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of federal policy, an analogy to elections in a political context is valid. Employees' freedom of choice exercised in a formal election should be binding, short of an unusual circumstance, until another election is possible. Congress has sought to establish a period of stability after an election. This formality of an election is meaningless if the NLRB can, within one year after an election, disrupt the stability by issuing orders to bargain, based upon showings of majority status attained through informal means. Stability in labor-management relations can best be achieved within a context of certainty. Decisions such as *Brooks* make this certainty mandatory when an election results in victory for a bargaining agent. To apply a different rule when a certified election results in defeat of a union is arbitrary and unfair.

GEORGE CARSON II

Labor Law—'Outsiders' As Agents of the Employer

Any coercive, antiunion activities by persons acting as agents of an employer covered by the Labor Management Relations Act¹ will be imputed to him and the union concerned will have a remedy before the National Labor Relations Board.² However, those persons found not to be agents are beyond the reach of the law and consequently are free to continue at will their antiunion activities. Thus, an important aspect of labor legislation is the concept of agency, as it will often determine employer responsibilities.

Under the original provision of the Wagner Act of 1935,³ the term "employer" included "any person acting in the interests of an employer, directly or indirectly. . . ."⁴ Using this language of the act, the NLRB imputed to employers the actions of third parties, even those only remotely connected with the employer.⁵ This was

¹ Labor Management Relations Act (Taft-Hartley Act) § 2(2), 61 Stat. 137 (1947), 29 U.S.C. § 152(2) (1965).

² Hereinafter referred to as NLRB.

³ Act of July 5, 1935, § 2(2), 49 Stat. 450.

⁴ Act of July 5, 1935, § 2(2), 49 Stat. 450.

⁵ H.R. REP. No. 244, 80th Cong., 1st Sess., 18 (1947). The committee report said:

The Board frequently "imputed" to employers anything that anyone connected with an employer, no matter how remotely, said or did, notwithstanding that the employer had not authorized the action and in many cases had even prohibited it.

Ibid.

done even though there existed no principal-agent relationship.⁶ However, Congress, in passing the Taft-Hartley Act of 1947, deleted the above language and inserted in section 2(2) language more favorable to management by defining an employer as including "any person acting as an agent of an employer, directly or indirectly. . . ."⁷ The purpose of this section seems to have been to restrict the prior liberal agency principles of the Wagner Act by requiring a common law principal-agent relationship between the employer and the third party.⁸ At the same time, in section 2(13) of the Taft-Hartley Act, Congress also provided that in determining whether a person is acting as an agent of another, "the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."⁹ This section was apparently designed primarily to liberalize prior strict agency principles applicable to *unions* so that they would be more amenable to unfair labor practice charges and suits for damages in courts of law.¹⁰

Where supervisory employees commit the alleged coercive acts, these sections seem to have effected little change in the law that existed prior to their enactment. In general the cases rely upon *International Assoc. of Machinists v. NLRB*,¹¹ decided before

To the same effect Sen. Pepper said:

Under present law [prior to 1947], it is not necessary to have a directly authorized agent of a corporation to bind it if a wrong is done a worker. If a trade association acted *in the interests and with the point of view* of the employer, the employer, therefore, might have been responsible for a large number of acts of people acting in his interests against workers. . . . [The Taft-Hartley Bill] . . . carefully limits the employers liability to the acts of duly authorized agents.

93 CONG. REC. 6521 (1947). (Emphasis added.)

⁶ H.R. REP. No. 244, 80th Cong., 1st Sess., 18 (1947).

⁷ Labor Management Relations Act (Taft-Hartley Act) § 2(2), 61 Stat. 137 (1947), 29 U.S.C. § 152(2) (1965).

⁸ See note 5 *supra*. See also 93 Cong. Rec. 7001 (1947).

⁹ Labor Management Relations Act (Taft-Hartley Act) § 2(13), 61 Stat. 137 (1947), 29 U.S.C. § 152(13) (1965).

