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Bargaining Orders for Employer Coercion: A Need for Consistency

BARGAINING ORDERS FOR EMPLOYER COERCION: A NEED FOR CONSISTENCY

An employer who violates section 8(a)(1) of the National Labor Relations Act during a union organizational campaign may be ordered to bargain upon request. However, depending upon the facts, the National Labor Relations Board may use either of two distinct methods of analysis. One line of approach has been evolved in cases where a union with majority status requests and is denied recognition and the employer subsequently commits section 8(a)(1) violations. In *Joy Silk Mills, Inc. v. NLRB*,[1] the Board held that the employer's subsequent course of section 8(a)(1) conduct is evidence that his prior refusal was designed to gain time to undermine the union and was, therefore, in bad faith. By means of this inference the Board was able to base its bargaining order on a finding that section 8(a)(5) had been violated. In this line of cases the issue before the courts on appeal is not whether as a matter of law a bargaining order is the appropriate remedy for the section 8(a)(1) conduct found by the Board, but whether there is substantial evidence to warrant the Board's factual determination that the employer's refusal was not in good faith. A second line of analysis has developed in those cases in which the employer prior to a valid demand for recognition engages in section 8(a)(1) conduct designed to dissipate the union's majority status.[2] Since there is no valid demand, the *Joy Silk* section 8(a)(5) argument cannot be availed of to justify a bargaining order.[3] Nevertheless, in *Caldarera v. NLRB*[4] the Eighth Circuit held that if a majority exists at some time the appropriate remedy under the act for certain section 8(a)(1) conduct designed to dissipate the majority is an order to bargain. Authority cited in cases considering the proper remedy for section 8(a)(1) violations establishes that the Board possesses substantial discretion in fashioning remedies for un-

1. Joy Silk Mills, Inc. v. NLRB, 85 N.L.R.B. 1263 (1949), *modified*, 185 F.2d 732 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 914 (1951). Similar reasoning was used in International Union of UAW v. NLRB, 363 F.2d 702 (D.C. Cir. 1966); NLRB v. Mid-West Towel & Linen Serv., Inc., 339 F.2d 958 (7th Cir. 1964); NLRB v. Philamon Laboratories, Inc., 298 F.2d 176 (2d Cir. 1962), *cert. denied*, 370 U.S. 919 (1962); NLRB v. Decker, 296 F.2d 338 (8th Cir. 1961); NLRB v. Trimfit of California, 211 F.2d 206 (9th Cir. 1954).

2. See NLRB v. Delight Bakery, Inc., 353 F.2d 344 (6th Cir. 1965); Editorial "El Imparcial," Inc. v. NLRB, 278 F.2d 184 (1st Cir. 1960); Piasecki Aircraft Corp. v. NLRB, 280 F.2d 575 (3d Cir. 1960), *cert. denied*, 364 U.S. 933 (1961); Summit Mining Corp. v. NLRB, 260 F.2d 894 (3d Cir. 1958); NLRB v. Caldarera, 209 F.2d 265 (8th Cir. 1954); D. H. Holmes Co. v. NLRB, 179 F.2d 876 (5th Cir. 1950); Texarkana Bus Co. v. NLRB, 119 F.2d 480 (8th Cir. 1941); Bannon Mills, Inc., 146 N.L.R.B. 611 (1964).

3. Sheboygan Sausage Co., 156 N.L.R.B. 1490 (1966).

4. NLRB v. Caldarera, 209 F.2d 265 (8th Cir. 1954).

fair labor practices.[5] Although not all section 8(a)(1) violations warrant a bargaining order, since the traditional cease and desist order will often be a sufficient remedy to restore the status quo,[6] *Caldarera* and subsequent Board and court decisions clearly establish that a bargaining order may be issued solely on the basis of certain section 8(a)(1) violations.[7] In this line of cases, unlike the *Joy Silk* cases, the appellate review focuses on the fundamental legal issue of the appropriateness of a bargaining order for a given course of section 8(a)(1) conduct.

