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Labor Law -- Unfair Labor Practice -- Discriminatory Denial of Use of Company Hall for Union Organization

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if the corporation is not controlled by antagonistic interests, the corporation may be realigned to sustain or defeat diversity jurisdiction,[27] but even if jurisdiction is sustained by the realignment, the stockholder has no standing to maintain the suit.

The courts have sought to bring the rule applied in derivative suits within the doctrine of realignment by stating it in terms of the antagonistic control of the corporation; however, the ultimate result amounts to a variation in the realignment doctrine which not only violates the basic theory of derivative suits[28] but cannot be reconciled with the practice of treating the corporation as a plaintiff for other jurisdictional purposes[29] and for the purpose of determining the district in which the suit may be brought.[30]

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Labor Law—Unfair Labor Practice—Discriminatory Denial of Use of Company Hall for Union Organization

An employer, motivated by anti-union bias, refused to allow union organizers to hold a meeting of employees in an employer-owned hall, not connected with the plant, in a North Carolina mill village. The hall had been used for other community activities in the past without objection. The only other public buildings in the mill village were also owned or controlled by the employer and unavailable to the organizers. Because of these circumstances the National Labor Relations Board found that the employer had discriminated against the union in violation of Section 8(1) of the National Labor Relations Act,[1] and ordered that

jected in Doctor v. Harrington, 196 U. S. 579 (1905), when Justice McKenna explained that the fiction was created to give federal courts diversity jurisdiction over corporations and could not be extended. See generally McGovney, *A Supreme Court Fiction, Corporations in the Diverse Citizenship Jurisdiction of the Federal Courts*, 56 HARV. L. REV. 853 (1943).

[27] Laughner v. Schell, 260 Fed. 396 (C. C. A. 3d 1919) (Requirements of rule 23(b) were not complied with. The court realigned to defeat jurisdiction and dismissed the bill for failure to comply with the rule.).

[28] See note 3 *supra*.

[29] *See* Koster v. (American) Lumbermens Mutual Casualty Co., 330 U. S. 518, 523 (1947); Hutchinson Box Board & Paper Co. v. Van Horn, 299 Fed. 424, 428 (C. C. A. 8th 1924) ("The amount in controversy is the value of the corporate right sought to be enforced and not the value of . . . [stockholder's] interest.").

[30] 28 U. S. C. §1401 (Supp. 1948) ("Any civil action by a stockholder on behalf of his corporation may be prosecuted in any judicial district where the corporation might have sued the same defendents.").

[1] 49 STAT. 452 (1935), 29 U. S. C. §158(1) (1946), subsequently amended by National Labor Management Relations Act, 61 STAT. ——, 29 U. S. C. §158(a)(1) (Supp. 1947): "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." Section 7 provides, "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 other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and

it cease and desist from withholding permission to use the hall for organizational meetings.[2] The Fourth Circuit Court of Appeals refused to enforce the order on the ground that the Board had exceeded its statutory power as limited by the constitutional provision prohibiting deprivation of property without due process.[3] In *National Labor Relations Board v. Stowe Spinning Co.* the Supreme Court reversed, holding that the order as modified and restricted should be enforced because it was based on a finding of discrimination not unjustified by the facts and background.[4] Two dissenting justices agreed with the lower court that the Board's extension of the concept of unfair labor practice infringed upon the employer's constitutional property rights. Justice Jackson concurred in the result but disagreed with the majority as to what conduct constituted the unfair practice.

In the previous development of the law relating to the respective rights of employers and employees[5] in the use of the employer's property, the cases have for the most part been concentrated in three general classifications: (1) those dealing with municipal ordinances which indirectly restricted freedom of speech or of the press by providing governmental machinery for the enforcement of conflicting property rights of employers;[6] (2) those dealing with employees' right to solicit union members or to distribute union literature during their leisure time on company property;[7] (3) those dealing with the right of union represent-

shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3)."

[2] Stowe Spinning Mills, 70 N.L.R.B. 614 (1946).

[3] National Labor Relations Board v. Stowe Spinning Co., 165 F. 2d 609 (C. C. A. 4th 1947).

[4] —— U. S. ——, 69 S. Ct. 541 (1948).

[5] See generally: *Union Activity on the Employer's Property,* 5 LAW. GUILD REV. 253 (1945).