¹⁰ Section 2(13) was directed primarily at labor. Prior to the Taft-Hartley Act, the Supreme Court held in *United Brotherhood of Carpenters & Joiners v. United States*, 330 U.S. 395 (1947), that very strict rules of agency were applicable to unions. The proponents of the Taft-Hartley Act wanted to enact laws prohibiting union unfair labor practices and to give employers rights to sue for damages in courts of law. So they enacted section 2(13) to insure that the rule of *United Brotherhood of Carpenters* would not be applied by liberalizing the law of agency applicable to unions. See 93 CONG. REC. 7000 (1947). See also *UMW v. Patton*, 211 F.2d 742 (4th Cir. 1954).

¹¹ 311 U.S. 72 (1940).

sections 2(2) and 2(13) were enacted. There the Court held that the employer was liable for the unauthorized acts of supervisory employees. It indicated that if strict principles of *respondet superior* were to be applied, the employer might not be liable.¹² While the legislative history indicates that section 2(2) was designed in part to overrule the *Machinists* case,¹³ the courts seem consistently to cite section 2(13) for the proposition that the decision has not been overruled. In *NLRB v. Arkansas-Louisiana Gas Co.*,¹⁴ the court said that in "interpreting . . . [section 2(13)] . . . the courts have held that strict principles of agency are not required . . . in determining an employer's liability for the union activities of its supervisory employees."¹⁵

Where unauthorized activities are carried on by "outsiders" or "volunteers," the real change created by these sections appears. These outsiders are non-employees, such as local police, businessmen, public officials, religious leaders, or members of the employer's family. Generally, by applying these sections the NLRB is able to impute outsiders' acts to the employer on the basis of apparent authority or ratification where there is some nexus of identification between the employer and the outsider such that the employees could

¹² *Id.* at 80.

¹³ "The apparent intention of the redefinition of section 2(2) is to change the rule, adopted by the Supreme Court in *International Association of Machinists v. NLRB* (311 U.S. 72), that an employer is responsible for the actions of his supervisory employees, even though he might not be under strict common law rules." 93 CONG. REC. 6660 (1947) (remarks of Sen. Murray). Senator Murray was an opponent of the Taft-Hartley Act. No statement could be found in the legislative history by any proponent of the Act specifically stating that the *Machinists* case was to be overruled. However, Senator Taft repeatedly said that the intention was to require the application of common law agency principles, which the Court in *Machinists* had refused to do. See 93 CONG. REC. 4561, 6690, 7001 (1947).

¹⁴ 333 F.2d 790 (8th Cir. 1964).

¹⁵ *Id.* at 796. In *Local 636, Plumbing & Pipe Fitters Independent of the United States v. NLRB*, 287 F.2d 354, 359 (D.C. Cir. 1961), it was said: "We know of nothing in the Act of 1947 or in the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C.A. § 401 *et seq.*, which affects the vitality of . . . [the *Machinists* doctrine]." See also *NLRB v. Champa Linen Service Co.*, 324 F.2d 28 (10th Cir. 1961); *NLRB v. Des Moines Foods Inc.*, 296 F.2d 285 (8th Cir. 1961); *NLRB v. Birmingham Publishing Co.*, 262 F.2d 8 (5th Cir. 1969).

Where non-supervisory, rank and file employees commit the unlawful acts, the employer generally will not be liable unless he authorizes or ratifies such conduct. Daykin, *Liability of Unions and Employers Under the Labor-Management Relations Act*, 42 IOWA L. REV. 370, 371 (1957).

reasonably assume that the outsider spoke with his approval.¹⁶ This determination is, of course, a factual one and depends upon the circumstances of each case. For example, where the outsider is a member of the employer's family, the NLRB has little difficulty in imputing these acts to the employer since the family relationship gives rise to the requisite identification between the employer and the third party.¹⁷

Applying this same rationale, the NLRB has also found principal-agent relationships where the outsiders are local businessmen or public officials. These determinations are usually based upon facts that indicate a close relationship between the employer and the outsider, such as where the outsiders helped to establish the plant¹⁸ or where the employer allowed them to come to the plant to make unlawful speeches.¹⁹ When this relationship exists, the employer will be liable even though he had no knowledge of the outsider's antiunion activity.²⁰ However, he can escape liability if he effectively disavows the outsiders' acts and communicates his disavowal to the employees.²¹ If no effective disavowal is made, he will be deemed to have acquiesced in the illegal acts of the outsiders.²² Where no close relationship exists, it seems that the common law agency requirements of section 2(2) prevent imputing the

¹⁶ See, e.g., *Colson Corp. v. NLRB*, 347 F.2d 128 (8th Cir.), cert. denied 382 U.S. 904 (1965).

