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Recent Decisions

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RECENT DECISIONS

TRUSTS — CONFLICT OF LAWS — TRUST CALLING FOR ESTABLISHMENT OF CLINIC-HOSPITAL ILLEGAL AT FORUM CANNOT ESCAPE INVALIDITY BY FOREIGN PERFORMANCE. — Involved was a testamentary trust providing for the establishment of a clinic-hospital which would apply methods of nutrition, blood chemistry, radionics and other types of non-medical healing. The lower court, while conceding that such an institution would be violative of local criminal and civil law if established in Texas, ruled that insofar as the trust provision authorized performance of the acts in California, its validity should be determined with respect to California rather than Texas law. On appeal to the Court of Civil Appeals of Texas, *held*: the trust is invalid. Since Texas is the situs of the trust and the domicile of the decedent, the trust's validity depends upon the laws of Texas, and fails for local public policy violation. *Wilson v. Smith*, 373 S.W. 2d 514 (Tex. Civ. App. 1963).

Perhaps no situation affords a court greater discretion than one which presents a trust-conflict of laws combination, for the "case law . . . is disturbingly sparse and shallow and text authority almost completely absent,"¹ and, therefore, the area presents less possibility for stating precise and universal rules than most.² However, it is generally unquestioned that the validity of trusts of land is governed both as to creation and administration by the law of the place of the land.³ So controlling is the location of land that in a suit involving only Ohio residents and brought to contest the testament of an Ohio domiciliary, the fact that the realty concerned was situated in Texas was deemed the overwhelming factor in allowing Texas courts to decide its devolution.⁴ The Supreme Court casts the importance of the land's location in these terms:

It is a principle firmly established that to the law of the State in which the land is situated we must look for the rules which govern its descent, alienation and transfer, and for the effect and construction of wills and other conveyances.⁵

The principle applies to all immovables.⁶

Where personal property is involved, its location is not the primary consideration. Courts will generally look to the last domicile of the testator to ascertain applicable legal rules.⁷ This is so at least where a testamentary trust of tangible personal property is concerned.⁸ A testamentary trust of intangible personal property apparently permits the most flexible choice since it is to be governed by the law of whatever state has the most substantial connection with it.⁹ From these basic considerations, then, it seems clear that the statement, "Each state has plenary power and authority to determine the disposition of decedents' property, real or personal, found within the state's borders,"¹⁰ is subject to serious qualification.

The facts in *Wilson* render impossible any attempt to impeach the authority of the Texas court to decide the applicable law. The decedent was a domiciliary of Texas at the time of his death. The situs of all property at issue, both real and personal, was also at the forum. The will itself was probated and the estate administered in Texas. But that the court had authority to decide what law was

1 Heyman, *Estate Planning and Conflict of Laws*, 27 U. CINC. L. REV. 234 (1958).

2 Hoar, *Some Aspects of Trusts in the Conflict of Laws*, 26 CAN. B. REV. 1415 (1948).

3 Bozeman, *The Conflict of Laws Relating to Wills, Probate Decrees and Estates*, 49 A.B.A.J. 670, 675 (1963); Cavers, *Trusts "Inter Vivos" and the Conflict of Laws*, 44 HARV. L. REV. 161, 162 (1930).

4 Toledo Soc. for Crippled Children v. Hickok, 152 Tex. 578, 261 S.W. 2d 692, (1953).

5 De Vaughn v. Hutchinson, 165 U.S. 566, 570 (1897).

6 Albuquerque Nat. Bank v. Citizens Nat. Bank in Abilene, 212 F.2d 943 (5th Cir. 1954).

7 Bozeman, *supra* note 3, at 674.

8 Cavers, *supra* note 3, at 162-63.

9 LAND, TRUSTS IN THE CONFLICT OF LAWS 204-05 (1940).

10 Bozeman, *supra* note 3, at 670.

to be applied is not necessarily a justification of its final decision. Its very compelling jurisdiction over the estate might have allowed it to subject the provisions to foreign law in order to uphold the trust. It was a Texas court which stated:

