LABOR LAW

NLRB AS PROTECTOR OF EMPLOYEES FROM DISCHARGE FOR MAKING SUGGESTIONS TO MANAGEMENT

The United States Circuit Court of Appeals for the Seventh Circuit has recently held that the National Labor Relations Act prevented an employer's discharging employees solely because they met and formulated suggestions to be made to management. This is the first instance where protection has been granted to an employee activity which involved neither self-organization nor collective bargaining. The right of employees to suggest was found in the "mutual aid or protection" clause of Section 7 of the Act.

A group of insurance salesmen, employees of the Phoenix Mutual Life Insurance Company, learned that the Company's cashier was about to retire. Feeling that their own financial welfare in part depended upon whether the cashier's duties were performed efficiently, the salesmen met to draft a letter to the branch manager, profferring their ideas and suggestions regarding the appointment of the cashier's successor. The branch manager learned of the meeting and discharged Davis and Johnson, two salesmen who had been active in the preparation of the letter. There was no other apparent ground for the discharge. No question of self-organization was involved; the salesmen belonged to no union. Davis and Johnson petitioned the NLRB for re-instatement, charging that their discharge was an interference with employee rights guaranteed them by Section 7[1] of the NLRA, and was therefore an unfair labor practice under Sections 8 (1) and 8 (3)[2] of the Act. The Board sustained the contention of the discharged salesmen and

1. Section 7. "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection." 49 STAT. 452 (1935), 29 U. S. C. § 157 (1940), prior to amendment by Labor Management Relations Act, 61 STAT. 140, 29 U. S. C. A. § 157 (Supp. 1947).
2. 49 STAT. 452 (1935), 29 U. S. C. § 158 (1940), providing that it shall be an unfair labor practice for an employer to: § 8 (1): "Interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in § 7." § 8 (3): "By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: . . ."

ordered Phoenix to re-instate them.[3] On the Board's petition to the Seventh Circuit Court of Appeals the order was enforced. The Court stated that although Phoenix might disregard the salesmen's suggestions, it could not interfere with their right to make suggestions concerning the cashier's successor, this being, under the circumstances, a matter reasonably related to their conditions of employment. *NLRB v. Phoenix Mutual Life Ins. Co.*, 167 F.2d 983 (C. C. A. 7th 1948), *cert. denied*, 69 S. Ct. 68 (1948).

Voluminous are the cases interpretating those portions of Section 7 which protect the employee activities of self-organization, of forming, joining, and assisting labor organizations, of bargaining collectively, and of engaging in concerted activities for the purpose of collective bargaining. Because of the absence of such activities in the *Phoenix* case, there was presented for the first time a fact situation requiring interpretative application of that portion of Section 7 which states that employees[4] have a right "to engage in concerted activities" for their "mutual aid or protection." The court held that these words of the Statute shielded employees in taking action with a view toward making suggestions to management about matters "reasonably relating to conditions of their employment."[5] It would be incorrect to term the decision "new law." For that part of Section 7 applied in this case has been a part of the NLRA since its enactment. Rather, the decision pours into the mold constructed by Congress the substance of a concrete fact situation. Putting aside, as did the court, any question whether the activity of suggesting falls within a broad definition of collective bargaining and hence achieves protection under that portion of Section 7 dealing with organization and collective bargaining,[6] still suggesting has important factual

3. In the Matter of Phoenix Mutual Life Insurance Company, 73 NLRB 1463 (1947).

4. A portion of the *Phoenix* decision not dealt with here decides that the salesmen in the case were "employees" within § 2 (3) of the NLRA. 49 STAT. 450 (1935), 29 U. S. C. § 152 (1940).

5. NLRB v. Phoenix Mutual Life Ins. Co., 167 F.2d 983, 988 (C. C. A. 7th 1948), *cert. denied*, 69 S. Ct. 68 (1948).

6. Section 8 (d) of the LMRA of 1947 gives a definition of collective bargaining. "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 other terms and conditions of employment, or the

differences from activities previously held to be encompassed within the rights accorded employees by Section 7. The "mutual aid or protection" clause seems to protect activity unrelated to efforts to organize or to formulate the terms of a contract, for the simple act of suggesting is certainly directed toward neither of those ends.