[6] Such ordinances have been held unconstitutional as inconsistent with the First and Fourteenth Amendments. These amendments inhibit the power of governments to make laws abridging freedom of speech and of the press; they do not apply to private individuals. It is not yet clear how far the courts will go in indirectly depriving owners of property rights by depriving them of remedies by which such rights may be enforced. Marsh v. Alabama, 326 U. S. 501 (1946) (Jehovah's Witness distributing religious literature on streets of privately owned town, remained after having been warned by the owner to leave, thereby violating a municipal ordinance. Ordinance held unconstitutional; the court said it constituted governmental interference with freedom of speech and of the press under these circumstances [company town]); Tucker v. Texas, 326 U. S. 517 (1946) (similar except that town was owned by federal government in its proprietary function). *Compare* Shelley v. Kraemer, 332 U. S. 1 (1948), 27 N. C. L. REV. 224 (1949), *with* the above two cases.

[7] This right was well established by the companion cases, Republic Aviation Corp. v. National Labor Relations Board, 324 U. S. 793 (1945), *affirming* 142 F. 2d 193 (C. C. A. 2nd 1944), and National Labor Relations Board v. Le Tourneau Co. of Georgia, 324 U. S. 793 (1945), *reversing* 143 F. 2d 67 (C. C. A. 5th 1945). *See, e.g.,* National Labor Relations Board v. American Pearl Button Co., 149 F. 2d 258 (C. C. A. 8th 1945) (discusses the extension of the law from earlier cases

atives to have access to employees who spend their full time on the employer's premises (*e.g.*, a ship or lumber camp).[8]

The *Stowe* case differs from most of the previous decisions in that it deals with the right of outside union representatives to come on an employer's production premises against his wishes and engage in organizational activities, rather than with the right of employees themselves to engage in union activities during their spare time on company production premises.[9] The Supreme Court upheld their right to do so, as limited to the particular circumstances present here.

One of the controlling factors in the instant case seems to be the absence of any other meeting place. It is difficult to formulate general rules specifying what weight will be given to any relative degree of isolation of company property and employees who work on it, but there are definite indications in the cases which may be pointed out.[10] In the more extreme cases where employees live and work on the employer's premises, it seems clear that union representatives would have a right to use the employer's property for organizational purposes subject only to such restrictions as are necessary for maintenance of effi-

which considered a rule prohibiting distribution of literature or solicitation in the plant valid unless arbitrarily enforced); National Labor Relations Board v. Illinois Tool Works, 153 F. 2d 811 (C. C. A. 7th 1946) (such a rule would be valid even under the *Republic* case if the employer showed special circumstances which made it necessary in order to maintain discipline in the plant or to assure efficient production); May Department Stores v. National Labor Relations Board, 326 U. S. 376 (1945), *affirming* 146 F. 2d 66 (C. C. A. 8th 1944) (special circumstances justified such a rule as applied to selling floor of a department store, because customers might be affected even though the employees were using their spare time).

[8] It is clear that certified representatives may have access to employees to carry on necessary functions, but whether or not this access may be used for solicitation of members is a matter on which the circuit courts do not agree and the Supreme Court has not spoken directly. It has long been the law that an employer may not prevent organizers from visiting employees in their company-owned homes. National Labor Relations Board v. West Kentucky Coal Co., 116 F. 2d 816 (C. C. A. 6th 1940). But where the employees live and work on the same premises, some circuit courts have held that although certified representatives may come on the property to collect dues, distribute the union newspaper, etc., to members, they may not use that access to solicit members. Richfield Oil Corp v. National Labor Relations Board (C. C. A. 9th 1944); National Labor Relations Board v. Cities Service Oil Co., 122 F. 2d 149 (C. C. A. 2nd 1941). The most recent decision, however, requires that union representatives be given access to employees who live and work on the same premises for solicitation purposes as well as for other union functions. National Labor Relations Board v. Lake Superior Lumber Corp., 167 F. 2d 147 (C. C. A. 6th 1948).

[9] *See* 9 N.L.R.B. ANN. REP. 37 (1944), and 12 N.L.R.B. ANN. REP. 25 (1948), for a brief résumé of the previous decisions by the National Labor Relations Board on this subject.

[10] 2 TELLER, LABOR DISPUTES AND COLLECTIVE BARGAINING 788 (1940).