Our courts, by reason of their ultimate power over lands situated within our state, no doubt have the *jurisdictional* authority in a given case to vary the . . . rule and apply the domiciliary law in preference to our own, if they should find compelling reasons so to do.¹¹

The great flexibility in the trust-conflict arena strikes one as both a cause and an effect of a strong disposition on the part of judicial tribunals to uphold testamentary provisions. Hence, automatic application of one law or another may be spurned "because of the substantial policy felt by judges everywhere for upholding dispositions of property according to the intent which was expressed or implied."¹² It is not far from correct to state that in nearly every case the courts have chosen that law affording validity to the trust's provisions.¹³

A highly persuasive factor in settling trust situations, and one which, it is submitted, the *Wilson* court grossly underplayed, is the intent of the decedent. Certainly his wishes should be given considerable weight before frustrating the thrust of his estate plan because of some technical defect, which he might easily have cured while living. By a proper choice of trustees, a suitable situation of the property involved, a prudential choice of domicile and other formalistic devices, the testator, before death, can foreclose the possibility of having his testamentary trust voided by some court overzealous in its application of rigid law. Would it not be easier and more rational to let the intent of the settlor govern whenever possible? After all,

To make the choice of law depend on actions so little related to the substance of the transaction and so wholly subject to the arbitrary control of the parties, seems to be letting in the doctrine of intent by the back door. Otherwise it gives to the crossing of a state line an almost ritualistic significance.¹⁴

Just how explicit the intent must be is open to question, and at least two views are worthy of consideration. The first of these would effectuate the wishes of the testator if the instrument indicates that the law of a particular state shall govern.¹⁵ Even here, however, the preference itself—so long as the specific state chosen is clear—can be expressed or implied.¹⁶ The chances for implementation of the testator's predilection are closely related to the closeness of the association existing between the trust and the indicated state.¹⁷

A more liberal view would make the testator's desire supreme, whether expressed or implied, at least where personal property is concerned and the otherwise applicable law is that of the forum. In such a situation, to preclude application of law of the domicile, the only requirement is that there be "sufficient evidence of a contrary intent."¹⁸ If the intent need be only implied, a further question arises as to the degree of clarity required. It is apparently sufficient if it can be "ascertained,"¹⁹ although this lacks a good deal of certainty when one is confronted with a concrete situation. A guide to this ascertainment is the following:

Where there is no . . . express declaration, the court should examine the facts of the transaction and the circumstances surrounding it in an effort to . . . effectuate any intent which is inferable therefrom.²⁰

11 *Toledo Soc. for Crippled Children v. Hickok*, *supra* note 4, at 696.

12 *Heyman*, *supra* note 1, at 268.

13 *Leflar, Estates and Trust—Conflict of Laws Problems*, 12 *ARK. L. REV.* 29, 34 (1957-58).

14 *Cavers*, *supra* note 3, at 194.

15 *Risher v. American Surety Co.*, 227 *Wis.* 104, 277 *N.W.* 160 (1938).

16 *Bozeman*, *supra* note 3, at 675.

17 *Hoar*, *supra* note 2, at 1433.

18 *Id.* at 1423.

19 *LAND, op. cit. supra* note 9, at 15.

20 *Cavers*, *supra* note 3, at 195.

It is true that the foregoing advice was advanced in connection with living trusts, but no convincing reason is perceived for attaching any less weight to it if applied to testamentary trusts as well; for it is in the latter case that a special effort need be made in searching out the creator's wishes. While such a process presents the height of flexibility, it does present the clearest opportunity for doing justice to the creator whose property, after all, will sponsor the carrying out of the judge's decision.