The *Phoenix* case holds that an employer may not discharge employees who seek simply to make suggestions to him. Perhaps also he may not take other action inconsistent with the protection accorded to the communication of suggestions. The facts required no decision upon the question whether employees may strike or engage in other coercive activity to force their suggestions upon their employer but there are strong indications that they may not. Admittedly, employees may take coercive action in relation to those activities which are part of and culminate in a collective bargaining agreement.[7] A prior decision by the Seventh Circuit Court of Appeals seems to justify the conclusion that coercive activity in relation to the "mutual aid or protection" clause would not be protected and that an employer would be privileged to discharge for coercion.[8] That the purpose of protecting activity aimed simply at suggesting seems to be to promote the interchange of ideas is consonant with this conclusion.

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negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, ..." 61 STAT. 140, 29 U. S. C. A. § 158 (d) (Supp. 1947). As thus defined it would seem that "collective bargaining" designates only the process of negotiating contracts and does not encompass discussions not intended to culminate in contract.

7. The type of activity previously protected under § 8 (1) is typified in the following cases: NLRB v. Schwartz, 146 F.2d 773 (C. C. A. 5th 1945), circulation of union membership applications; NLRB v. Rockingham Poultry Co., 59 NLRB 486 (1944), petition for higher wages; Carter Carburetor Corp. v. NLRB, 140 F.2d 714 (C. C. A. 8th 1944), work stoppage to protest the discharge of a fellow-employee because of his union activities; NLRB v. Ever Ready Label Corp., 54 NLRB 551 (1944), presentation of grievances by employee on behalf of his department; NLRB v. Remington Rand, 130 F.2d 919 (C. C. A. 2d 1942), strike to protest conditions of employment; Thomas v. Collins, 323 U. S. 516 (1945), organization for purpose of collective bargaining and whatever concerted activity may be necessary to preserve such organization.

8. NLRB v. Reynolds Pen. Co., 162 F.2d 680 (C. C. A. 7th 1947). See also United Mine Workers v. Fontaine Converting Wks., 77 NLRB No. 216 (1948).

The obvious and declared purpose of labor relations legislation, which purpose is clearly continued in the Labor-Management Relations Act of 1947, is to foster industrial peace.[9] Congress has evidenced its conviction that harmonious relations between labor and management are most effectually engendered through a process of collective bargaining which demands a good faith exchange of views[10] and an airing of ends sought. In view of this basic statutory policy, it is probable that the present decision is both desirable and justifiable, since its effect will be further to foster interchange of ideas. Although this decision might be objected to as being without support in precedent the obvious answer is that the problem was one of first impression.

As pointed out above, Section 7 of the NLRA guarantees to employees the right to engage in concerted activities for the purpose of collective bargaining "or other mutual aid or protection." In Congressional reports explaining the purpose of Section 7 all emphasis is directed toward the activities of organization and collective bargaining.[11] No explanation is offered for the inclusion of the last six words, "or other mutual aid or protection," other than a statement that they were carried over into the Act from Section 7 (a) of

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9. See policy sections: National Labor Relations Act, § 1, 49 STAT. 449 (1935), 29 U. S. C. § 151 (1940); Labor Management Relations Act, §§ 1 (b), 101, 201, 61 STAT. 136, 29 U. S. C. A. §§ 141, 151, 171 (Supp. 1947); Norris-LaGuardia Anti-Injunction Act, § 2, 47 STAT. 70 (1932); 29 U. S. C. § 102 (1940); H. R. REP. No. 1147, 74th Cong., 1st Sess. 9 (1935).

