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COLLECTIVE BARGAINING: RANK AND FILE UNION AS REPRESENTATIVE OF SUPERVISORS

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Is a strike by a rank and file union to force an employer to recognize it as the representative of supervisory employees unlawful in California? The Supreme Court of California has recently had a chance to pass on this question in *Safeway Stores, Inc.* v. *Retail Clerks International Ass'n.*[1] In addition, recent changes in federal legislation have brought the question of bargaining by supervisors into focus.

A distinction should be made between the case where supervisors themselves strike through a union of their own and the situation where a rank and file union strikes for the inclusion of supervisors. Attention in this comment will be concentrated on the rank and file strike. Reference will be made to the other only when necessary.

Before discussing the question of what factors are determinative of whether such is a legitimate interest of a rank and file union in California, it must be seen if this kind of controversy is controlled by federal legislation.

Supervisory Personnel and the National Labor Relations Act.

Prior to the passage of the Taft-Hartley Act,[2] the status of supervisors under the National Labor Relations Act[3] was a very controversial subject. The controversy was whether or not the right to bargain collectively with their employer came within the act's protection.[4] By 1946 a trend was established to include within the act bargaining by supervisors through an *independent* union.

In 1947, the United States Supreme Court decided *Packard Motor Car Co.* v. *National Labor Relations Board.*[5] This case ended the controversy as far as the unamended N.L.R.A. was concerned. The court upheld an N.L.R.B. ruling that foremen, represented by an independent union, could bargain collectively with their employer. The Supreme Court did not pass upon the question of whether the N.L.R.A. extended to supervisors bargaining through a rank and file union.

The Labor Board thought the N.L.R.A. also covered the rank and file situation. In re *Jones & L. Steel Corp.*[6] the Board ruled that foremen could

[1] 41 A.C. 579, 261 P.2d 721 (1953).
[2] 61 STAT. 136 (1947), 29 U.S.C. 151-166 (1947) (Labor Management Relations Act).
[3] 49 STAT. 457 (1935), 29 U.S.C. 151-166 (1947).
[4] American Steel Foundries v. National Labor Relations Bd., 158 F.2d 896 (7th Cir. 1946); National Labor Relations Board v. Armour & Co., 154 F.2d 570 (10th Cir. 1946), 169 A.L.R. 421 (1947); Jones & Laughlin Steel Corp. v. National Labor Relations Bd., 146 F.2d 833 (5th Cir. 1945), *cert. denied* 325 U.S. 886 (1945); National Labor Relations Board v. Skinner & K. Stationery Co., 113 F.2d 667 (8th Cir. 1940).
[5] 330 U.S. 485 (1947)
[6] 66 N.L.R.B. (F.) 386 (1946). See Note, 173 A.L.R. 1401, 1408 (1948).

affiliate with a rank and file union which might then bargain collectively with the employer. With this ruling the Board did an about face from its attitude in an earlier case, involving the same company, in which the following statement appears:

> "The Board on these grounds has announced the *general policy* of not including supervisory employees of any grade in bargaining units which include the employees under them; but in proper cases it gives the supervisors *a separate unit of their own.*"[7] (Emphasis added.)

The Supreme Court did not pass on either of these rulings.

Effect of the Taft-Hartley Act on Bargaining by Supervisors; the Relinquishment of Federal Jurisdiction.

The Taft-Hartley Act, Labor Management Relations Act of 1947, amended the National Labor Relations Act of 1935 to exclude from the definition of "employee" "any individual employed as a supervisor." Section 2 (11) of the amending act states that the term "supervisor" means a person having the authority to

> " hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

The effect of the amendment was to withhold from supervisors the protection of federal legislation whether they seek collective bargaining through an independent or a rank and file union.[8] It left the regulation of collective bargaining by supervisors a matter of state law.[9] In the *Safeway* case it was stated:

> " since the state court can act, it has the jurisdiction to determine the facts upon which its jurisdiction depends."[10]

Thus, if the state court finds that the matter before it concerns the bargaining rights of supervisors, then it has jurisdiction to apply state law to the regulation of their rights.

The precise effect of the amendment is illustrated by a federal case that involved a rank and file union. In *Eastern Gas and Fuel Associates* v. *Nation-*

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[7]Jones & Laughlin Steel Corp. v. National Labor Relations Bd., 146 F.2d 833, 834 (5th Cir. 1945)

[8]National Labor Relations Board v. Leland-Gifford Co., 200 F.2d 620 (1st Cir. 1952), National Labor Relations Board v. Quincy Steel Casting Co., Inc., 200 F.2d 293 (1st Cir. 1952), National Labor Relations Board v. Chautauqua Hardware Corp., 192 F.2d 492 (2d Cir. 1951), Ohio Power Co. v. N.L.R.B., 176 F.2d 385 (6th Cir. 1949), 11 A.L.R.2d 243 (1950), Morrison v. Shopmens' Local Union 682, Etc., 114 F.Supp. 54 (W.D. Ky. 1953)

[9]*Supra* note 1.