Could the court in *Wilson* have used an intent doctrine in reaching a different result, one which would not have thwarted the essential purpose of the trust? No express preference for foreign law was found in the instrument; in fact, the appellate court agreed with the lower court's finding that the testator intended the trust to be administered in Texas, and that its corpus should remain in, and be subject to, the jurisdiction of Texas courts.²¹ But surely to maintain that this intent would be unaltered by knowledge that execution in Texas would be illegal and hence performance of the trust impossible is to say that the creator intended the result reached by the court, a rather unreal observation. Perhaps it would have been more accurate to ask whether the testator would have preferred foreign performance of his purpose or the disposition of the property which will ensue as a result of the court's ruling. To have confronted the instrument in this manner would have been a more pragmatic "effort to . . . effectuate any intent which is inferable therefrom," and the answer would have provided a sufficiently-implied intent to have California law control.

Had the requisite intent been found, the illegality objection might still have arisen, for, while most courts strive to uphold a trust where possible, they are reluctant so to do if the trust "violates some strong local public policy of the state in which the case comes up."²² The *Wilson* court declared that it would not have

Texas land and personal property administered by Texas trustees under Texas law, and the revenue sent to another State for a purpose which is criminal under our laws, although it is not condemned as criminal in the foreign jurisdiction.²³

Such an objection might easily have been overcome; court policy, in passing upon foreign-charity bequests which violate either the laws of one state or the other, have held such laws to apply only to "domestic wills to be carried out locally," and therefore sustain the bequests if valid under either state's laws.²⁴ Likewise, in situations where the trust violates the perpetuities rule of the domicile but not of the foreign jurisdiction, "[T]he way of escape usually followed has been to construe the statute of the domicile not to apply to trusts to be administered abroad."²⁵ Professor Goodrich, positing the situation where property is to be held in trust for the founding of a charitable institution in another state, which trust is in contravention of the domiciliary but not the foreign law, states there is authority for allowing the arrangement on the grounds that it is the administration which is objectionable, not the giving.²⁶ To that effect is *Hope v. Brewer*.²⁷ At issue was a New York instrument calling for the foundation and endowment of a Scotland infirmary. The court upheld the trust though its terms were too vague to satisfy New York law regarding beneficiaries. Holding that the trust's execution hinged not upon the trustees' will but upon the law of the country where the fund would be used, the court stated:

[A] disposition of personal property made in this state, by a competent testator, in a valid testamentary instrument, to trustees in a foreign country, for the purposes of a charity to be established in that country, is valid,

²¹ 373 S.W. 2d at 516-17.

²² Leflar, *supra* note 13, at 34.

²³ 373 S.W. 2d at 517.

²⁴ Bozeman, *supra* note 3, at 674.

²⁵ Cavers, *supra* note 3, at 166.

²⁶ GOODRICH, *CONFLICT OF LAWS* 517 (3d ed. 1949).

²⁷ 136 N.Y. 126, 32 N.E. 558 (1892).

although not in compliance with our statute or the rules of law in force here . . . providing it is valid by the law of the place where the gift is to take effect. . . .²⁸

Such reasoning has also been employed where trusts contravened such local prohibitions as limitations upon the suspension of the power of alienation or of absolute ownership of property: the limitations were "so construed as not to apply to wills creating trusts which are to be administered in other states."²⁹ The Texas court had every reason for refusing to abet the establishment of such a hospital in Texas: public policy. But it is not so clear that such a hospital in *California* violates *Texas* public policy. Texas has no stake in such an institution.

Since the illegality should be patent before the nullification of a trustor's intent is justified,³⁰ the *Wilson* trust should have been made to depend upon the law of the place of performance; this seems the better standard, and the one generally leaned upon in contract suits. Whether certain acts result from a testamentary trust or from a contractual agreement, the danger to local public policy is the same, yet the validity of a multi-state contract is gauged by the law of the state where the performance is to be carried out. A relevant instance is *Zenatello v. Hammerstein*,³¹ where the Pennsylvania court, having construed a New York contract to call for out-of-state performance, enforced the agreement though such performance at the place of making the contract would have been illegal. Much of the language in *Zenatello* might have found fruitful application to the *Wilson* situation:

The law will not presume that the parties contracted to do an unlawful thing, or violate a statutory prohibition in carrying out its terms, but that their purpose was the accomplishment of a lawful object, and the performance of the agreement in a place or territory where its performance was permissible.³²