10. See National Labor Relations Act, as amended by Labor Management Relations Act, § 8 (d), note 6 *supra*.
The National Labor Relations Act, as amended, provides in § 8 (c): " . . . expressions of any views . . . shall not constitute, or be evidence of, an unfair labor practice under any of the provisions of this act, if such expression contains no threat of reprisal or force or promise of benefit." Although this subsection is included within the larger section dealing with unfair labor practices, legislative history indicates that it is applicable only as a defense to such a charge, and not to define the limits of employees' rights under § 7. *Conference Report*, H. R. REP. No. 510, 80th Cong., 1st Sess. 45 (1947). From this subsection, however, Congressional intention to protect free expression of views on the part of both employers and employees is apparent. *Conference Report*, H. R. REP. No. 510, 80th Cong., 1st Sess. 45 (1947).

11. See SEN. REP. No. 573, 74th Cong., 1st Sess. 8 (1935); H. R. REP. No. 1147, 74th Cong., 1st Sess. 15 (1935); *Conference Report*, H. R. REP. No. 510, 80th Cong., 1st Sess. 38 (1947).

the National Industrial Recovery Act.[12] Nor in the reports on Section 7 (a) of the NLRA is there any indication regarding the significance of these words, which also appeared, without interpretation, in the Norris-LaGuardia Anti-Injunction Act.[13] One may wonder with what intent the legislators included these words in the NLRA. Congress, quite possibly, may have added them as a matter of tradition, having no specific substantive content for them in mind. At any rate, there is little affirmative support for the *Phoenix* decision to be found in the legislative history of these words. In this situation it is for the Board to work out the application of the section, keeping in mind the policy underlying the NLRA.[14]

And though the case authority relied upon to support the position in the *Phoenix* case seems to be of questionable applicability,[15] this too affords slight grounds for criticism of the decision of a novel question. The Board's determina-

12. 48 STAT. 198 (1934).
13. 47 STAT. 70 (1932), 29 U. S. C. § 102 (1940).
14. It is the function of the National Labor Relations Board to resolve the conflict among the interests of labor, management, and the public. *See* National Licorice Co. v. NLRB, 309 U. S. 350, 364 (1940); NLRB v. Illinois Tool Co., 153 F.2d 811, 816 (C. C. A. 7th 1946); NLRB v. Barrett, 120 F.2d 583, 585 (C. C. A. 7th 1941).
15. The Board found sole major support in the case of NLRB v. Peter Cailler Kohler Swiss Choc. Co., 130 F.2d 503 (C. C. A. 2d 1942). In that case the union published a protest condemning their employer's action in aiding the latter's milk supplier to break a "strike" to raise prices by a rival of the supplier. Judge Learned Hand upheld the Board's determination that it was an unfair labor practice under the "mutual aid or protection" clause for the employer to discharge the union president in retaliation. While the effect of that case was to protect the union in announcing its views, it is important to note the reason behind the decision: Judge Hand stated that consistent with his interpretation of Section 7, secondary boycotts and sympathy strikes would also be protected under the "mutual aid or protection" clause. It seems apparent that he was focusing attention upon the word "mutual" and that the thrust of his argument was that where there is sufficient economic relation between the welfare of two different groups of employees, one group will be protected by Section 7 if it takes action to aid the other. Further, Judge Hand's suggestion that coercive activity would be protected indicates that he was not finding in Section 7 a right simply to express views upon a matter about which the employer had no duty to bargain. If the foregoing analysis of the *Swiss* case is accurate, that case's interpretation of "mutual aid or protection" is entirely unlike the interpretation in the *Phoenix* case. Indeed, Judge Hand's interpretation necessarily has fallen with the passage of § 8 (b) (4) of the Labor Managament Relations Act of 1947 making secondary boycotts an unfair labor practice. 61 STAT. 140, 29 U. S. C. A. § 158 (b) (4) (Supp. 1947).

tion to protect the salesmen in their effort to communicate their views to the Phoenix Company seems to foster industrial peace and thus to effectuate the policy of the Statute. No more should be expected. Nor is any vice in the decision to be found in its appraisal of the Board's test to delimit the activities protected under the "mutual aid or protection" clause: the matters about which employees may make suggestions must have some "reasonable relation to conditions of their employment." Recent labor law history gives abundant warning to courts to avoid attempts to solve involved questions of labor relations by formulating inflexible rules of law.[17] Reasonable relationship seems eminently workable and it leaves the Board the latitude necessary to the solution of diverse factual problems.