[11] *See* note 8, *supra*. But in Republic Aviation Corp. v. National Labor Relations Board, 324 U. S. 793 (1945), the court seemed to approve of the holding in the Lake Superior case: "Neither of these is like a mining or lumber camp where the employees pass their rest as well as their work time on the employer's premises, so that union organization must proceed upon the employer's premises or be seriously handicapped."

cient production.[11] In the intermediate situation, where it is practicable to contact the employees in other ways[12] but not to hold a meeting unless it can be held on company property, the instant case seems to say that outsiders have no absolute right to use company property for organizational meetings, but may not be discriminated against as was done in the *Stowe* case.[13] In cases at the other extreme, where there are no circumstances making it impracticable to carry on organizational activities elsewhere than on company premises, it would seem that the right of outsiders to use the employer's property for such purposes is very doubtful.[14]

Apparently the strongest factor in the *Stowe* decision is the existence of anti-union bias. That the employer was motivated by opposition to the unionization of his employees is not contested.[15] The National Labor Relations Board is entitled to consider the manner in which a company's labor policy is promulgated, and the purpose for which it is invoked, in determining whether or not an unfair labor practice has been committed.[16] Thus the simple fact of refusal to let union organizers use the hall, motivated by a hope of discouraging or preventing organization of his employees, might be considered in itself a violation of the Act where the circumstances make such a denial a reasonably effective means of accomplishing that prohibited objective.[17] Coupled with the

[12] *See* note 20 *infra.*

[13] National Labor Relations Board v. Stowe Spinning Co., —— U. S. ——, 69 S. Ct. 541, 544 (1948) (". . . the refusal by these respondents was unreasonable because the hall had been given freely to others, and because no other halls were available for organization. . . . We must require explicit language making it clear that the mere denial of facilities will not subject respondents to punishment for contempt.").

[14] *Id.* at 543 ("We cannot equate a company-dominated North Carolina mill town with the vast metropolitan centers where a number of halls are available within easy reach of prospective union members."); 2 TELLER, LABOR DISPUTES AND COLLECIVE BARGAINING 821 (1940) (discusses cases which hold that use of company facilities by a union is evidence of domination by the employer in violation of §8(2) of the Act. That section declares that it is 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. . . ." 49 STAT. 452 (1935), 29 U. S. C. 158(2) (1946), as amended by National Labor Management Relations Act, 61 STAT. ——, 29 U. S. C. 158(a)(2) (Supp. 1947).

[15] *Id.* at 543, n. 7.

[16] Carter Carbureter Corp. v. National Labor Relations Board, 140 F. 2d 714, 717 (C. C. A. 8th 1944) ("The vice is not necessarily in the rule itself but in the manner in which and the purpose for which it was promulgated and employed."). *See, e.g.,* United Aircraft Corp., 67 N.L.R.B. 594 (1946) (company refused passes to union organizers, although it granted them to tradespeople and vendors, to enter a street which had been closed for security reasons during the war; *held,* an unfair labor practice); Brown Shipbuilding Co., 66 N.L.R.B. 1047 (1946) (company refused outsiders permission to distribute union literature on company-owned parking lot; *held,* not an unfair practice in absence of a finding that permission had been asked or refused to distribute it at the gate where other literature was distributed).

[17] Weyerhaeuser Timber Co., 31 N.L.R.B. 258, 266 (1941) (". . . constitutes an unfair labor practice inasmuch as it is based on hostility to the right of employees to organize . . .").

fact that on this particular occasion the employer took affirmative action to prevent use of the hall for organizational purposes, although its custom was to allow a fraternal order, which met in the hall, to handle all requests to use it, the case is much stronger.[18] Justice Jackson thought that had the employer retained direct control over the disposition of the hall there would have been no unfair practice here, but that having let the fraternal order dispose of it without interference on previous occasions, the employer could not now depart from its custom without violating Section 8(1).[19]

As the Fourth Circuit Court of Appeals pointed out, a serious question of constitutional law is involved in the instant case.[20] Assuming that the Congress has power to restrict the property rights of employers when they come into conflict with the rights of employees to organize,[21] there remains the question whether it has exercised that power to the extent enforced by the *Stowe* decision. Although the discretion of the Board is very broad, it must be exercised within the limits of a statutory standard.[22] The standard here involved states that it shall be an unfair labor practice for an employer "to interfere with, restrain, or coerce"[23] his employees in the exercise of their right to organize and bargain collectively. If the Board's orders were unreasonable and arbitrary in view of that standard, enforcement would deprive the employer of his property without due process of law.[24] On the other hand, if in the light of the particular circumstances of this case it could not properly be said