Applying very little strain to either, the court in *Wilson v. Smith* could have applied the doctrines of intent and performance so as to uphold the Ferguson trust and follow the spirit of the Restatement's declaration that "the charitable trust is not invalid if the substantial purpose of the trust can be achieved by other methods which are not illegal."³³

Fernand N. Dutille

LABOR LAW—DUTY OF FAIR REPRESENTATION—BREACH OF DUTY NOT UNFAIR LABOR PRACTICE.—Lopuch, a teamster driver who worked for the Miranda Fuel Co., was eleventh man on a twenty-one-man seniority list, under a seniority arrangement between his company and the union. As part of the collective agreement, the company and the union provided that drivers with seniority insufficient to prevent their layoff during the "slack season" (April 15 through Oct. 15) could take those months off and obtain employment elsewhere without losing any seniority. To maintain the seniority, however, the drivers had to sign in at the end of the period (Oct. 15). Lopuch had sufficient seniority to guarantee his steady employment.

On April 12, with his employer's permission, Lopuch left his job on account of his brother's death. This plus a subsequent personal illness, kept Lopuch away from work beyond the sign-in date.

Lopuch's failure to return caused the union to ask the employer to reduce his seniority, a request that was dropped upon learning of his illness. Other drivers

28 *Id.* at 562.

29 STUMBERG, *PRINCIPLES OF CONFLICT OF LAWS* 392 (3d ed. 1963).

30 *Jenkins v. First Nat. Bank in Dallas*, 107 F.2d 764, 765 (5th Cir. 1939).

31 231 Pa. 56, 79 Atl. 922 (1911).

32 *Id.* at 923.

33 RESTATEMENT, TRUSTS § 377, comment *d* (1935).

then asked the union to have the employer reduce Lopuch's seniority on the ground that he had left work too early. The employer acceded to the union's request, and Lopuch was dropped to the bottom of the seniority list. When Lopuch subsequently filed unfair labor practice charges against the union,¹ the Board found a union unfair labor practice,² and the Second Circuit granted enforcement.³ Hearing the case on certiorari,⁴ however, the Supreme Court vacated the judgment for reconsideration in light of *Local 357*.⁵ Subsequently on remand, the Board *held*: under section 8(b)1 of the National Labor Relations Act, the union had breached its duty to fairly represent all the employees in the exercise of the right to bargain through representatives of their own choosing; and under section 8(b)2, the union caused the employer to discriminate against Lopuch and that this discrimination naturally tended to encourage union membership.⁶ The Board petitioned for enforcement, but the Second Circuit *held*: enforcement denied, and dismissed the proceedings. The court said there was no affirmative evidence either of discrimination or of discriminatory motive to encourage union membership, and under section 8(b)2 an unfair labor practice is committed only if there is discrimination and where that discrimination is deliberately designed to encourage membership in the union. Furthermore, discrimination by a union amounting to a breach of the duty of fair representation, though possibly a tort, does not violate section 8(b)1.⁷

A. The Section 8(b)2 Issue

Section 8(b)2 of the act⁸ makes it a union unfair labor practice for a union to cause an employer to discriminate against an employee in violation of section 8(a)3 of the act. Section 8(a)3 states that it shall be an employer unfair labor practice for an employer "by discrimination . . . to encourage or discourage membership in any labor organization."⁹ So three elements are necessary for a finding of a section 8(b)2 violation: 1) discrimination, 2) intent or foreseeable tendency to encourage union membership, and 3) actual encouragement of union membership.

The first point of difference between the majority and the dissenter comes on the question of exactly what "discrimination" the act prohibits. Given the other elements of a section 8(b)2 violation, the dissenter reads the act to outlaw *any discrimination* designed or naturally tending to encourage union membership or activities, whereas the majority, relying on *N.L.R.B. v. Local 294, International Brotherhood of Teamsters*¹⁰ would read the act more narrowly to proscribe only *discrimination because of union activities* designed to encourage membership or activities. The majority view, therefore, is that the act lawfully entitles the statutory bargaining representative, no matter how arbitrary or disparate its action may be, to close the doors of employment to an individual so long as the union

1 Unfair labor practices were also filed against the employer. For the purposes of this discussion, however, only the Union Unfair Practices will be discussed. The issues are, however, similar.

