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the insurer will gamble with the insured's money, since rejection of an offer within policy limits will expose the carrier to double liability, and (2) would determine the outer limits of the insurer's liability, absent actual bad faith. Such a provision would be more reasonable than court imposition of strict liability, which would frequently impose liability for exercising a contractual right, often one approved by the state legislature.⁴⁷ Before such drastic action is taken, the legislature should give its express sanction.

JAMES R. CARPENTER, JR.

Labor Law—Innocent Purchaser's Duty to Reinstatement Employees

The NLRB, under Section 10(c) of the National Labor Relations Act, has authority to issue a remedial order against an employer who "has engaged in or is engaging in . . . unfair labor practice[s]."¹ The exercise of this authority is unquestioned when the order is directed against the guilty employer. If the guilty employer sells his business before the unfair practice has been remedied, however, the Board must decide whether the order may be directed against the purchaser. If the purchaser is but a "disguised continuance" of the seller² or one who has concerted with the guilty employer to evade the order,³ the Board may properly direct an order against the purchaser. When the purchase is made in good faith, the problems are more acute. An examination of the decisions reveals the Board's difficulties.

Initially, the Board recognized no limitation as to the parties who could be bound by an order under Section 10(c) once an unfair labor practice was discovered. In the 1948 decision of *Alexander Milburn Co.*,⁴ a purchaser, who was neither a "disguised continuance" nor an "evader,"

⁴⁷ *E.g.*, N.C. GEN. STAT. § 20-279.21(f)(3) (1953).

¹ National Labor Relations Act § 10(c), 29 U.S.C. § 160(c) (1964).

If . . . the Board shall be of the opinion that any person . . . has engaged in or is engaging in any such unfair labor practice, then the Board . . . shall issue . . . an order requiring such person to cease and desist from such unfair practice, and to take such affirmative action including reinstatement of employees with or without back pay as will effectuate the policies of this Act.

Id.

² *Regal Knitwear Co. v. NLRB*, 324 U.S. 9 (1945); *Southport Petro. Co. v. NLRB*, 315 U.S. 100 (1942).

³ *Regal Knitwear Co. v. NLRB*, 324 U.S. 9 (1945); *NLRB v. Ozark Hardwood Co.*, 282 F.2d 1 (8th Cir. 1960).

⁴ 78 N.L.R.B. 747 (1948).

was ordered to reinstate employees wrongfully discharged by his predecessor. The Board, however, did recognize the policy favoring free alienation as it limited the class of "innocent purchasers" upon whom the order would be binding to those who were found to be "successors" of the previous employers. A "successor" was defined as one who continued the seller's business operations in substantially unchanged form. In *Milburn*, this was evidenced by the retention of the predecessor's employees and plant and by the manufacture of the same products.⁵

Upon subsequent judicial examination, Section 10(c) was held not to encompass an innocent purchaser. Two courts of appeals⁶ reasoned that the enforceability of a Board order was limited by Rule 65(d) of the Federal Rules of Civil Procedure,⁷ concluding that an innocent purchaser was not a "party to the action" under a statute applicable only to those "engaged in or engaging in" unfair labor practices. The Board, following this judicial mandate, overruled *Milburn* in *Symms Grocer Co.*⁸

In *Perma Vinyl Corp.*,⁹ the Board reversed its position again by ordering a purchaser to reinstate employees discharged by the previous owner in violation of Section 8(a)(1) and (3) of the Act,¹⁰ despite a finding that the successor was a "bona fide purchaser."¹¹ United States Pipe & Foundry Co. had purchased the assets of Perma Vinyl Corporation with knowledge of a pending unfair labor charge against Perma Vinyl, and had continued the manufacture of plastic pipe in the same manner with substantially the same work force. After the acquisition, the Board issued an order requiring Perma Vinyl and "its successors and assigns" to reinstate the employees. U.S. Pipe was served notice to appear and show cause why it should not be charged as Perma Vinyl's

⁵ *Id.* at 748.

⁶ *NLRB v. Lunder Shoe Corp.*, 211 F.2d 284 (1st Cir. 1954); *NLRB v. Bird-sall-Stockdale Mfg. Co.*, 208 F.2d 234 (10th Cir. 1953).

⁷ Fed. R. Civ. P. 65(d) provides that

[e]very order granting an injunction and every restraining order . . . is binding only upon the parties to the action, their officers, agents, servants, employees, . . . and upon those persons in active concert or participation with them. . . .

⁸ 109 N.L.R.B. 346 (1954).

⁹ 164 N.L.R.B. No. 119 (May 24, 1967).

¹⁰ National Labor Relations Act § 8(a)(1), (3), 29 U.S.C. § 158(a)(1), (3) (1964). The Board found that Perma Vinyl had discharged three employees because of their affiliation with a labor union.