[10]*Supra* note 1 at 585, 261 P.2d at 724.

al Labor Relations Board[11] a determination that a foreman might be a member of a union controlled by or identical with the union representing the rank and file employees under the foreman's supervision was modified on rehearing to limit the enforcement of the decree to the period ending with the effective date of the Taft-Hartley Act.

From the foregoing, it is clear that the problem is within the influence of federal legislation only in so far as changes in the national outlook have already or may in the future affect the local viewpoint as to what is sound public policy.

Injunction Against Unlawful Strikes: The Proper Purpose Doctrine.

It has been said that all states now take the view that injunction will issue against labor activities which have as their end an improper purpose.[12] Prior to 1940 there seems to have been a difference of opinion as to whether this doctrine was applicable in California.[13] However, decisions since then make it clear that strikes for objects contrary to state policy will be enjoined.[14] This was the action of the California Supreme Court in the *Safeway* case.

Apparently, the *Safeway* case is the only California decision directly in point. In that case the court did not cite any California case which it considered controlling of the question except in so far as it referred the reader to decisions holding that strikes for improper purposes will be enjoined. For this reason it is desirable to examine this case.

The case arose when the company brought an action to enjoin strike activities of the rank and file clerks' union. The trial court found the strike was the result of the refusal of Safeway to include its managers in the labor contract with the union. The Superior Court of Alameda County found that the purpose of the strike was improper and issued a preliminary injunction. The District Court of Appeals[15] modified the injunction to limit its enforcement to controlling the methods the union was using in attaining its object. But this decided, in effect, that the purpose was a proper one. The Supreme Court, two justices dissenting, held that the purpose of the strike was to further an objective contrary to the public policy of the state, and enjoined the union. Upon what basis is this result reached?

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[11]162 F.2d 864 (6th Cir. 1947).

[12]Armstrong, *Where Are We Going With Picketing*, 36 CALIF. L. REV. 1, 34 (1948).

[13]*Ibid.*

[14]Hughes v. Superior Court, 32 Cal.2d 850, 198 P.2d 885 (1948), *affd.* 339 U.S. 460 (1949); James v. Marinship Corp., 25 Cal.2d 721, 155 P.2d 329 (1944); Magill Bros. v. Building Service Etc. Union, 20 Cal.2d 506, 127 P.2d 542 (1942); McKay v. Retail Auto S. L. Union No. 1067, 16 Cal.2d 311, 106 P.2d 373 (1940).

[15]—— Cal.App.2d ——, 234 P.2d 678 (1951).

The Division of the Supervisor's Loyalty by Membership in a Rank and File Union.

The *Safeway* decision closes with the following statement:

> "Confronted with the responsibility of declaration where as here there is no constitutional or legislative guide on the subject we hold that the trial court was correct in deciding that the coercion sought to be exercised by the defendants under the circumstances of the case was not reasonably related to any legitimate interest of organized labor; and that as a matter of sound public policy were enjoinable within the equity jurisdiction of the court."[16]

Obviously this is not a decision that such a strike is directly contrary to state legislation or is unconstitutional. It is a judicial declaration of public policy. Earlier in the opinion the court remarks[17] that public policy is primarily for the Legislature to determine, but that when neither the constitution nor the Legislature has spoken on the subject the courts may make the declaration. Since the court was unfettered by local precedents it would seem that it was free to choose which way it should go in the interests of public policy. The question remaining is: why did the court feel that the object was contrary to sound public policy?

The following passage from the opinion answers this question.

> "Since on this record store managers are agents of management when so acting they owe undivided loyalty to their principal. As members of the defendant unions they would under union rules be in duty bound to advance the cause for the community interest of store managers and clerks in any dispute or disagreement with their principal. They would be under constant apprehension of penalties under union rules, such as fines, suspension, or expulsion. It is eminently proper that management supervisors, the store managers in this case, be kept free from the *divided loyalty* that would be engendered by compulsory membership in the defendant local unions."[18] (Emphasis added.)