2 *Miranda Fuel Co.*, 125 N.L.R.B. 454 (1959).

3 *N.L.R.B. v. Miranda Fuel Co.*, 284 F.2d 861 (2d Cir. 1960).

4 366 U.S. 763 (1961).

5 *Local 357, International Brotherhood of Teamsters v. N.L.R.B.*, 365 U.S. 667 (1961).

6 *Miranda Fuel Co.*, 140 N.L.R.B. 181 (1962).

7 326 F.2d 172 (2d Cir. 1963).

8 National Labor Relations Act § 8(b)2, 61 Stat. 141 (1947), 29 U.S.C.A. § 158(b)2 (1958) provides: "(b). It shall be an unfair labor practice for a labor organization or its agents . . . (2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3). . . ."

9 National Labor Relations Act § 8(a)3, 61 Stat. 140 (1947), 29 U.S.C.A. § 158(a)3 (1952) provides: Sec. 8(a). It shall be an unfair labor practice for an employer . . . (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. . . ."

10 *N.L.R.B. v. Local 294, International Brotherhood of Teamsters*, 317 F.2d 746 (2d Cir. 1963).

action is not motivated by the individual's activities as a member or nonmember. Such a view seems unwarranted in view of the legislative history of the act. The Senate Minority Report makes this clear:

Even under a union-security contract which this bill permits, an employee could with impunity completely defy the union. He could defame it, . . . be a racketeer or a grafter, and yet the union would have no effective sanction against him. If he pays or offers to pay his dues and initiation fees, the employer need not fire him and any attempt by the union to persuade the employer to do so would be an unfair labor practice on the part of the union.¹¹

Moreover, although in the majority of cases decided under section 8(a)1 the element of differentiation because of union affiliation or activity has been present, it has not been present in all.¹² *Local 357* stated that "the Act aims at every practice, act, source or institution which in fact is used to encourage and discourage union membership by discrimination. . . ."¹³ The very purpose of the statute is to protect the rights of the employees to organize and bargain both from employer and union pressure.¹⁴

The determination by the majority that there was no evidence in the record to support the Board's finding of discrimination, and the dissenter's contrary finding, seem to follow from their respective definitions of discrimination. It is true, as the court says, that there is nothing in the record showing "discrimination on account of union activities." Consequently, *Local 294*¹⁵ would be controlling (there, also the Court similarly defined discrimination, and could find no evidence of such discrimination). However, given the dissenter's definition of discrimination, which seems correct, there was ample evidence in the record to support the Board's finding,¹⁶ in which case *Local 294*¹⁷ would not be controlling.

The dissenter's case is further supported by *N.L.R.B. v. Erie Resistor Corp.*¹⁸ There the Board found an employer grant of super-seniority to striking employees to encourage them to return to work, an 8(a)3 violation. The grant foreseeably discouraged their participation in concerted activities. The Supreme Court agreed with the Board and pointed out that "the existence of discrimination may at times be inferred by the Board, for it is permissible to draw on experience in factual inquiries."¹⁹

It should be further pointed out that the union's conduct cannot be saved here by characterizing it either as mere "interpretation" or "amendment" of the collective agreement.²⁰ The determination of whether or not the union represents the employees in good faith, although in the first instance a matter of union

11 S. MIN. REP. No. 105, pt 2, 80 Cong., 1st Sess. 9 (1947).

12 *Salt River Valley Water Users Ass'n v. N.L.R.B.*, 206 F.2d 325 (9th Cir. 1953); *N.L.R.B. v. Schwartz*, 146 F.2d 773 (5th Cir. 1945).