¹⁷ See, e.g., *Star Baby Co.*, 140 N.L.R.B. 678 (1963); *Forston Co.*, 139 N.L.R.B. 561 (1962); *Mansbach Metal Co.*, 83 N.L.R.B. 797 (1953); *Taylor Mfg. Co.*, 83 N.L.R.B. 142 (1949).

¹⁸ E.g., *Colson Corp. v. NLRB*, 347 F.2d 128 (8th Cir.), cert. denied 382 U.S. 904 (1965); *A. M. Andrews Co.*, 112 N.L.R.B. 626 (1956).

¹⁹ E.g., *Byrds Mfg. Co.*, 140 N.L.R.B. 147 (1962); *Pearson Corp.*, 138 N.L.R.B. 910 (1962); *Wayline, Inc.*, 81 N.L.R.B. 511 (1949). Cf. *Livingston Shirt Co.*, 107 N.L.R.B. 400 (1948).

However, the rules normally applied to outsiders are not followed where the police engage in anti-union activity. At least one circuit has indicated that it is more difficult to impute the acts of police to the employer, even where they are engaging in coercive activity, because they also act within the scope of their legal duty. See *NLBR v. Bibb Mfg. Co.*, 188 F.2d 825 (5th Cir. 1951); *NLRB v. Russel Mfg. Co.*, 187 F.2d 296 (5th Cir. 1951).

²⁰ *Pearson Corp.*, 138 N.L.R.B. 910 (1962). But see *Byrds Mfg. Co.*, 140 N.L.R.B. 147 (1962).

²¹ The disavowal is not sufficient to allow the employer to escape liability unless it is communicated to the employees. *NLRB v. Fulton Bag & Cotton Mills*, 175 F.2d 675 (5th Cir. 1949); *Indiana Metal Products*, 100 N.L.R.B. 1040 (1952). And the employer cannot wait until the last minute before making his disavowal known to his employees. See *Colson Corp. v. NLRB*, 347 F.2d 128 (8th Cir.), cert. denied 382 U.S. 904 (1965).

²² E.g., *Byrds Mfg. Co.*, 140 N.L.R.B. 147 (1962); *Wayline, Inc.*, 81 N.L.R.B. 511 (1949).

acts of outsiders to the employer. The aggrieved union does have a remedy in representation election cases. Here, notwithstanding the lack of an agency relationship, the NLRB will set aside the election where the laboratory conditions necessary for a free election have been destroyed.²³

The recent case of *Amalgamated Clothing Workers v. NLRB*²⁴ is an example of application of the above rules. There the local businessmen of a small town were desirous of improving its economy. They were successful in inducing a large shirt manufacturer to locate a subsidiary, the respondent company, there. They agreed to float a bond issue to finance a permanent physical plant, and also recommended certain people for jobs. Within a short period of time the Amalgamated Clothing Workers began to organize. At the same time, the local businessmen, fearful that the plant would move if unionized, began their antiunion campaign. They enlisted the support of a local minister who spoke to his parishioners, many of whom were employees, to the effect that the plant might move. Workers were visited in their homes and were told of adverse economic conditions that might follow if the union were successful in its organization of the plant. An advertisement was placed in the local paper asking that the workers vote "no" at the representation election. Although the employer did not engage in the open antiunion campaign and stated that the plant would not move if the union came in, he was at one time evasive when questioned on this point.

The trial examiner found the outsiders' acts to be in violation of section 8(a)(1)²⁵ and imputed them to the employer.²⁶ The NLRB adopted his opinion as its own and enforcement was granted by the Circuit Court of Appeals for the District of Columbia.²⁷ The trial examiner found that the employer did not authorize the outsiders to speak for him in that there was "no evidence that the

²³ See, e.g., *James Lee & Sons*, 130 N.L.R.B. 290 (1961); *Monarch Rubber Co.*, 121 N.L.R.B. 81 (1958); *Great Atl. & Pac. Tea Co.*, 120 N.L.R.B. 765 (1958); *Falmouth Co.*, 114 N.L.R.B. 896 (1955).

