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Labor Law -- Unfair Labor Practices -- Employer By-passing Designated Bargaining Agent

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when compelled to speak\textsuperscript{37} and the voice heard at the time the rape was
committed should not be excluded as a violation of the privilege against
self incrimination. It should be admitted as a fact calculated to aid the
jury in discovering the truth, the correctness of the identification going
to the weight and not the admissibility of the evidence.\textsuperscript{38}

\textbf{Leroy F. Fuller.}

\textbf{Labor Law—Unfair Labor Practices—Employer By-passing}
\textbf{Designated Bargaining Agent}

An employer, after having bargained to an impasse with the certified
representative of the employees, submitted his final proposal directly to
strikers individually by mail, requesting them to vote on a ballot pro-
vided as to whether they would be willing to return to work upon the
terms proposed by the employer but rejected by the union. The National
Labor Relations Board found\textsuperscript{1} that the employer interfered with the
rights of the employees to bargain collectively within the meaning of
Section 8(a)(1)\textsuperscript{2} of the National Labor Relations Act. Upon petition
to the Circuit Court of Appeals for the Seventh Circuit for enforcement
of the order, it was held that the evidence did not justify a finding of
an unfair labor practice because: (1) the letter disclosed no effort to
bargain with the employees individually; (2) the employer had evi-
denced his good faith in dealing with the union; and (3) the employer

\textsuperscript{37} No power of compulsion beyond that ordinarily permitted in obtaining testi-
mony should be allowed. The powers of compelling testimony are discussed in 8
\textit{Wigmore, Evidence} §2195 (3d ed. 1940). If the accused refuses to repeat the
words, testimony as to this refusal would be competent. State v. Graham, 74
N. C. 646 (1876).

\textsuperscript{38} The question of admissibility of voice identification on grounds other than
violation of the privilege against self-incrimination is beyond the scope of this
note. Proper safeguards should be taken to prevent inducement or suggestion
of the identification. The accused should be presented in company with others
who are similar in appearance. This procedure was followed in the instant case.
3 \textit{Wigmore, Evidence} §§786, 786a (1946). In general such identification is ad-
missible, its probative value to be a question for the jury. \textit{Riner v. State}, 128
Fla. 848, 176 So. 38 (1937); \textit{Fussell v. State}, 93 Ga. 450, 21 S. E. 97 (1895);
\textit{Commonwealth v. Williams}, 105 Mass. 67 (1870); 2 \textit{Wigmore, Evidence} §660
(3d ed. 1940); \textit{Stansbury, North Carolina Evidence}, §96 (1946).

\textsuperscript{1} Penokee Veneer Co., 74 N. L. R. B. 1683 (1947).

\textsuperscript{2} 49 Stat. 452 (1935), 29 U. S. C. §158(1) (1946), as amended by National
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.” Sec. 7 provides, “Employees shall have the right to self organization,
to form, join, or assist labor organizations, to bargain collectively through repre-
sentatives of their own choosing, and to engage in other concerted activities for
the purpose of collective bargaining or other mutual aid or protection, and 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).”
had never been charged with failure to bargain collectively nor any previous unfair conduct.3

Section 14 of the Act provides that it is the policy of the United States to remove recognized sources of industrial strife by establishing equality of bargaining power and encouraging collective bargaining between employers and employees. Fundamental to the whole structure of collective bargaining are the exclusive bargaining rights5 granted to the proper representative of the employees. The duty of the employer to bargain collectively with the union designated by the employees includes the negative duty to refrain from bargaining with any other group or individual.6

Fact situations of a wide variety have arisen before the National Labor Relations Board which present the question of whether or not it is an unfair labor practice for the employer to disregard or by-pass the union designated by the employees as their bargaining representative. The Board has consistently held that it is an unfair labor practice for an employer to by-pass the designated representative of the employees by dealing directly with them individually7 or by unilaterally determining conditions of employment.8 Similarly, unfair labor prac-

8 See, e.g., Hartz Stores, 71 N. L. R. B. 848 (1946); May Dept. Stores Co., 53 N. L. R. B. 1366 (1943), enforcement granted, 146 F. 2d 66 (C. C. A. 8th 1944), aff'd, 326 U. S. 376 (1945); Hirsch Mercantile Co., 45 N. L. R. B. 377
tices have been found when an employer urges striking employees to return to work under the employer's terms regardless of the decision of their chosen bargaining representative, or when an employer conducts a poll among the employees to determine their wishes about returning to work.

