had earlier forced the national group to prove its status. Further, the employer did all the printing for the committee and printed the committee's rules in its own booklet given to all new employees. Finally, the rules of the committee were very loose, did not protect the members from the employer's inherent power to discharge them, and did not provide for written agreement between employer and employees, dues and regular meetings. The court of appeals recognized all these facts, but negated them by saying:

No two cases in this field are altogether alike and each must be judged by the totality of its own facts. Here the totality of the facts does not constitute substantial evidence of support or domination.³¹

²⁸ 39 L.R.R.M. 1213 (1957)

²⁹ 38 L.R.R.M. 1079 (1956)

³⁰ 39 L.R.R.M. 2315 (1957)

³¹ *Id.* at 2321.

It is difficult to accept the position taken by the court of appeals. As a practical matter the evidence would appear to require a finding of domination under section 8(a)(2). The attitude of the court seems well summed up in the concurring opinion of Judge Magruder:

It must not be forgotten that the employer too, has a legitimate interest in having an established channel of communication between his employees and management, the only limitation being that the employer is forbidden to use his economic power in any way to fetter the free choice of his employees.³²

And finally,

Though admitting the representative was weak the statute (Taft-Hartley) does not make it the duty of the employer nor a function of the board (NLRB) to "baby" along the employees in the direction of choosing an outside union as their bargaining representative.³³

CONCLUSION

In both the Wagner and Taft-Hartley Acts, section 8(a)(2) was deemed one of the most important features. The basis of sound collective bargaining between employer and employees requires that the workers have a free choice in naming the group to represent them and that such group be independent from management. Realizing the value and power of a workers' union, certain employers have sought to control it by various methods and in violation of the Act. In holding that such action was violative of section 8(a)(2), the NLRB and courts have established guides by which they measured the aid and support given by the employer. In the past several years, however, it is seen that while the same basic measuring sticks are still used to find domination, more aid and support is now required to bring a given case within the guides.

No specific reasons can be found for this gradual evolution. Rather it would seem that a culmination of factors has brought the change about. The laboring force is no longer in the position it occupied in the early thirties. At that time, it was apparent that any misstep by management had to be corrected promptly, or labor would soon find itself once more under the domination of management. Today, however, efforts are being made by management and unions to establish peaceful relations, and the governing bodies realize that a line can be drawn between cooperation and domination. This is presently being done.

RAYMOND E. GRIFFITHS

³² *Ibid.*

³³ *Ibid.*