

12-1-1960

Labor Law - Economic Pressure in the Context of a Refusal to Bargain

Herbert Odell

Follow this and additional works at: <https://repository.law.miami.edu/umlr>

Recommended Citation

Herbert Odell, *Labor Law - Economic Pressure in the Context of a Refusal to Bargain*, 15 U. Miami L. Rev. 215 (1960)

Available at: <https://repository.law.miami.edu/umlr/vol15/iss2/7>

This Case Noted is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact library@law.miami.edu.

collision of his aircraft with another. The owner's direct control is immaterial.⁹ However, the owner's consent to the operation is necessary.¹⁰

The instant case has precedent for applying the automobile law to that of airplane collision.¹¹ Precedent is also to be found for denoting the airplane a dangerous instrumentality.¹² However, it is suggested that the result is a compilation of nonsense¹³ and that the reasoned, logical view is that the airplane is not a dangerous instrumentality.¹⁴ Assuming, without acknowledging, the result to be socially desirable does not excuse the conclusion. Results reached by courts should only be reached by processes de jure. All other results are properly within the province of the legislature.

A. H. TOOTHMAN

LABOR LAW — ECONOMIC PRESSURE IN THE CONTEXT OF A REFUSAL TO BARGAIN

After the expiration of a collective bargaining agreement, and during the period of negotiations, the union utilized harassing tactics¹ to pressure management into acceptance of a new contract on favorable terms. After

9. *Grain Dealers Nat'l Mut. Fire Ins. Co. v. Harrison*, 190 F.2d 726 (5th Cir. 1951) (applying Florida law); *Lynch v. Walker*, 159 Fla. 188, 31 So.2d 268 (1947); *Atlantic Food Supply Co. v. Massey*, 152 Fla. 43, 10 So.2d 718 (1942); *Blanford v. Nourse*, 120 So.2d 830 (Fla. App. 1960). These cases trace the genesis and summation of the Florida automobile dangerous instrumentality doctrine and its initial extension to the airplane.

10. *Ibid*; ALPERT, *FLORIDA AUTOMOBILE ACCIDENT LAW* 110-40 (1958).

11. *Tiedt v. Gibbons*, 1939 U.S. Av. 63 (Cook County Ct., Ill. 1937); *State v. Henson Flying Service*, 191 Md. 240, 60 A.2d 675 (1948); *Davies v. Oshkosh Airport, Inc.*, 214 Wis. 236, 252 N.W. 602 (1934).

12. *Kadylak v. O'Brien*, 32 F. Supp. 281 (W.D. Pa. 1941); RESTATEMENT, *TORTS* § 520 (1938).

13. Proper classification as ultrahazardous or as a dangerous instrumentality requires that the object not be in common usage and that it involves risk of harm which cannot be removed with *utmost care*. Neither of these conditions is presently fulfilled by the airplane. RESTATEMENT, *TORTS* § 520 (1938).

14. *Johnson v. Central Aviation Corp.*, 103 Cal. App.2d 102, 111, 229 P.2d 114, 120 (1951): "It is true that the law formerly looked upon aviation as an ultrahazardous activity. . . . However, this view has come to be modified and now . . . an airplane is not an inherently dangerous instrument." Accidents involving colliding airplanes should be carefully segregated from accidents involving an airplane with ground objects. The latter group fundamentally sounds in trespass. See, Eubank, *Land Damage Liability in Aircraft Cases*, 57 *DICK. L. REV.* 188 (1953); Vold, *Strict Liability for Aircraft Crashes and Forced Landings on Ground Victims Outside of Established Landing Areas*, 5 *HASTINGS L.J.* 1 (1953).