A review of the cases in the circuit courts of appeals reveals a divergence of opinion. The Seventh Circuit Court of Appeals set aside the Board's finding of an unfair labor practice where the employer conducted his own strike vote subsequent to a strike resolution of the union, but approved a finding of an unfair labor practice when an employer went over the head of the union and submitted an employment contract to a mass meeting of employees. In National Labor Relations Board v. Remington Rand the Second Circuit Court of Appeals upheld a finding of an unfair labor practice where an employer conducted a strike vote of his own, disregarding the strike vote conducted by the union. The Board's finding of an unfair labor practice was rejected by the Sixth Circuit Court of Appeals where the employer had polled the employees, rather than bargain with their representative, with reference to holiday and overtime work. The Fifth Circuit Court of Appeals conceded that it was unfair for an employer to effect a wage cut unilaterally but reached an opposite result when the employer unilaterally increased wages.


National Labor Relations Board v. Crompton-Highland Mills, Inc., 167 F.
The United States Supreme Court faced the question in two cases. In *Medo Photo Supply Corp. v. National Labor Relations Board*,\(^1\) at the request of the employees, the employer negotiated with them and granted a wage increase without the intervention of the union. In *May Department Stores Co. v. National Labor Relations Board*\(^2\) the employer unilaterally applied to the War Labor Board for approval of a wage increase. In both cases the Court held that the National Labor Relations Board was justified in finding unfair labor practices in spite of the extenuative circumstances that the *Medo* case employees in effect requested the employer to by-pass the union, and the *May* case employer's unilateral action consisted of a mere *preliminary step* toward a wage adjustment. Thus the Supreme Court has given strong support to the proposition that it is unfair for the employer to by-pass the designated employee representatives either by dealing with employees directly or by unilateral action.

The findings of unfair labor practices in these cases are not always based on the same provision of the Act. The conduct of the employer in by-passing the union has been treated as evidence of bad faith in bargaining and therefore a failure to bargain as required in Section 8(a)(5),\(^3\) and an interference with the rights of the employees which are protected by the general terms of Section 8(a)(1).\(^4\)

Though a violation of 8(a)(5) is technically a violation of 8(a)(1) also,\(^5\) it is not necessary to find a violation of 8(a)(5) in order to find

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\(^{2}\) 321 U. S. 678, 684-685 (1943) ("That it is a violation of the essential principle of collective bargaining and an infringement of the Act for the employer to disregard the bargaining representative by negotiating with individual employees . . . with respect to wages, hours and working conditions was recognized by this court . . . . The statute guarantees to all employees the right to bargain collectively through their chosen representative. Bargaining carried on by the employer directly with the employees . . . who have not revoked their designation of a bargaining agent, would be subversive of the mode of collective bargaining which the statute has ordained, as the Board, the expert body in this field, has found. Such conduct is therefore an interference with the rights guaranteed by §7 and a violation of §8(1) of the Act.").

\(^{3}\) 326 U. S. 376, 384 (1945) (citing the *Medo* case, the Court said, "Employer action to bring about changes in wage scales without consultation and negotiation with the certified representative of its employees cannot, we think, logically or realistically, be distinguished from bargaining with individuals or minorities.").


\(^{5}\) May Dept. Stores Co. v. National Labor Relations Board, 326 U. S. 376 385 (1945); *Medo Photo Supply Corp. v. National Labor Relations Board*, 321 U. S. 678, 684 (1943) ("Such conduct is therefore an interference with the rights guaranteed by §7 and a violation of §8(1) of the Act."); National Labor Relations Board v. Whittier Mills Co., 111 F. 2d 474 (C. C. A. 5th 1940) (conduct may constitute failure to bargain, interference, or both).