13 *Local 357, International Brotherhood of Teamsters v. N.L.R.B.*, 365 U.S. 667, 676 (1961).

14 National Labor Relations Act § 1, 61 Stat. 137 (1947), 29 U.S.C. § 151 (1958). ". . . It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce . . . 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."

15 *N.L.R.B. v. Local 294, International Brotherhood of Teamsters*, 317 F.2d 746 (2d Cir. 1963).

16 *N.L.R.B. v. Miranda Fuel Co.*, 326 F.2d 172, 182-83 (2d Cir. 1963) (dissenting opinion). Judge Friendly sets out the facts upon which the Board based its opinion in footnote no. 4.

17 *N.L.R.B. v. Local 294, International Brotherhood of Teamsters*, 317 F.2d 746 (2d Cir. 1963).

18 *N.L.R.B. v. Erie Resistor Corp.*, 373 U.S. 221 (1963).

19 *Id.* at 227.

20 Ratner, *Some Contemporary Observations on Section 301*, 52 GEO. L.J. 260 (1964). Mr. Ratner's argument, however, is somewhat weakened by the decision in *Humphrey v. Moore*, 375 U.S. 335 (1964).

determination, is ultimately a matter of construction of the contract for determination by the Board and the courts.²¹ This, of course, is not to deny that collective bargaining is a "continuous process."²² The union can always modify seniority rights in the common interest, but there must be a valid motive for doing so.²³ Although seniority is not a vested right like accrued wages, it should be apparent that an "expectation" is created, and consequently, that it cannot be swept away from a few merely because others would like to move up on the list.²⁴

Besides a showing of discrimination, for a section 8(b)2 violation there must also be a showing of "motive to discriminate." *Radio Officers Union v. N.L.R.B.*²⁵ made it clear, however, that specific evidence of intent to encourage or discourage is not essential if the discrimination has, instead, a foreseeable tendency to encourage or discourage unionism. The dissenter relies on this foreseeability doctrine as did the Board majority. The majority of the court, however, read *Local 357*²⁶ as limiting *Radio Officers*,²⁷ i.e., requiring specific evidence of intent to encourage unionism.

It is not enough merely to show that the employer discriminated among employees at the behest of the union. An unfair labor practice has been committed only if the discrimination was deliberately designed to encourage membership in the union.²⁸

The majority's reading of *Local 357*²⁹ in view of *Erie Resistor*,³⁰ however, is unwarranted.

In *Local 357*, the employer hired Slater outside the union's hiring hall in violation of the collective agreement. Subsequently, the union asked for Slater's dismissal and the employer complied. Slater then filed unfair labor practice charges, and the Board, applying the *Mountain Pacific* doctrine,³¹ found that the hiring hall agreement was discriminatory on its face. The Supreme Court, however, noted that the hiring hall agreement contained a "no-discrimination" clause, and held that the agreement could not be discriminatory on its face. The Court further noted that there was no allegation or evidence of actual discrimination. Moreover, the Court pointed out that hiring hall could serve useful employer purposes. It therefore held that even though the agreement might encourage unionism, there could be no section 8(b)2 violation because there was no discrimination, or discriminatory purpose shown. Neither discrimination alone, nor encouragement alone was forbidden by the act. The holding goes no further.

Mr. Justice Harlan, concurring in *Local 357*,³² in endeavoring to elaborate on the majority position, indicated that the foreseeability doctrine remains alive. Stating the general rule, he pointed out that given a lawful employer purpose, usually invidious motivation to encourage unionism must be established by affirmative evidence.

He also indicates that there are exceptions to the general rule, one of which is crucial here. Given employer action which substantially encourages or discourages

21 *Humphrey v. Moore*, 375 U.S. 335 (1964).

22 *Comment*, 9 VILL. L. REV. 306. The *Miranda* case is discussed 312-14, but the writer reaches conclusions not shared by this writer.

23 *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953).