One factor may be suggested as a proper guide in determining the area of reasonable relationships. As enunciated, the Board takes into account only the interests of employees. But the policy of our most recent labor legislation is to balance the interests of labor, management, and the public.[18]

16. " . . . we believe that what these salesmen did was closely related to their legitimate interests as employees. In essence, their activity consisted of common discussion of circumstances which they considered elements of a grievance concerning their working conditions, and preparation of a method for presenting the grievance to their employer. This was reasonable and temperate conduct by employees who had a real cause for concern and was clearly within the scope of the kind of concerted activity protected by Section 7 of the Act." In the matter of Phoenix Mutual Life Ins. Co., 73 NLRB 1463, 1464 (1947).

17. *E.g.*, in Anderson v. Mt. Clemens Pottery Co., 328 U. S. 680, 691 (1945), a case involving the Fair Labor Standards Act, it was held that as a matter of law the time spent by employees in walking to work on the employer's premises must be compensated as work. It was estimated that as a result of a multitude of suits filed after this decision, fabulous sums would have to be paid by employers as back pay, the financial structure of many businesses would be seriously endangered, and the federal treasury disrupted. To alleviate these hardships Congress enacted the Portal-to-Portal Act. See Section 1, "Findings and Policy," 61 STAT. 84, 29 U. S. C. A. § 251 (Supp. 1947).

18. Labor Managament Relations Act, § 1 (b), 61 STAT. 136, 29 U. S. C. A. § 141 (Supp. 1947); SEN. REP. No. 105, 80th Cong., 1st Sess. 1 (1947). Although § 7 of the NLRA was amended by the LMRA of 1947 (see note 1 *supra*), the *Phoenix* case seems unaffected. Section 7 was amended by adding to it: " . . . 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)." Since emphasis is now placed on the right of employees to *refrain* from organization, collective bargaining, etc., it would seem that the informal meeting and the making of suggestions protected by the *Phoenix* case actually draw support from the amended Section 7.

The protection of a particular expression of views should involve a determination that the expression has some reasonable relation to conditions of employment, but also that the interests of management and the public are not thereby unreasonably encroached upon. So formulated, the *Phoenix* test would focus the attention of the Board and the courts upon the economic and social bases of that case's doctrine, thus assuring the development of a beneficial application of the mutual aid or protection clause.

LIBEL

APPLICATION OF SINGLE PUBLICATION RULE TO PUBLISHER OF BOOKS

There is an obvious potentiality for conflict between the rule that each publication of a libel is a separate tort and the policy of the statute of limitations that all actionable wrongs must eventually be put in repose. In cases involving libelous periodicals, some modern courts have resolved the conflict in favor of the policy of the statute of limitations. Resolution has been effected by resort to a legal fiction, the "single publication rule." This rule, which regards all the steps attendant on the mass distribution of periodicals as but a single act, a single publication, has heretofore been limited in application to cases dealing with newspapers and magazines. In a case of first impression,[1] the New York Court of Appeals has extended the single publication rule and applied it to the distribution of books.

Total Espionage, a book containing an alleged libel of Gregoire, reached the market in 1941, and in several subsequent printings sold some 12,300 copies. In March 1944, its publisher, G. P. Putnam's Sons, began distribution of an eighth printing. Sales diminished to a point where only 60 copies were distributed from stock in the year immediately preceding July 1946, when Gregoire instituted suit in New York complaining of the sale of a single copy of the book dur-

1. *Cf.* Lewisohn v. Dial Press, Inc., 264 App. Div. 370, 35 N. Y. S.2d 551, 552 (1942) involving a libel action upon a book wherein defendant pleaded the statute of limitations. There the court was not applying the single publication rule to books, but merely held that plaintiff's cause of action did not accrue until the defamatory statement became false.