¹¹ 164 N.L.R.B. No. 119 (May 24, 1967). As employed in this context, "bona fide purchaser" may be a misleading phrase. U.S. Pipe did have notice of the NLRB proceeding and, therefore, is to be distinguished from a bona fide purchaser in the law of real property who must take without notice. *E.g.*, *Companaro v. Gondolfo*, 60 F.2d 451, 452 (3rd Cir. 1932).

successor with remedying the unfair practices. Following an adverse ruling, U.S. Pipe petitioned the court to have the order set aside.

The Fifth Circuit Court of Appeals in *United States Pipe and Foundry v. NLRB*¹² affirmed the Board's decision. Finding support in the Supreme Court decision of *John Wiley and Sons, Inc. v. Livingston*,¹³ which had bound a purchaser to his predecessor's collective bargaining agreement, the court directed that the order be enforced on the successorship theory of *Alexander Milburn Co.* Seizing upon the language in *Wiley* that "[t]he objectives of the national labor policy . . . require that the rightful prerogative of owners independently to rearrange their business . . . be balanced by some protection to the employees from a sudden change in the employment relationship,"¹⁴ the court concluded that "purchasing with notice of the unfair labor proceedings and continuing the same operation even to the jobs in question . . . is . . . sufficient basis for requiring it to offer reinstatement to the employees on the successorship theory"¹⁵ of *Alexander Millburn*.

Although the *Milburn* reasoning was revived, the decision did not fully resolve the difficulty with innocent purchaser liability, for the court based its decision on policy considerations and never explicitly faced the legal bar presented by the earlier courts of appeals decisions.¹⁶ *U.S. Pipe* would constitute stronger precedent for future board rulings had these contrary holdings been dealt with adequately.

There are two possible approaches that the court could have taken to support its policy. As to the limitation posed by Federal Rule 65(d), the court may be justified in considering *U.S. Pipe* a "party to the action." In *Symms Grocer Co.*,¹⁷ which initially overruled *Milburn*, the Board reasoned that the scope of their order was limited by Rule 65(d) of the Federal Rules of Civil Procedure and concluded that a successor employer, who had not acted with his predecessor to evade the charge and who was not a disguised continuance, could not be reached by an order under Section 10(c). The purpose of the limitations in Rule 65(d) apparently is to prevent unwitting contempt,¹⁸ and *U.S. Pipe*, in the instant case, had notice of the NLRB proceedings against Perma

¹² 398 F.2d 544 (5th Cir. 1968).

¹³ 376 U.S. 543 (1964).

¹⁴ *Id.* at 549.

¹⁵ *United States Pipe & Foundry Co. v. NLRB*, 398 F.2d 544, 548 (5th Cir. 1968).

¹⁶ See note 6 *supra*.

¹⁷ 109 N.L.R.B. 346 (1954).

¹⁸ See *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 15 (1945).

Vinyl and was given an opportunity to be heard. This circumstance, added to the fact that the Board's orders are remedial rather than punitive in nature,¹⁹ appear to justify an order against such a "bona fide purchaser."

An alternative approach would be for the Board to proceed directly against U.S. Pipe as the guilty employer, which would preclude any problem raised by Federal Rule 65(d). The Board has previously imposed only derivative responsibility in such cases,²⁰ seemingly on the ground that it was not the purchaser who committed the violation. This approach, however, is inconsistent with the "evader" cases²¹ and seems to belie the plain import of the language in Section 10(c), which provides that the Board may issue an order against an employer who "has engaged in or is engaging in . . . unfair labor practices."²² An evader, unlike a disguised continuance, is not the party that discharged the employees, but one who, by his acts, has *engaged* in unfair labor practices. Therefore, "engaging in unfair labor practices" may be construed to include not only those persons *committing* the violation, but also employers who, by their failure to afford a remedy, allow the harmful effects of a violation to continue.

Assuming that a "bona fide purchaser" can be validly bound by a Board order, there still remain policy restrictions on the exercise of this authority. These restrictions, which are embodied in the successorship theory, are seldom adequately articulated.

It is obvious that the purchaser must have the present capacity to comply with the order. If reinstatement is to be required, the jobs must still exist; the Board cannot order an employer to hire more men than he needs or to employ a person for whom there is no work.²³ This limitation upon the Board's power is qualified to the extent that an employer may be required to discharge employees hired subsequent to the violation to create openings for those ordered to be reinstated.²⁴ Also, the Board may require the employer to put the injured employees on a preferential hiring list.²⁵

¹⁹ Republic Steel Corp. v. NLRB, 311 U.S. 7, 11 (1940); Frosty Morn Meats, Inc. v. NLRB, 296 F.2d 617 (5th Cir. 1961).

²⁰ NLRB v. Harris, 198 F. Supp. 947 (S.D.N.Y. 1961).

²¹ See note 3 *supra*.

²² National Labor Relations Act § 10(c), 29 U.S.C. § 160(c) (1964).

²³ NLRB v. Lightener Pub. Corp., 128 F.2d 237 (7th Cir. 1942); NLRB v. Somerset Shoe Co., 111 F.2d 681 (1st Cir. 1940).