1. This consisted of various on-the-job activities which were initiated subsequent to the expiration of the old contract and entailed the following: refusal to solicit new business; refusal to comply with company reporting procedures; refusal to participate in the "May Policyholders' Month Campaign"; reporting late at the district offices; refusal to perform customary office duties; refusal to be present at special business conferences; picketing and distributing leaflets to policyholders; soliciting policyholders' signatures on petitions; and presenting these petitions to the company while engaging in mass demonstrations.

several months of bargaining, an agreement was finally consummated. Management, however, charged the union with a violation of section 8(b)(3) of the National Labor Relations Act.² The National Labor Relations Board held that the union's conduct constituted a refusal to bargain.³ The Court of Appeals for the District of Columbia denied the Board's petition for enforcement of its order.⁴ On certiorari to the Supreme Court, *Held*, affirmed: the use of economic pressure is not antithetic to "good faith" bargaining; the Board cannot base a refusal to bargain on the mere circumstance of conduct constituting an exertion of economic pressure. *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477 (1960).

Prior to the decision in the instant case, the NLRB had found both management and labor guilty of bargaining in "bad faith"⁵ when they exerted economic pressure during collective bargaining negotiations.⁶ The elements that comprise economic pressure are not subject to definitive explanation, but depend on the factual circumstances of the individual case.⁷ Labor has been found by the Board to have employed economic pressure in the context of an 8(b)(3) violation when it engaged in strikes in violation of an existing agreement,⁸ slowdowns,⁹ and harassing tactics during bargaining negotiations.¹⁰ Management's abidment of econo-

2. Section 8(b)(3) of the National Labor Relations Act provides: "It shall be an unfair labor practice for a labor organization or its agents . . . to refuse to bargain collectively with an employer, provided it is the representative of his employees. . . ." National Labor Relations Act (Wagner Act) as amended by the Labor Management Relations Act (Taft-Hartley Act) § 8(b) (3), 61 Stat. 141 (1947), 29 U.S.C. § 158(b) (3) (1958).

3. *Insurance Agents' Int'l Union*, 119 N.L.R.B. 768 (1957).

4. *Insurance Agents' Int'l Union*, 260 F.2d 736 (D.C. Cir. 1958). This case is commonly referred to as the *Prudential* case.

5. Section 8(d) of the Taft-Hartley Act defines collective bargaining and requires that the parties bargain in "good faith." "For the purposes of this section, 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 conditions of employment. . . ." (Emphasis added.) National Labor Relations Act (Wagner Act) as amended by the Labor Management Relations Act (Taft-Hartley Act) § 8(d), 61 Stat. 142 (1947), 29 U.S.C. § 158(d) (1958). This section was passed in 1947 and embodies the prior determinations of the courts that the duty to bargain requires "good faith" negotiations. See cases collected at 29 U.S.C.A. § 158, n.268 (1956).

6. *Amalgamated Lithographers of America*, 124 N.L.R.B. 298 (1959); *Quaker State Oil Ref. Corp.*, 121 N.L.R.B. 334 (1958); *Insurance Agents' Int'l Union*, 119 N.L.R.B. 768 (1957); *International Union, UMW*, 117 N.L.R.B. 1095 (1957), *set aside*, 257 F.2d 211 (D.C. Cir. 1958); *Textile Workers Union of America*, 108 N.L.R.B. 743 (1954), *set aside*, 227 F.2d 409 (D.C. Cir. 1955).

7. *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 505 (1960) (separate opinion of Mr. Justice Frankfurter) "It [the Board] must proceed in terms of specific conduct which it weighs as a more or less reliable manifestation of the state of mind with which bargaining is conducted. No conduct in the complex context of bargaining for a labor agreement can profitably be reduced to such an abstraction as 'economic pressure'."

8. *International Union, UMW*, 117 N.L.R.B. 1095 (1957).

9. *Amalgamated Lithographers of America*, 124 N.L.R.B. 298 (1959) (stated refusal to work overtime).

10. *Insurance Agents' Int'l Union*, 119 N.L.R.B. 768 (1957) (see note 1 *supra*); *Textile Workers Union of America*, 108 N.L.R.B. 743 (1954) (organized refusal to work overtime, an unauthorized extension of rest periods, directing employees to refuse to work special hours, unannounced walkouts).

mic pressure has consisted of closing some of its facilities after threatening a lockout, shortening its work week during collective bargaining negotiations¹¹ and engaging in a partial or a complete lockout.¹² The Board seemingly would allow management to exert economic pressure as a defensive¹³ measure.¹⁴

The prohibition of economic weapons by the Board is based on its belief that the National Labor Relations Act¹⁵ requires "reasoned discussion in a background of balanced bargaining relations. . . ."¹⁶ The Board rationalizes its regulation of economic pressures as a necessary corollary to the accomplishment of this objective.

