Labor Law -- The Legality of Co-ordinated Bargaining

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The question of substituting a presumption for section 267's prohibition is not one for the courts. The fact that Congress has enacted 267(d) seems to imply that no other relief should be granted to intra-family transferors, especially if such transfer is willful. When a transfer within the economic "unit" has been forced, however, the equities of the situation, especially in the absence of a specific Congressional pronouncement, would suggest retention by that "unit" of the original basis.

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Co-ordinated or coalition bargaining is a new technique in the power struggle between labor and management. This approach to collective bargaining consists of forming a multi-union negotiating committee for the purpose of cooperation and communication among several unions that represent employees of a common employer. Through this process the cooperating unions hope to achieve common contract terms.\(^1\) Management has not welcomed this union practice. When co-ordinated union bargaining extends to the bargaining table, resistance by management has taken the form of refusing to negotiate with joint-union committees.

The legality of union insistence on management's negotiating with a union coalition was considered by the National Labor Relations Board in *General Electric Co.*\(^2\) In that case the union whose contract was to be negotiated insisted on including members of other unions on its negotiating committee. The Board held that by refusing to bargain with this committee, General Electric was guilty of unfair labor practices.

Eight of the unions\(^3\) with which G.E. had contracts were dissatisfied with a lack of progress in previous negotiations with that company and therefore formed the Committee on Collective Bargaining (CCB).\(^4\) The objective of the CCB was to gain the cooperation in collective bargaining of unions representing employees of a single employer in order to negotiate major economic items on a company-wide, national level. G.E.'s labor

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3. These eight unions became dissatisfied with the lack of union progress under G.E.'s purported "whipsawing" tactics. Under this practice G.E. convinced the weaker unions to accept its contract offers and then used the acceptances to bring pressure on the stronger unions.
4. 69 L.R.R.M. at 1305.
contract with the International Union of Electrical Workers (IUE), a member of the CCB, was about to expire. G.E.'s representatives walked out of preliminary negotiations before bargaining could begin when they discovered that IUE's committee included members of the other seven unions constituting the CCB. The company persisted in its refusal to meet with this multi-union committee beyond the bargaining date specified by the labor contract. IUE filed unfair labor practice charges against G.E., alleging violation of sections 8(a)(5) and 8(a)(1) of the National Labor Relations Act.

In its argument to the Board, G.E. contended that it had no duty to bargain with these other unions because their contracts had not expired and because their presence prevented good faith bargaining. IUE asserted, on the other hand, that the committee's only purpose at that time was to negotiate a contract for IUE. The Board said that it was crucial to its analysis of the case that G.E. had refused to bargain even before negotiations were to begin. As a result of this refusal, the Board held that it was not required to determine whether IUE's assertion was in fact true. Absent proof of an agreement between these unions that would bind the IUE to accept only those contract terms approved by the CCB, G.E. had a duty to bargain with the IUE's multi-union bargaining committee. Therefore, the mere presence of the non-IUE union committee members did not justify G.E.'s walk-out and refusal to bargain. The Board expressly limited the application of its decision by its focus on the pre-negotiation walk-out and the lack of proof of a conspiratorial union agreement by which IUE could accept only CCB-approved terms. The impact of the holding, however, may in subsequent cases extend

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6 Also at issue was whether G.E. was guilty of unfair labor practices for refusing to bargain before the bargaining date set by the labor contract. That question, however, will not be dealt with here since G.E.'s refusal continued beyond the contractually required bargaining date.


9 69 L.R.R.M. at 1306-07.

10 69 L.R.R.M. at 1311.
beyond those limits to allow use of coalition bargaining committees in all situations, because the unions need never enter into any such binding conspiratorial agreement in order to carry out their co-ordinated plan. G.E. was aware of this implication and insisted that the mere presence of members of other unions on IUE's committee justified its refusal to bargain. Viewed in light of these considerations, the decision represents a further development in the use of co-ordinated bargaining. This extension, however, raises serious questions that are certain to be considered by the courts.

The development of co-ordinated bargaining has resulted in a conflict of valid policies, each with a statutory foundation. Section 711 of the Act guarantees employees the right to select their own bargaining representatives. This in turn involves the correlative right of that representative to choose the members of its negotiating committee. This right, however, has been construed not to be absolute. It has assumed a subordinate role whenever it has produced a situation that might violate section 8(d)12 of the Act. This section, as does the entire Act generally, requires the parties to refrain from conduct destroying the atmosphere conducive to good faith bargaining. When a company is to bargain with an individual union, as it is required to do, the presence of members of other unions with which the company has contracts may have an adverse effect on the collective bargaining atmosphere. The employer may resent the presence of "outsiders" from unions whose contracts have not yet expired. It may in fact result in the company bargaining with a union when it is not required to do so. The co-ordinated bargaining committee, although properly selected by the union, may therefore present an impediment to good-faith bargaining.