²⁴ NLRB v. Shenandoah-Dives Mining Co., 145 F.2d 542 (10th Cir. 1944); NLRB v. Grower-Shipper Vegetable Ass'n, 122 F.2d 368 (9th Cir. 1941).

²⁵ NLRB v. J.G. Boswell Co., 136 F.2d 585 (9th Cir. 1943).

Notice before the purchase that there is an unfair labor practice charge against the seller is a second element of the successorship theory. *U.S. Pipe* and *Alexander Milburn* emphasized actual knowledge, and the ruling in *M. Yoseph Bag Co.*²⁶ suggests that the Board will require such notice. In *M. Yoseph*, the Board refused to order a remedy, although the predecessor was an officer, director, and large stockholder in the purchasing corporation. Since information of the charge is readily available, either by an inquiry to the union or to the NLRB itself, it would not appear to be inequitable to bind a purchaser to constructive notice, and future rulings may so hold.

The successorship theory may also require an affirmative showing that the labor policy of the purchaser will be the same as that of the predecessor-employer. The purpose of the National Labor Relations Act is to lessen industrial strife,²⁷ and to this end the Act protects the right of employees to engage in union activities.²⁸ The most serious consequence of a dismissal in violation of Section 8(a)(1) and (3) is the deterrence of these activities.²⁹ This deterrence was not alleviated by the change in ownership in either *U.S. Pipe* or *Alexander Milburn*. In the former, although there was a new owner, the president of Perma Vinyl became U.S. Pipe's general manager; the old employer was still influencing the labor policy and the deterrence to unionization remained. In *Alexander Milburn* the court was careful to note that the purchaser retained his predecessor's plant manager and supervisory personnel. "Under these circumstances, the employees had no reason to believe that the labor policies of the successor were other than those of the predecessor."³⁰ Therefore, the policy favoring the issuance of a remedial order is not weakened by the change in ownership. A different situation unfolds if there is a complete change in the employing enterprise before a remedy has been effected. Although the new employer continues the same operation in the latter situation, an employee is not justified in believing that there will still be discriminations in violation of the Act, for all ties binding the new labor policy with the old are broken. Under these circumstances, there is no deterrence of union activities and the policy favoring the issuance of an order against the new owner is considerably weakened. This suggests that the phrase often identified with the successorship theory, "similarity and continuity of operations across the change of

²⁶ 139 N.L.R.B. 310 (1962).

²⁷ National Labor Relations Act § 1(b), 29 U.S.C. § 141(b) (1964).

²⁸ National Labor Relations Act § 7, 29 U.S.C. § 157 (1964).

²⁹ *Ford Motor Co.*, 31 N.L.R.B. 994, 1009 (1941).

³⁰ *Alexander Milburn Co.*, 78 N.L.R.B. 747, 750-51 (1948).

ownership"³¹ refers not so much to the making of the same products in the same plant, but to an appearance to the employee of a continuation of the old labor policy, which, in turn, frustrates the policies of the National Labor Relations Act.

An innocent purchaser can now be required by the NLRB to remedy the unfair labor practices of his predecessor under the successorship theory. Although an unrestricted exercise of this authority may place an unjust burden upon the purchaser, an examination of the contractual options available to the purchaser indicates that innocent purchaser liability, as limited by the successorship theory, is not manifestly unfair. If the prospective buyer has notice of the unfair labor charge, as required by *U.S. Pipe*, he can insulate himself from the hardships imposed by the subsequent order either by negotiating for a reduced purchase price or for an indemnity clause in the contract of sale. Admittedly, the innocent purchaser cannot be relieved of all the burdens through contractual agreement;³² however, any remaining burden is negligible when contrasted to the deleterious effects of an unremedied violation. In light of this consideration, the court in *U.S. Pipe* properly balanced the equities.

JERRY W. LEONARD

Real Property—Mortgagee's Rights in Security

The California Supreme Court, in the recent decision of *American Savings & Loan Association v. Leeds*,¹ imposed significant limitations on a purchase money mortgagee's rights to his security. Contrary to the situations in other states, the California mortgagee finds himself in an increasingly precarious position. The *Leeds* decision not only increases the mortgagee's risk, but also injects a degree of uncertainty into the law.

The plaintiff in *Leeds* was the beneficiary of a deed of trust given to secure a debt defendant Leeds had incurred to purchase real estate from defendants Sheridan. The Sheridans had falsely represented that the house had been built on unfilled land and had also concealed defects caused by subsidence due to improper filling. After the sale, when further

³¹ *United States Pipe & Foundry Co. v. NLRB*, 398 F.2d 544, 548 (5th Cir. 1968).

³² For example, a stigma possibly attaches to an employer involved in an unfair labor proceeding.

¹ — Cal. 2d —, 440 P.2d 933, 68 Cal. Rptr. 453 (1968).