²⁴ 63 L.R.R.M. 2581 (D.C. Cir. Dec. 15, 1966), *enforcing* *Hamburg Shirt Corp.*, 156 N.L.R.B. No. 51 (Dec. 30, 1965).

²⁵ National Labor Relations Act § 8(a)(1), 41 Stat. 452 (1935), 29 U.S.C. § 158(a)(1) (1965), reads "It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in section 7; . . ."

²⁶ 156 N.L.R.B. No. 51 at 18.

²⁷ 63 L.R.R.M. 2581 (D.C. Cir. Dec. 15, 1966).

respondent requested these men to make such threats."²⁸ He said it was apparent that "they did so of their own volition . . . [because] they feared that the respondent would not accept the plant if the union came in. . . ."²⁹ Notwithstanding this lack of actual authority, the employer was found liable in that his silence was taken as a ratification of the acts of the businessmen.³⁰

Three factors seem to underlie this decision. First, the local businessmen, after initially identifying themselves with the employer, continued to be more than mere "passive spectators"³¹ in that they spoke to employees about their shortcomings in terms of output and production. Also, they not infrequently visited the plant. Second, the employer himself engaged in questionable activity, which the court termed "marginal promises of benefit and portents of reprisal to avoid recognizing the union until its status could be undermined."³² Third, the employer failed to unequivocally repudiate the acts of the outsiders, and was evasive as to whether the plant would move if the union were successful in its organization drive.³³

Clothing Workers represents the traditional approach taken by the NLRB where outsiders engage in antiunion activity. However, certain language of the court of appeals seems to have opened the way for a return to the principles of the Wagner Act.³⁴ The court affirmed the NLRB finding that the employer had ratified the outsiders' acts.³⁵ In so doing the court relied upon section 2(13) for the proposition that "responsibility . . . is not controlled by the law of agency."³⁶ This language seems to indicate that by utilizing section 2(13), the agency hurdles of section 2(2) may be overcome to expand employer responsibility to cover a broader range of conduct on the part of non-employees who engage in unlawful acts.

In recent congressional hearings several union leaders pointed out the problems of outside community pressure to the House Subcommittee on the National Labor Relations Board.³⁷ The sub-

²⁸ 156 N.L.R.B. No. 51 at 18.

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ 63 L.R.R.M. at 2583.

³² *Id.* at 2583.

³³ *Id.* at 2583.

³⁴ See note 3 *supra* and accompanying text.

³⁵ 63 L.R.R.M. at 2583.

³⁶ *Id.* at 2583.

³⁷ STAFF OF SUBCOMM. ON THE NATIONAL LABOR RELATIONS BOARD, HOUSE COMM. ON EDUCATION AND LABOR, 87TH CONG., 2D SESS., ADMINIS-

committee heard testimony that some outside community pressure exists in the form of local licensing ordinances that purport to require licensing for soliciting membership in organizations or distributing literature.³⁸ While the constitutionality of these ordinances has been successfully challenged,³⁹ the necessary litigation results in frustrating delay.⁴⁰ The subcommittee found that this form of community pressure was violative of rights secured by the Constitution and laws of the United States, often occurring under color of law, and recommended that the Department of Justice determine whether the situation could be dealt with under existing civil rights statutes.⁴¹ It remains to be seen whether criminal prosecutions can be had under the civil rights statutes of those found to be acting pursuant to these ordinances.⁴² In the meantime it is hoped that

TRATION OF THE LABOR-MANAGEMENT RELATIONS ACT BY THE NLRB 59-61 (Comm. Print 1961). The committee report said in part:

This subcommittee has received testimony that union organizers have been physically escorted by local law enforcement agents to the town limits and told not to return. This subcommittee has received evidence that town bankers call in loans of union adherents on the eve of elections. This subcommittee has received evidence that local merchants, including grocers, inquire as to the pronoun attitude of the customer before extending credit.