The majority opinion in General Electric Co. recognized that the rights of a union to select its bargaining representatives are not absolute, but limited the exceptions to those rights to "unusual situations where the chosen representative is so tainted with conflict or so patently obnox-

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11 Employees shall have the right to self-organization . . . 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. . . .

12 To bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement. . . .
CO-ORDINATED BARGAINING

ious as to negate the effect of good-faith bargaining."\(^\text{13}\) In reaching its decision that no unusual circumstances existed in General Electric Co., the Board relied on two recent decisions.

In *Standard Oil Co. v. NLRB*,\(^\text{14}\) the union’s bargaining committee included employees who were members of different locals, but were still within the same international union of which the negotiating union was a member. The company believed that this technique was an attempt to bring about company-wide bargaining, and therefore refused to bargain with this committee. The court affirmed the Board’s holding that the company’s refusal to bargain was unjustified. This decision is distinguishable on its facts from the General Electric case. In *Standard Oil*, there were several locals of one international union; whereas in General Electric there were seven other different internationals represented on IUE’s committee.

The facts of *American Radiator & Standard Sanitary Corp. v. NLRB*\(^\text{15}\) are more directly in point with General Electric. The Board had ruled that the employer was required to bargain with the union’s committee that included members of other unions.\(^\text{16}\) The court denied enforcement noting that the allegedly unfair employer practice was the mere writing of a letter suggesting the parties continue to bargain, pending the Board’s determination, without the presence of the outsiders. The company then acquiesced to the union’s counter-offer for the company to continue to bargain under protest. The court concluded that this conduct did not add up to a refusal to bargain.\(^\text{17}\) Since the court did not decide the issue involved in General Electric, the decision is hardly a strong precedent for the Board’s decision in General Electric.

The Board’s exceptions to the right to select one’s own representative have been limited to “unusual situations,” and it failed to see anything unusual in General Electric. There have been only a few cases finding such a situation as the Board has previously shown a reluctance to give effect to that limitation. In several cases, in order to overcome this reluctance, the courts have reversed the Board’s determinations. In each case the courts recognized the right to select one’s own bargaining representative. That right was subordinated, however, as threatening the required good faith atmosphere.

\(^{13}\) 69 L.R.R.M. at 1307.
\(^{14}\) 322 F.2d 40 (6th Cir. 1963).
\(^{15}\) 381 F.2d 632 (6th Cir. 1967).
\(^{16}\) 155 N.L.R.B. 736 (1965).
\(^{17}\) 381 F.2d at 635.
In *NLRB v. Kentucky Utilities Co.*, the company refused to bargain with a union's representative who was a former company employee. The representative in question had been discharged by the company but then ordered reinstated with back pay by the Board in a prior proceeding. He declined reinstatement, however, and obtained employment as an international representative of his local's international union. The Board also had held in a former case that certain testimony given by this representative against the company was untrue. He had, in addition, expressed his purpose to destroy this company financially. The Board in *Kentucky Utilities* held that the company's refusal to negotiate constituted a violation of the right of a selected bargaining representative to choose the individual members of its committee. The court of appeals reversed the Board and emphasized that the policy of the National Labor Relations Act was to insure an atmosphere of good faith for collective bargaining. This policy, it was held, would be of no value if the company were required to bargain with this particular union negotiator. The Board's decision was modified accordingly.

A former union negotiator was the company's bargaining representative in *NLRB v. International Ladies' Garment Workers' Union*. This representative had held highly confidential positions in representing the union with whom he was now employed to negotiate. The time of this change of employment was in fact close to the date on which bargaining was to begin. An official of the company had tauntingly indicated to the union that they had "put one over on the union" and had "the union on the spot." The Board held that the union's refusal to bargain was not justified in this situation. Here again the court of appeals, though recognizing the rights of each party to choose its representative, refused to find these rights "absolute or immutable." In denying enforcement, the court concluded that any negotiations under these circumstances would be in form only, without good faith.

In *Bausch & Lomb Optical Co.*, the board held that a union that is also a business rival of an employer is not a proper bargaining repre-
sentative of that company's employees. The Board stated that the mere fact that the anticipated conflicts had not yet been realized was not controlling. The latent danger was sufficient. To require the employer to meet with this union would result in bargaining in which "at best, intensified distrust of the Union's motives would be engendered."

In the more recent case of NLRB v. David Buttrick Co., the employer refused to meet with a local union on the ground that a loan arrangement by the local's international with the employer's competitor had raised a serious conflict of interests. The Board concluded that there was insufficient evidence of connection between the local and the loan, and held unlawful the employer's refusal to bargain. The court of appeals stated that although employees have the right to be represented by persons of their own choosing, "there is the correlative duty of complete loyalty of such representatives to their constituents." In remanding the case the court indicated that the Board should not be concerned with the local's autonomy or with its connection with the loan, but rather with an assessment of the potential, not merely actual, conflict of interest.