In the Federal Courts of Appeals the use of economic pressure has been considered in accord with "good faith" bargaining contrary to the determinations of the NLRB.¹⁷ As early as 1942, the Sixth Circuit stated that "the parties to labor controversies are left free under the act to use their own economic strength in all lawful ways to obtain their respective advantages."¹⁸ In the *Personal Products* case,¹⁹ the Court of Appeals for the District of Columbia held that the use of harassing tactics by a union was an exertion of economic pressure and that there was not "the slightest inconsistency between a genuine desire to come to an agreement and use of economic pressure to get the kind of agreement one wants."²⁰ The *ratio decidendi* of the court was that Congress never intended

11. *Quaker State Oil Ref. Corp.*, 121 N.L.R.B. 334 (1958).

12. *Great Falls Employers' Council, Inc.*, 123 N.L.R.B. 974 (1959). The Supreme Court has stated that "the unqualified use of the term lock-out in several sections of the Taft-Hartley Act is statutory recognition that there are circumstances in which employers may lawfully resort to the lock-out as an *economic weapon*." (Emphasis added.) *NLRB v. Truck Drivers' Local 449*, 353 U.S. 87, 92 (1957).

13. A defensive measure would be activity on the part of one party in retaliation to the other party's acts, *i.e.*, a lockout by an employer in the face of a threatened strike by a union.

14. *Great Falls Employers' Council, Inc.*, 123 N.L.R.B. 974 (1959). The use of economic pressure as a defensive measure was approved by the Supreme Court in *NLRB v. Truck Drivers' Local 449*, 353 U.S. 87 (1957), decided prior to the *Great Falls Employers'* case. However, management in *Truck Drivers' Local 449* was not charged with a refusal to bargain, but rather of violating other sections of the NLRA. Therefore the decision cannot be used as a premise upon which to base a conclusion that such pressure was considered in conformity with "good faith" bargaining. See also, 24 NLRB ANN. REP. 66 (1959); *American Brake Shoe Co. v. NLRB*, 244 F.2d 489 (7th Cir. 1957).

15. National Labor Relations Act (Wagner Act) 49 Stat. 449 (1935), as amended, 29 U.S.C. §§ 151-166 (1958).

16. *Phelps Dodge Copper Prods. Corp.*, 101 N.L.R.B. 360, 368 (1952). See also the Board's reasoning in *Textile Workers Union of America*, 108 N.L.R.B. 743 (1954); 23 NLRB ANN. REP. 89 (1958).

17. *Insurance Agents' Int'l Union v. NLRB*, 260 F.2d 736 (D.C. Cir. 1958); *International Union, UMW v. NLRB*, 257 F.2d 211 (D.C. Cir. 1958); *Textile Workers Union of America v. NLRB*, 227 F.2d 409, (D.C. Cir. 1955).

18. *NLRB v. Knoxville Publishing Co.*, 124 F.2d 875, 881 (6th Cir. 1942). The court, however, did find management guilty of a refusal to bargain on the circumstances involved in this particular case.

19. *Textile Workers Union of America v. NLRB*, 227 F.2d 409 (D.C. Cir. 1955).