24 Aaron, *Reflections on the Legal Nature and Enforceability of Seniority Rights*, 75 HARV. L. REV. 1532 (1962). Prof. Aaron uses the term "Expectancy" to describe seniority rights. Consequently he says "Seniority rights . . . may be modified or eliminated by agreement of the union and the employer so long as they act in good faith. . . ."

25 *Radio Officers Union v. N.L.R.B.*, 347 U.S. 17 (1954).

26 *Local 357, International Brotherhood of Teamsters v. N.L.R.B.*, 365 U.S. 667 (1961).

27 *Radio Officers Union v. N.L.R.B.*, 347 U.S. 17 (1954).

28 *N.L.R.B. v. Miranda Fuel Co.*, 326 F.2d 172, 180 (2d Cir. 1963).

29 *Local 357, International Brotherhood of Teamsters v. N.L.R.B.*, 365 U.S. 667 (1961).

30 *N.L.R.B. v. Erie Resistor Corp.*, 373 U.S. 221 (1963).

31 *Mountain Pacific Chapter*, 119 N.L.R.B. 883 (1957).

32 *Local 357, International Brotherhood of Teamsters v. N.L.R.B.*, 365 U.S. 667, 677 (1961) (concurring opinion).

union activity, the employer's purpose served must be lawful, and also of some significance. *Miranda* rests on this, that

Violation does not necessarily flow from conduct which has the foreseeable result of encouraging union membership, but given such "foreseeable result" the finding of violation may turn upon an evaluation of the disputed conduct "in terms of legitimate employer or union purpose."³³

Radio Officers, Harlan's concurrence in *Local 357*, and the Board's holding in *Miranda* are firmly buttressed by the Supreme Court's holding in *Erie Resistor*, that a grant of super-seniority by the employer to the employees to encourage their return to work was a violation of 8(a)(1) and 8(a)(3). This holding was made in the face of a valid employer motivation, the desire to keep his business operation.

We think the Court of Appeals erred in holding that, in the absence of a finding of specific illegal intent, a legitimate business purpose is always a defense to an unfair labor practice charge. Cases in this court dealing with unfair labor practices have recognized the relevance and importance of showing the employer's intent or motive to discriminate or to interfere with union rights. But specific evidence of such subjective intent is "not an indispensable element of proof of violation" [citing *Radio Officers*]. . . . "Some conduct may by its very nature contain the implication of the required intent; the natural foreseeable consequences of certain action may warrant the inference. . . ."³⁴

Finally, for a violation of 8(b)2 there must be a Board finding of encouragement or discouragement of union membership.

In *Radio Officers* the Court said that specific proof of encouragement is not necessary, and that the Board might infer "encouragement or discouragement" from employer or union conduct. Since the union is a service agency, wherever it serves well, it increases its prestige, and thereby encourages unionism: "[I]t is common experience that the desire of employees to unionize is raised or lowered by the advantages thought to be attained by such action."³⁵

Local 357 does not deny that any union that renders services encourages unionism, but rather points out only that encouragement, not the result of discrimination, is not violative of the act. In *Miranda*³⁶ the board drew the inference and found that the reduction of Lopuch's seniority at the union's request "encourages union membership."

Here again the dissenter and the majority disagree, the former, who would uphold the Board, pointing out that the Board could find that the action tended to encourage the employees to be "good members." Moreover, looking to *Radio Officers*, he notes that the act does not require that the employees discriminated against be the ones encouraged for purposes of the violation.³⁷

The majority, on the other hand, finds that the employer-union action encouraged only a "timely return" to work. Whether it did or not, however, is only one consideration.³⁸

B. The Section 8(b)1 Issue

Pursuant to Lopuch's charge, the Board, by interlacing sections 9(a), 7, and 8(b)1, found another unfair labor practice. Under section 9³⁹ the union has a duty as well as a right to represent all employees in the unit. This duty the Board

33 *Miranda Fuel Co.*, 140 N.L.R.B. 181, 187-88 (1962).

34 *N.L.R.B. v. Erie Resistor Corp.*, 373 U.S. 221, 227 (1963).