The principle to be gained from these cases is that whenever a chosen representative has an unusually hostile interest in the negotiations, or an independent concern therein that may result in a conflict of interest, exception may be taken if his presence threatens to disrupt good faith bargaining. In applying this principle to the General Electric case, the dissent stated:

While . . . those who represent other units may claim and honestly intend to devote their particular skills solely to bargaining in behalf of the employees currently under consideration, it is virtually impossible for them to separate their own ultimate goals and problems from those of the unit for which they are currently bargaining.

A final question is the effect of co-ordinated bargaining upon the individual bargaining units. Section 9 of the Act provides that the bargaining unit will be that unit certified by the Board. The employer is bound to bargain only with the duly elected representative of that certified unit. The Board and the courts have long held that it is a violation of

27 Id. at 1561.
28 361 F.2d 300 (1st Cir. 1966).
30 361 F.2d at 305.
31 69 L.R.R.M. at 1312.
a union's duty to bargain to insist upon an expansion or change in the certified unit that it represents. This policy was expressed in *Kennecott Copper Corp.* where the Board held that two separate units could not be merged for bargaining, absent an election by the employees approving such action. As stated by the dissent in *General Electric*:

[T]o allow representatives of other units to attend and participate in negotiations for a unit which they do not represent may have the effect of broadening or narrowing, at the pleasure of the unions concerned, the numbers, types, and locations of the employees covered or affected by the bargaining. This in turn would conflict with the responsibility of the Board to determine the scope of the appropriate unit under Section 9 of the Act, and would curtail the Board's power to enforce the good faith bargaining requirement of Sections 8(a)(5) and 8(b)(3).

In addition to these legal questions, the practical reasons for the union's insistence upon this new bargaining technique must be examined. Co-ordinated bargaining has had its greatest appeal where labor has felt frustrated by the traditional individual union-management negotiations. One of the reasons this technique was instituted by the unions has been the numerous conglomerate mergers that have weakened the union's position relative to management in collective bargaining. As a result of this inequality of bargaining power, the unions found that they could increase their power by working together and maintaining a high level of inter-union communication. Through this process the unions have realized that to bargain effectively, they must bargain for common con-

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34 98 N.L.R.B. 75 (1952).

35 See also UMV v. Pennington, 381 U.S. 657 (1965); United States Pipe & Foundry Co. v. NLRB, 298 F.2d 873 (5th Cir. 1962).

36 69 L.R.R.M. at 1312. The majority did not think it necessary to discuss this issue.


tract terms. These union practices are not be condemned; they may in fact be quite necessary. The legal implications of this practice, however, may lead the courts to conclude that it presents too great a threat to good faith bargaining and to the certified bargaining units to be sustained.

Union insistence upon employer acceptance of a coalition bargaining committee therefore is not always protected by section 7 of the Act contrary to the Board's implication in General Electric. The detrimental effect of this practice on the requirement of good faith bargaining may have justified the employer's refusal to negotiate with that committee. This conclusion, however, does not preclude the employer's consent to the union's including "outsiders" on its committee. The propriety of such consent has been recognized by the courts, co-ordinated bargaining is not illegal per se. Its use, however, should properly be limited to those situations involving no threat to good faith bargaining.

RICKY LEE WELBORN

Municipal Corporations—Constitutional Law—Eviction From Public Housing Projects

Public housing in the United States originated in the 1930's as part of the larger effort to escape from the clutches of the Great Depression. The Wagner-Steagall Act of 1937 signaled the entry of the federal government into the field of housing and, although amended many times, remains in force today with its basic design still largely intact. Today, more than one out of every one hundred persons in the United States lives in federally assisted, low-rent public housing.

40 Id. According to Mr. Hilderbrand, taking wages out of competition among unions is the most sought after goal of the unions.
42 It should be noted that employers may join together in multi-employer associations for the purpose of collective bargaining, if done in good faith and with the consent of the union, with each party retaining the right to withdraw from this bargaining arrangement upon reasonable notice. See NLRB v. Truck Drivers, Local 449, 353 U.S. 87 (1957); Publishers' Ass'n of New York City v. NLRB, 364 F.2d 293 (2d Cir.), cert. denied, 385 U.S. 971 (1966); Pacific Coast Ass'n of Pulp & Paper Mfrs., 163 N.L.R.B. No. 129 (1967); Retail Associates, Inc., 120 N.L.R.B. 388 (1958).

2 Rosen, Tenants' Rights in Public Housing, in Housing for the Poor: Rights