20. *Id.* at 410.

the Board to regulate such conduct.²¹ In a later case,²² the same court stated *obiter* that a strike during negotiations in violation of an existing collective bargaining agreement did not constitute a refusal to bargain.²³ The Courts of Appeals have rejected the Board's contention that the regulation of economic weapons is necessary to implement congressional intent under section 8(b)(3) of the NLRA.²⁴

The Supreme Court, prior to the decision in the *Prudential* case, had not determined the effect of economic pressure on the duty to bargain in "good faith."²⁵ The Court had held, however, that the Board could not declare a particular act as a *per se* refusal to bargain.²⁶ The entire factual pattern has to be considered in order to ascertain the subjective intent of a party engaged in collective bargaining negotiations.²⁷ In the instant case, the Court could have reversed the Board on the basis of this doctrine alone. However, it chose to go further. The Court reasoned that Congress never intended the act to control the substantive terms of a collective bargaining agreement. By allowing the Board to regulate the economic pressures used by either party, in effect, the Board would be substantially controlling these terms.²⁸ Thus, the use of economic pressure was not inconsistent with "good faith" bargaining.²⁹ The act requires "good faith" collective bargaining and permits the use of economic weapons during bargaining negotiations. The Court did not preclude the Board from considering economic pressure as one aspect of the totality of bargaining conduct.³⁰ Thus, the Board in determining the subjective "good faith" of the parties may take into consideration the exercise of economic pressures.³¹ The Court did hold that economic pressure alone

21. The court reasoned that on the basis of the Supreme Court's interpretation of the NLRA in *International Union, UAW v. Wisconsin Employment Relations Bd.*, 336 U.S. 245 (1949), regulation of this type of conduct was not within the Board's domain.

22. *International Union, UMW v. NLRB*, 257 F.2d 211 (D.C. Cir. 1958).

23. The court's rationale was that Congress intended that the courts rather than the Board should enforce collective bargaining agreements. *International Union, UMW v. NLRB*, 257 F.2d 211, 214-15 (D.C. Cir. 1958).

24. See note 2 *supra*.

25. The Supreme Court had held that a unilateral wage increase by an employer during collective negotiations, where the employer failed to notify the union of the action he was taking and the wage increase was greater than any he had been willing to discuss with the union, constituted a refusal to bargain. *NLRB v. Crompton-Highland Mills, Inc.*, 337 U.S. 217 (1949). For the Board's view on unilateral actions by an employer see: 17 NLRB ANN. REP. 168 (1952); 16 NLRB ANN. REP. 199 (1951); 15 NLRB ANN. REP. 122 (1950).

26. *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395 (1952).

27. Justice Frankfurter's separate opinion in the *Prudential* case is in accord with this view. His test for determining whether a party has bargained in good faith would be based on the totality of conduct. Included within this totality is any exertion of economic pressure as well as other relevant conduct that should be considered. *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 508 (1960).

28. *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 490 (1960).

29. *Id.* at 490-91.

30. *Id.* at 498-99.

31. For varying views on this point see: Note, 62 W. VA. L. REV. 410 (1960); Note, 28 GEO. WASH. L. REV. 924 (1960).

could not be considered "bad faith."³² Of course, where particular economic conduct is specifically prohibited by the act, it is, of itself, a violation.³³

The decision in the *Prudential* case is an emphatic denial of the Board's power to regulate economic weapons during collective bargaining in the context of an 8(b)(3) violation. The attempted regulation of these weapons by the Board placed it in a position of controlling the substantive terms of any resultant collective bargaining contract.³⁴ Congress did not intend such a result.³⁵ Although the writer wishes to express no opinion as to whether this will have beneficial effect on national labor relations, it is submitted that the decision is an implementation of congressional intent as expressed in the current act. Whether the use of economic weapons will be extended to the area of section 8(a)(5)³⁶ was not determined. If congressional intent is to be *fully* implemented, it certainly should.³⁷

HERBERT ODELL

32. *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 494-95 (1960).

33. *Id.* at 498-99.

34. See, Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401 (1958); Delony, *Good Faith in Collective Bargaining*, 12 U. FLA. L. REV. 378 (1959).

35. *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 484-87 (1960).

36. "It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees. . . ." (Emphasis added.) National Labor Relations Act (Wagner Act) § 8(5), 49 Stat. 452-53 (1935), as amended, 29 U.S.C. § 158(a)(5) (1958).

37. H.R. REP. No. 245, 80th Cong., 1st Sess. 30, 31 (1947).