[18] The hall had been built by the company partly as a meeting place for a fraternal order, Patriotic Order Sons of America, composed of employees and others. Although the employer had told the Order in letting them use the hall that it was not to be rented for other purposes, it had been used on numerous occasions for social and welfare activities, and so far as appears the Order had passed on all previous requests without interference by the employer). National Labor Relations Board v. Stowe Spinning Co., —— U. S. ——, 69 S. Ct. 541, 547, n. 1 (1948).

[19] *Id.* at 545.

[20] National Labor Relations Board v. Stowe Spinning Co., 165 F. 2d 609, 614 (C. C. A. 4th 1947) ("In the pending case there was no evidence of any interference with or restriction upon the men in their communications on labor matters either with each other or with agents of the union, in the homes of the men or on the streets of the town, or for that matter in the company's plant itself; and we think that the Board had no authority to compel the company to surrender their other property against their will for uses of which they did not approve, since the Board's power in this direction is limited by a constitutional provision of great importance under our form of government.").

[21] National Labor Relations Board v. Jones & Laughlin Steel Co., 301 U. S. 1 (1937). *See* generally: Philbrick, *Changing Conceptions of Property in Law,* 86 U. OF PA. L. REV. 691 (1938).

[22] STASON, THE LAW OF ADMINISTRATIVE TRIBUNALS 76 (1947).

[23] 49 STAT. 452 (1935), 29 U. S. C. §158(1) (1946), as amended by National Labor Management Relations Act, 61 STAT. ——, 29 U. S. C. §158(a)(1) (Supp. 1947), quoted in full *supra* note 1.

[24] Phelps-Dodge Corp. v. National Labor Relations Board, 313 U. S. 177, 194 (1941); Wallace Corp. v. National Labor Relations Board, 323 U. S. 248 (1944).

as a matter of law that the refusal was not an unfair practice,[25] the Board is entitled to the benefit of a presumption that its experienced judgment is correct.[26]

Whatever be the merits of the very close question of due process, the Supreme Court's opinion in the *Stowe* case is in line with its liberal policy in construing the National Labor Relations Act. The holding is restricted to circumstances where two conditions concurrently exist: (1) physical necessity for holding the meeting, if at all, in the employer's hall; (2) use of the hall, with the employer's assent, by the public for other purposes. Thus understood, the decision is of limited significance. It remains for the future to disclose where the court will draw the ultimate line in balancing the conflicting claims of employers to control property and of union representatives to use it for organizational purposes.

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Municipal Corporations—Legislative Authority—Limitation Thereon

The power of municipalities to legislate on specifically enumerated subjects is usually supplemented by a general delegation of authority to pass ordinances for the general welfare of the city. In North Carolina this general enabling act is N. C. GEN. STAT. §160-52 (1943), which provides that "The board of commissioners shall have power to make ordinances, rules and regulations for the better government of the town, *not inconsistent with this chapter and the law of the land,* as they may deem necessary."

"[Police ordinances and regulations] must not be inconsistent with the general laws of the state, including the common law, equity and public policy."[1] This principle is frequently relied upon in litigation involving the validity of a local regulation, and many ordinances are attacked and overthrown as in conflict with the general law. Therefore, it is important to attorneys and to local legislative bodies to know what constitutes such an inconsistency as is contemplated by the statute. How

[25] Marsh v. Alabama, 326 U. S. 501, 509 (1946) ("Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."); National Labor Relations Board v. Cities Service Oil Co., 122 F. 2d 149 (C. C. A. 2nd 1941) ("It is not every interference with property rights that is within the Fifth Amendment. . . . Inconvenience, and even some dislocation of property rights, may be necessary in order to safeguard the right to collective bargaining."). This statement was cited and quoted in the *Republic* case, 324 U. S. 793, 803 (1945).

[26] *E.g.,* Peyton Packing Co., 49 N.L.R.B. 828 (1943), *enforcement granted,* 142 F. 2d 1009 (C. C. A. 5th 1944).

[1] 3 MCQUILLIN, MUNICIPAL CORPORATIONS §953 (2nd ed. 1939).