The perplexing question is why this dichotomy in the case law should exist. Could not the approach taken in the *Caldarera* line of cases be applied with equal persuasion in a *Joy Silk* fact situation? Since the only factual distinction between the two situations is the presence of a valid demand prior to the section 8(a)(1) violations in the *Joy Silk* situation, it appears that the remedy in each case is attributable directly or indirectly to the same conduct—the threats, coercion and restraint of employees. Therefore, it would seem that the same section 8(a)(1) conduct that results in a bargaining order under *Joy Silk* through the circuitous approach of inferring bad faith and thereby establishing a section 8(a)(5) violation, would itself warrant a bargaining order under the law of *Caldarera.*

Recent Board action indicates a recognition of this fact. In *Mock Road Super Duper, Inc.,*[8] and other recent decisions,[9] the Board has held it unnecessary to determine whether an employer's conduct violated section 8(a)(5) of the act. In some of the cases section 8(a)(5) violations were actually found,[10] and in others the facts were such that section 8(a)(5) violations could have been found by application of the *Joy Silk* approach.[11] By stating that it is unnecessary to determine whether the employer violated section 8(a)(5), the Board implies that a section 8(a)(5) finding is not a prerequisite for a bargaining order. Moreover,

5. See Frank Bros. v. NLRB, 321 U.S. 702 (1944); Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941); NLRB v. Stowe Mfg. Co., 217 F.2d 900 (2d Cir. 1954), *cert. denied,* 348 U.S. 964 (1955).

6. *E.g.,* Edward Fields, Inc. v. NLRB, 325 F.2d 754, 759 (2d Cir. 1963), where even though there was a finding of substantial evidence to sustain the conclusion that the company committed an unfair labor practice in violation of § 8(a)(1), the court held that whatever the company may have done to encourage the employees not to look to the union to represent them, to require it to bargain with this union would be a remedy going far beyond the necessities of the situation and would disregard the paramount rights and interests of the employees.

7. Cases cited note 2 *supra.*

8. 156 N.L.R.B. 983 (1966).

9. Wausau Steel Corp., 160 N.L.R.B. No. 47 (Aug. 19, 1966); Luisi Truck Lines, 160 N.L.R.B. No. 45 (Aug. 16, 1966); Priced-Less Discount Foods, Inc., 157 N.L.R.B. No. 95 (March 28, 1966).

10. Luisi Truck Lines, *supra* note 9; Wausau Steel Corp., *supra* note 9.

11. Priced-Less Discount Foods, Inc., 157 N.L.R.B. No. 95 (March 28, 1966).

in several cases now pending on review in the courts of appeals the Board has adopted the practice of arguing in the alternative: (1) that the section 8(a)(1) violations warrant a bargaining order since they establish a lack of good faith doubt in violation of sections 8(a)(5) and (2) that the section 8(a)(1) violations, in and of themselves, warrant a bargaining order under the act.[12]

Joy Silk and *Caldarera* are both based upon the premise that if an employer commits certain section 8(a)(1) violations during the organizational period, an order to bargain may be necessary to restore as nearly as possible the situation that would have obtained but for the section 8(a)(1) conduct. Consequently the outcome of a particular case should depend upon the conduct involved and not upon the method of analysis employed. At present, however, this result is not always attained. In *Flomatic Corp.*[13] the Board found certain violations of section 8(a)(1) and issued a bargaining order. Applying the argument of *Caldarera* the Board held that only a bargaining order could restore as nearly as possible the situation that would have obtained but for the employer's unfair labor practices. Finding that there had been no demand made, the Board was precluded from finding a section 8(a)(5) violation, *i.e.*, precluded from applying *Joy Silk's* inference of bad faith argument. On appeal the Second Circuit denied enforcement, holding that a cease and desist order, not an order to bargain, was the proper remedy for the section 8(a)(1) conduct.[14] The result in *Flomatic* should have been the same regardless of which analysis was applied to the facts. However, if there had been a request to bargain and the case had come before the court with the Board relying upon the *Joy Silk* argument, the scope of review would have been limited to the factual issue: was there substantial evidence to sustain the Board's finding of a lack of good faith at the time of demand. In such case the bargaining order would probably have been enforced.[15]

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12. Brief for Respondent at 32, 33, General Steel Products, Inc. v. NLRB, appeal pending, 4th Cir., from 157 N.L.R.B. No. 59 (March 11, 1966); Brief for Respondent at 45, 46, National Can Corp. v. NLRB, appeal pending, 7th Cir., from 159 N.L.R.B. No. 66 (June 17, 1966); Brief for Respondent, at 32, 33, Master Transmission Rebuilding Corp. v. NLRB, 373 F.2d 402 (9th Cir. 1967).