35 *Radio Officers Union v. N.L.R.B.*, 347 U.S. 17, 51 (1954).

36 140 N.L.R.B. 181 (1962).

37 326 F.2d 172, 185 (2d Cir. 1963).

38 *N.L.R.B. v. Animated Displays Co.*, 327 F.2d 230 (6th Cir. 1964).

39 National Labor Relations Act § 9(a), 61 Stat. 143 (1947), 29 U.S.C. § 159(a) (1958) provides:

Representatives designated or selected . . . by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such a unit for the purposes of collective bargaining. . . .

read into the section 7⁴⁰ right of the employees to bargain through their elected representatives. Interference with the right through the employer would therefore be an 8(b)1 violation.⁴¹ The theory is novel, and presents two interesting questions: 1) does a union under the NLRA have a duty to fairly represent all the employees, and 2) if there is such a duty, was the breach of the duty a section 8(b)1 violation?

The duty of fair representation has been clearly established in a number of cases under the Railway Labor Act.⁴² A similar duty existing under the NLRA⁴³ was first clearly recognized in *Wallace Corporation v. N.L.R.B.*⁴⁴ and remains law in spite of the 1947 amendments to the act.

It is, however, another thing to ask if the duty should be guaranteed by the Board through section 8(b)1. In *Miranda*, Judges Friendly and Lumbard did not discuss the question, and Judge Medina said that the duty was not enforceable by the Board through section 8(b)1.

In this respect, Judge Medina seems technically correct. But failure to represent all the employees fairly, in good faith, is in fact invidious discrimination. The NLRA is, however, designed only to protect the employees in their union membership and job capacity. Congress has not sought to punish discrimination *as such* through the NLRA. It has sought to prevent only such discrimination as is designed or tends to encourage or discourage union membership.

However, section 8(b)1 forbids unions to restrain or coerce employees in the exercise of rights guaranteed in section 7. Since discrimination could amount to restraint or coercion, given the other elements thereof, there would be an 8(b)1 violation. As a consequence of this, given restraint or coercion which is in fact discrimination, there could be a violation of a section 8(b)1, while in theory the same discrimination would not be a violation of 8(b)2. In other words, the act seems to be in conflict with itself where restraint or coercion is accomplished by discrimination.

Conclusion

In reality, however, there is no internal conflict. It would seem that discrimination intended to abridge section 7 rights, would also foreseeably tend to encourage or discourage union membership. Consequently, the Board's roundabout 8(b)1 is actually just an 8(b)2. Discrimination which interferes with section 7 rights, rights of organization and bargaining, will also encourage unionism. Thus, though not every 8(b)1 violation will be an 8(b)2 violation, in those cases where the restraint or coercion is discrimination, 8(b)1 and 8(b)2 merge. The foreseeable consequence of this particular type restraint or coercion would be encouragement (or discouragement) of unionism.

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40 National Labor Relations Act § 7, 61 Stat. 140 (1947), 29 U.S.C. § 157 (1952) provides:

Employees shall have the right to self-organize, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . .

41 National Labor Relations Act § 8(b)1, 61 Stat. 141 (1947), 29 U.S.C. § 158 (1952) provides:

(b) It shall be an unfair labor practice for a labor organization or its agents . . . (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7. . . .

42 *Brotherhood of Railroad Trainmen v. Howard*, 343 U.S. 768 (1952); *Tunstall v. Brotherhood of Locomotive Firemen*, 323 U.S. 210 (1944); *Steel v. Louisville & Nashville Railroad*, 323 U.S. 192 (1944); *Thompson v. Sleeping Car Porters*, 316 F.2d 191 (4th Cir. 1963); *Ferro v. Railway Express Agency*, 296 F.2d 847 (2d Cir. 1961).

43 *Humphrey v. Moore*, 375 U.S. 335, 356 (1964) (concurring opinion); *Syres v. Local 23, Oil Workers International Union*, 223 F.2d 739, *reversed* 350 U.S. 892 (1955); *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953).

44 323 U.S. 248 (1944).