\(^{6}\) Arts Metal Construction Co. v. National Labor Relations Board, 110 F. 2d
a violation of §8(a)(1). Thus it appears that by-passing the designated representative of the employees, if not a refusal to bargain, may constitute interference, though the possibility seems to be overlooked on occasion.

The instant case is open to criticism on two principle grounds:

1. The reasons given by the court to support its conclusion that the employer committed no unfair labor practice in conducting the poll among the employees may constitute a valid argument that the employer had not refused to bargain with the designated union within the meaning of §8(a)(5). However, the reasoning does not support a conclusion that the employer had not interfered with rights of the employees protected by §8(a)(1), the only unfair labor practice charged against the employer in this case.

2. On the merits, it is difficult to conceive of any employer conduct which could more effectively interfere with the rights of the employees to bargain collectively through the representative of their own choosing. Though the mere act of conducting a poll among strikers to determine their wishes about returning to work may appear to be innocent on the surface, a consideration of the effect of such conduct brings out a different picture. By contacting each employee individually, the employer subjects them to the same pressures which the Act was intended to eliminate and "minimizes the influence of organized bargaining." An

148 (C. C. A. 2d 1940); Note, 9 Geo. Wash. L. Rev. 360, 362 ("The committee reports indicate that the unfair labor practices set forth in subsections (2), (3), (4), and (5) of section 8, are not intended to limit the guaranties of subsection (1) of that section, but are merely intended to set out with greater particularity some of the unfair labor practices requiring such amplification. Sen. Rep. No. 973, 74th Cong. 1st Sess., at 9; H. R. Rep. No. 1147, 74th Cong. 1st Sess., at 17."). But cf. National Labor Relations Board v. Express Publishing Co., 312 U. S. 426 (1941).

23 It is believed that National Labor Relations Board v. Algoma Plywood & Veneer Co., 121 F. 2d 602 (C. C. A. 7th 1941) is in this category. See note 24 infra.

24 The same error in reasoning was committed by the same court in National Labor Relations Board v. Algoma Plywood & Veneer Co., 121 F. 2d 602 (C. C. A. 7th 1941), relied upon in the principal case. There the employer's conduct in holding his own strike vote was said to be a "proper and necessary business expedient." Assuming that this justifies a refusal or failure to bargain, does it necessarily follow that there has been no interference with the employees' right to bargain collectively through their representative?

immediate consequence would be to discredit the union in the eyes of the employees by demonstrating that the union does not effectively represent them.27 The ultimate consequence may be the complete destruction of the actual bargaining capacity of the representative.28

LIVINGSTON VERNON.

Libel—Theories of Liability—Publication as Single or Multiple Tort

At common law it was uniformly held that each time a libelous article was brought to the attention of a third person a new publication had occurred and each publication gave rise to a separate cause of action.1 This is still the law in many jurisdictions2 and is the view adopted by the Restatement of Torts,3 but the weight of modern authority favors the "single publication" rule of liability.4 This rule contemplates that, whereas each publication does give rise to a separate cause of action, in the case of newspapers, magazines and books there is but one publication which occurs at the place where the alleged libel is published5 and is completed when the libelous matter has been composed, printed and generally distributed.6

27 National Labor Relations Board v. Remington Rand, 94 F. 2d 862, 870 (C. C. A. 2d 1938).
28 Ibid.
1 OGDENS, LIBEL AND SLANDER 139 (6th ed. 1929); see Age-Herald Pub. Co. v. Huddleston, 207 Ala. 40, 43, 92 So. 193, 196 (1921).
3 RESTATEMENT, TORTS §578(b) (1938).
6 General distribution to newsstands and subscribers is all that is required. The mailing out of miscellaneous copies to replace those lost or damaged, or in response to requests for the purchase of single copies is a part of the original publication and does not constitute a republication such as will amount to an additional tort