One union leader testified that "these volunteers are no more volunteers than the Chinese Communists that invaded North Korea against the United Nations. They are nothing but willing henchmen and associates of employers." Statement of Jacob Scheinkman, General Counsel, Amalgamated Clothing Workers, AFL-CIO, *Hearings Before the Subcommittee on the National Labor Relations Board of the House Committee on Education and Labor*, 87th Cong., 1st Sess., Pt. 1, at 601 (1961) [hereinafter cited as *1961 Hearings*].

³⁸ *1961 Hearings* Pt. 1, at 562.

³⁹ See, e.g., *Denton v. The City of Carrolton*, 235 F.2d 481 (5th Cir. 1956).

⁴⁰ *1961 Hearings* Pt. 1, at 562.

⁴¹ STAFF OF SUBCOMM. ON THE NATIONAL LABOR RELATIONS BOARD, note 37 *supra*.

⁴² The pertinent civil rights statutes are 18 U.S.C. §§ 241, 242 (1950). Section 242 makes it illegal to deny, under color of law, inhabitants of the United States their rights secured by the Constitution or laws of the United States. Research reveals no reported case wherein a person has been charged under this provision of violating another's section 7 rights. See note 43 *infra*. Section 241 makes it illegal for two or more persons to conspire to injure, threaten, intimidate, or oppress any citizen in the exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States. In *United States v. Bailes*, 120 F. Supp. 614 (S.D.W.Va. 1954), the defendants were charged under section 241 with conspiring to violate a person's right under section 7 *not* to join, form, or assist a labor union. The court held that section 241 protected rights that citizens possess as such or rights wholly dependent upon an act of Congress. The court said that the right not to join a union did not fall within either

courts will follow the precedent of *Clothing Workers*, i.e., the application of liberal agency principles. Such results would appear desirable since outside community pressure seems a major obstacle to the attainment of basic section 7 rights,⁴³ one that merely setting aside the representation election cannot fully remedy.⁴⁴

TOMMY W. JARRETT

Labor Law—Representation Elections—Union Right to Employee Mailing Lists

In February, 1966, the National Labor Relations Board expounded a new rule governing future cases involving representation elections. The rule provides that after an election has been agreed to by the parties or directed by the regional director, the employer is required to "file with the Regional Director an election eligibility list, containing the names and addresses of all the eligible voters. The Regional Director, in turn, shall make this information avail-

category because section 7 rights are guaranteed to *employees*, not to citizens generally and because the right not to join a union, as guaranteed in section 7, is not wholly dependent upon an act of Congress because this right is only the embodiment of employees' pre-existing rights. *Id.* at 628. The court also stated that the NLRB and not the courts is to determine what constitutes an unfair labor practice. Furthermore, the court reasoned that since the Taft-Hartley Act only covers acts by employers, unions, or their agents, the states, and not the federal government, must punish others who might conspire to violate the rights of workers. *Id.* at 631. See also *United States v. Moore*, 129 Fed. 630 (N.D. Ala. Cir. 1904), where the court held that section 241 was not available to protect a miner in his right to organize because this right existed because of his status as an employee, not because of his being a citizen. *Cf. UMW v. Patton*, 211 F.2d 742 (4th Cir. 1954) (court denied recovery of punitive damages).

⁴³ Section 7 is the basic provision of labor law. It reads in part: Employees shall have the right to self-organization, to form, to join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for mutual aid or protection, and shall also have the right to refrain from any or all such activities. . . . National Labor Relations Act § 7, 41 Stat. 452 (1935), as amended, Labor Management Relations Act (Taft-Hartley Act) § 7, 61 Stat. 140 (1947), 29 U.S.C. § 157 (1965).

⁴⁴ Once the requisite laboratory conditions have been upset, it seems that they, to a large degree, remain so during the second election. It was found that after the election was "tainted," the party losing has about a one-in-three chance of winning the second. Pollitt, *NLRB Re-Run Elections*, 41 N.C.L. Rev. 209 (1963). Also, it seems that antiunion elements, particularly in the South, have a ready made issue to use against unions in the form of race hate. See Pollitt, *The National Labor Relations Board and Race Hate Propaganda in Union Organizational Drives*, 17 STAN. L. REV. 373 (1965).