13. 147 N.L.R.B. 1304 (1964).

14. NLRB v. Flomatic Corp., 347 F.2d 74 (2d Cir. 1965).

15. See NLRB v. Philamon Laboratories, Inc., 298 F.2d 176 (2d Cir. 1962), *cert. denied*, 370 U.S. 919 (1962), where it was held that an employer withheld recognition merely to gain time to dissipate the majority status of the union and had thus violated § 8(a)(5). Conduct in violation of § 8(a)(1), very similar to that found in *Flomatic*, was held to be substantial evidence of a lack of good faith at the time of demand. In *Flomatic* the employer was held to have interfered with the employee's exercise of § 7 rights in violation of § 8(a)(1) by sending a letter to his employees which contained promises of benefit and invitations to employees to bypass the union and to deal directly with the employer. The promises included statements concerning a wage raise, vacations

The Board's approach in the recent cases substantiates what has for sometime seemed apparent: that the *Caldarera* principle is applicable whether or not there has been a demand. The next logical step is to insure that the question of the right to a bargaining order in any given case will be governed by the merits, *i.e.*, by the nature of the section 8(a)(1) conduct, and not by the method employed in analyzing the case. This necessitates an examination of the two approaches and an abandonment of one in favor of the more rational.

While section 8(a)(1) violations may often be indicative of an original lack of good faith, an employer's refusal may have been motivated by a good faith doubt. It is possible that an employer could refuse to bargain with an honest doubt and yet subsequently commit section 8(a)(1) violations. Of greater concern, however, is the confining effect that the *Joy Silk* analysis has upon the courts' scope of review. Whether the case is argued under *Caldarera* or *Joy Silk,* the underlying question is whether as a matter of law the act authorizes the issuance of a bargaining order for a given course of section 8(a)(1) conduct. The *Joy Silk* approach, however, precludes court review of this fundamental question, and limits the court to the factual issue of whether the Board's finding of lack of good faith is supported by substantial evidence.[16]

Under the *Caldarera* approach, no fictions need be employed; no inferences need be drawn. The potential for error inherent in *Joy Silk* is therefore non-existent. More importantly, on appeal review is focused on the critical legal issue common to both lines of cases: whether the act authorizes a bargaining order for a given course of section 8(a)(1) conduct.

The conclusion seems inescapable that the courts' acceptance of the *Caldarera* principle has expunged the only reason for the existence of the *Joy Silk* argument. At one time the Board perhaps felt constrained by the language of the act to base all bargaining orders upon a section 8(a)(5) finding. However, the recent court decisions affirming the issuance of section 8(a)(1) bargaining orders have eliminated the need to perpetuate the fictitious *Joy Silk* argument. If there is a course of section 8(a)(1) conduct, regardless of whether there has been a valid demand, the Board should apply the *Caldarera* approach and determine

with pay, paid holidays, profit-sharing, pensions, and lay-off and recall provisions. The § 8(a)(1) conduct in *Philamon* consisted of similar promises concerning a pay raise, a profit-sharing plan, and better grievance procedures.

16. See Master Transmission Rebuilding Corp. v. NLRB, 373 F.2d 402 (9th Cir. 1967) where the court chose to apply the *Joy Silk* analysis, even though the Board had presented the alternative arguments; see Brief for Respondent at 32, 33. A bargaining order was issued but the court did not consider whether the § 8(a)(1) conduct would in itself warrant such an order.

whether a bargaining order is authorized under the terms of the act. This will allow court review of the crucial legal issue, and will thereby insure consistency and predictability in the remedial process.