The division of the loyalty of the supervisory personnel has been the chief objection to their organization in a rank and file union in all cases where the question has been considered. The objection has been that this type of organization results in a two way pull on supervisors between the interests of those who have hired them to supervise and the interests of those who are to be supervised. Since the argument against division of loyalty plays such a large part in these cases, it is important to keep in mind that this situation is to be distinguished from one in which managers are organized in a union of their own, in which their allegiance is split between their employers and *themselves.* The sanction for emphasizing the division of loyalty can be

[16] *Supra* note 1, at 587-588, 261 P.2d at 726.

[17] *Id.* at 586, 261 P.2d at 725, *See, e.g.,* Tanenhaus, *Picketing-Free Speech: The Growth of The New Law of Picketing From 1940 to 1952,* 38 Cornell L. Q. 1, 29 (1952)

[18] *Supra* note 1, at 587, 261 P.2d at 726.

found by considering the shift in national policy which led to the exclusion of supervisors from the N.L.R.A.

An Epilogue to Re Jones & L. Steel Corporation.

The N.L.R.B. case re *Jones & L. Steel Corp.* has been mentioned above. It should be remembered that the Board there ruled that the N.L.R.A. covered bargaining by foremen through a rank and file union. A report of the Senate Labor Committee submitted subsequent to this ruling is of a different tenor. Keeping in mind that this report preceded the amendment of the N.L.R.A., it indicates the motives of Congress in establishing federal policy in this matter. After discussing the extension of the N.L.R.A. to cover supervisors in organizations "of the very men they were hired to supervise," the following appears in the report:

> "The folly of permitting a continuation of this policy is dramatically illustrated by what has happened in the captive mines of the Jones & Laughlin Steel Corp. since supervisory employees were organized by the United Mine Workers under the protection of this act. Disciplinary slips in these mines have fallen off by two-thirds and the accident rate in each mine has doubled. . . . It is natural to expect that unless this congress takes action, management will be deprived of the undivided loyalty of its foremen. There is an inherent tendency to subordinate their interests wherever they conflict with those of the rank and file."[19]

The *Safeway* opinion and this report show a conviction that "supervisor-rank and file" bargaining is to be distinguished from the case where supervisors are organized in a union of their own. Both emphasize that in the former the supervisor must further the interests of rank and file employees. However, Congress went a step further than the *Safeway* case does. The *Safeway* case condemns only the rank and file situation. Congress removed federal protection of collective bargaining by supervisors entirely. As far as contemporary national policy is concerned, it is apparently not considered sound for supervisors to require their employer to bargain collectively with them even if they are in an independent union.[20] But it remains to be seen whether there is any California legislation which should require an opposite conclusion in a case like this. If not, whether any other reasons counteract the force of the argument against division of loyalty.

California Public Policy as Expressed in the Labor Code.

The dissenting opinion in the *Safeway* case[21] calls attention to section 923 of the California Labor Code. This statute provides:

> " . . . The public policy of this state is declared as follows:
> " . . . In dealing with such employers the individual unorganized

[19] *See* 173 A.L.R. 1401, 1408 (1948).
[20] See note 8 *supra.*
[21] *Supra* note 1, at 588, 261 P.2d at 727.

> worker is helpless. . Therefore it is necessary that the individual workman have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

The dissent then argued that because there is no qualification on the word "employee" in this section it was intended to include supervisory as well as non-supervisory employees, and cited a California case[22] holding that a mine superintendent is an employee within the meaning of the labor laws.

The question is not whether this section was meant to insure supervisors the right to bargain collectively. The question is whether it also meant to insure rank and file unions full freedom in the selection of members, not only from their own employee-level but also from groups composed of persons who are in an agency relationship with management. In every case there will be close questions of fact as to who wants whom. Do the supervisors select the rank and file union or does the rank and file union select the supervisors? In the *Safeway* case, according to the District Court of Appeal,[23] less than half of the managers of the stores struck sought organization by the defendant union. Therefore, even those who would apply section 923 in favor of supervisors who actively seek affiliation with a rank and file union might think it not applicable to the *Safeway* facts. The rank and file union was not, with respect to more than half the managers, to quote from the statute, "a representative of (their) own choosing." To enforce the union demands in a case similar to *Safeway* controversy would result not only in the division of loyalty already mentioned but also a further split within the ranks of the supervisors themselves.

Assuming that supervisors are unopposed to absorption by a rank and file union, the question of whether the statute was intended to insure them that right becomes one of interpretation. The cases in which this statute has been applied are of little aid as precedents. Apparently the statute has never been applied to define state policy in this fact situation. However, a reference to section 923 in a 1940 California case[24] raises the question of the desirability of applying it to sanction a strike for this purpose. The court in that case said, in substance, that the intended effect of the statute (together with section 921 of the same code) was to "balance the industrial equation" by placing employer and employee on an equal footing. In view of the arguments advanced in the *Safeway* opinion and the policy behind the exclu-

[22]Davis v. Morris, 37 Cal.App.2d 269, 99 P.2d 345 (1940)
[23]*Supra* note 15, 234 P.2d at 680.
[24]Shafer v. Registered Pharmacists Union, 16 Cal.2d 379, 106 P.2d 403 (1940)

sion of supervisors from the N.L.R.A., it could be maintained that including supervisors in a rank and file union upsets the "balance of the industrial equation" in the other direction. Namely, that it puts agents of management in the hands of those whose interests are "adverse" to the interests of the employer and thus tips the scale in favor of labor.

In the last analysis a categorical exclusion of the facts in controversy from the protection of this statute is impossible. It may or may not have been intended by the legislature to cover this case. From the layman's point of view, at least, the question of whether it ought to require management to bargain collectively with a union of rank and file clerks and supervisors will be dependent largely on personal notions of what is fair in such cases.

Validity of the Argument Against Division of Loyalty as Applied to the Supervisor-Rank and File Situation.

During the period when the federal courts and the N.L.R.B. were determining the status of supervisors under the N.L.R.A., a common objection of counsel for the employer was that supervisors organized in *any* union resulted in an unsatisfactory division of loyalty. To this objection there were two answers. First, the N.L.R.A. as it then stood did not exclude supervisors. Second, there is always some division of loyalty between employer and employee. Therefore as between the two parties, supervisors and employer, the argument does not have as much force as when a third party, a rank and file union, is introduced.

These answers to the argument against division of loyalty where supervisors sought bargaining through a union of their own are illustrated by the *Packard* case. The court there said:

> "It is also urged upon us . . . that it puts union foremen in the position of serving two masters, divides their loyalty and makes generally for bad relations between management and labor. However we might appraise the force of these arguments as a policy matter, we are not authorized to base decisions of a question of law upon them. They concern the wisdom of *legislation;* they cannot alter the meaning of otherwise plain provisions."[25] (Emphasis added.)

Though the decision is an interpretation of the N.L.R.A., apart from the act the court was unimpressed by the argument against division of loyalty as applied to supervisors actively seeking bargaining through an independent union. To wit:

> " . . . Though the foreman is the faithful representative of the employer in maintaining a production schedule, his interest properly may be adverse to that of the employer when it comes to fixing *his own* wages, hours,

[25] *Supra* note 5, at 493.

seniority rights or working conditions. He does not lose his right to serve *himself* in these respects because he serves his master in others.

" . It (the company) fears that if foremen combine to bargain advantages for themselves, they will sometimes be governed by interests of their own or of their *fellow foremen,* rather than by the company's interest."[26] (Emphasis added.)

Assuming that the argument against division of loyalty is not all-convincing when applied to an independent union of supervisors, it may still be sound when applied to a rank and file union which includes supervisors. To say that a supervisor should not lose his right to serve *himself* does not answer the question of whether he should be bound to *serve as well* rank and file employees. These employees he is already obligated to supervise in the interests of his employer. In this last situation, the degree of division of loyalty engendered is greatly in excess of the ordinary conflict of interests in any master-servant relationship. The validity of the argument against division of loyalty is thus directly proportionate to the division of loyalty engendered.

The Ultimate Question.

The decision in the *Safeway* case is founded on the reasoning that the divided loyalty which results when rank and file unions are the bargaining agents of supervisors is contrary to public policy. It may be conceded that a supervisor's interest may be properly adverse with respect to his own rights. Nevertheless the employer is entitled to know that with respect to rank and file disciplinary problems the supervisor's interest will not be adverse to that of the employer. However, the ultimate question is whether rank and file bargaining for supervisors is a legitimate interest of organized labor in spite of the division of loyalty. In this respect it should be noted that a decision which enjoins a strike for this purpose does not deny the supervisor the right to bargain collectively but only through a rank and file union. He is not, as section 923 puts it, "helpless . . . to protect his freedom of labor, and therefore to obtain acceptable terms and conditions of his employment." If the *Safeway* decision entirely foreclosed the right of supervisors to bargain collectively, then the problem would require an entirely different analysis.

In the last analysis, it would appear that a supervisor may still bargain through an independent union in California. In this sense he is still protected. Whether any reasons exist more important than division of loyalty which should justify the rank and file union's demands, is a matter for individual decision according to personal ideas of what is a proper balance between management and labor.

[26] *Id.* at 489.