

itself of the opportunity to indicate the possibly erroneous approach taken by the courts in regard to superseniority.

It is one thing to assure replacements that they will not lose their jobs upon termination of the strike by granting permanent tenure to that time; it is another thing to give seniority which will secure replacements against possible lay-off in the future because of economic conditions not directly related to the strike. This latter point seems to go beyond the *Mackay* doctrine. The Board has made the point quite clear:

Mackay itself holds that, as 'employees,' strikers may not be discriminated against in the manner of, and the terms of, their reinstatement. Yet, giving 20 years or any other special seniority to strike replacements necessarily deprives unreplaced strikers of an important aspect of their prestrike status, for seniority is by its nature relative; giving to one necessarily takes away from another. In essence, therefore, an award of superseniority to strike replacements renders one important requirement of *Mackay*—nondiscriminatory and complete reinstatement of unreplaced strikers—an actual impossibility.²⁶

This argument should not be overlooked because it points up a latent defect in the reasoning and meaning given to a preferential seniority policy by the courts. While the attempt is being made to secure the employer's right to protect and continue his business, the union is left, however unintentionally, without such ability to protect and continue its purposes and activities. It seems more logical that the court in *Mackay* intended to allow, as an inducement to cross picket lines, the granting of job security to replacements over the returning strikers upon termination of the strike, and that the replacements, as well as all other employees, would be subject to lay-off due to future economic conditions according to seniority actually accrued. To interpret the *Mackay* decision as holding that the promise of tenure will apply as to future economic conditions seems grossly inaccurate. The Supreme Court is now directly faced with the problem,²⁷ and its decision should do much to clear up the confusion on the question of superseniority and the effect of the employer's motive.

EDWARD BOGRAD

Labor Law—Unfair Labor Practices— Interference, Restraint or Coercion—Unconditional Pre-Election Benefits.—*NLRB v. Exchange Parts Co.*¹—Two weeks before a scheduled union representation election, the Exchange Parts Company, in a letter urging employees to vote against the union, announced the granting of extra vacation periods and increased holiday overtime pay. Some of the benefits had been settled on prior to

²⁶ Supra note 2, at 626.

²⁷ Certiorari was granted to the Board in the *Erie* case, 83 Sup. Ct. 48 (1962). Petition for certiorari has been filed in the *Swarco* case.

¹ 304 F.2d 368 (5th Cir. 1962).

the union's representation activity. Others, according to the findings of the hearing examiner, were planned and instigated after the start of the union's campaign for the express purpose of influencing the election outcome. All the benefits, however, were granted absolutely and were not conditioned on the results of the election. The union lost the election and charged the company with unfair labor practices in violation of Section 8(a)(1) of the amended National Labor Relations Act.² The National Labor Relations Board ruled that the company's actions unlawfully interfered with, restrained and coerced the employees in the exercise of their right of self-organization.³ On appeal, the Fifth Circuit refused to enforce the Board's order. HELD: Provided the increases were clearly granted unconditionally, an employer was not guilty of an unfair labor practice if he increased employees' wages or benefits with the intent of influencing the outcome of a pending union representation election.

In a well reasoned opinion, the court emphasized the absence of any condition that the workers must reject the union to retain the new benefits. The company was entitled to improve worker conditions to such an extent that a union would seem unnecessary. Such lawful affirmative action could occur shortly before an election and be motivated, as well as timed, solely by a desire to dampen the employees' ardor for a union.⁴ Since the workers were not faced with the unhappy alternative of voting against the union or losing the benefits, freedom of choice on election day was still preserved. As the court said, "Persuasion is not coercion."⁵

In *Peter J. Schweitzer v. NLRB*⁶ another court reached a similar result. During a union campaign the company increased the wages and benefits of two pro-union employees to lure them from the union movement. Shortly before the election, a letter was sent to all employees telling of the company's liberal benefit policies, but, according to the Board's finding, "the letter constituted a veiled warning . . . that should the union be designated . . . the benefits . . . might be jeopardized."⁷ The court ordered the company to emphasize to the workers that the benefits were unconditional. However, the court would not go further, and ruled that the employer, even by granting benefits "so as to induce them to vote against the union through loyalty and gratitude, is not guilty of an unfair labor practice."⁸

The opinions of two other circuit courts are clearly contrary to the

² 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. . . . Section 8(a). 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. . . . 61 Stat. 140 (1947), 29 U.S.C. §§ 157 & 158(a)(1) (1958).

³ 131 N.L.R.B. 806, 48 L.R.R.M. 1147 (1961).

⁴ The union began its campaign in November 1959. The increased overtime pay and vacation period were "introduced in 1960 and announced generally for the first time in the March 4 letter." Thus, the court accepted the Board's finding that these benefits were "increased . . . with an intent to influence the . . . election." 304 F.2d at 371.

⁵ 304 F.2d at 376.

⁶ 144 F.2d 520 (D.C. Cir. 1944).

⁷ *Peter J. Schweitzer, Inc.*, 54 N.L.R.B. 813, 829, 13 L.R.R.M. 192, 193 (1944)

⁸ *Supra* note 6, at 525.

holding of the Fifth Circuit in *Exchange Parts*.⁹ These courts, which hold unconditional benefits to be interference, reject the contingency test.¹⁰ Their basic test of unlawfulness is whether the benefits were timed to influence the workers.¹¹

In interpreting a statute, reference may be made to the specific words which define the acts to be outlawed and also to the basic philosophy behind its enactment, *i.e.*, what ends are sought. The court in the instant case emphasized the strict literal meaning of the words of the statute, while the *Indiana Metal*, *Pyne Molding* and similar courts apply a flexible interpretation of the language to effect what they feel is the policy objective of Congress.

In looking at the words "interfere," "restrain" and "coerce," the Fifth Circuit concludes that the "evil to which the statute is directed is the use of force and pressure. Persuasive efforts are not outlawed."¹² Unconditional benefits are classified as influence and persuasion, but as neither interference, restraint nor coercion. On the other hand, the courts which disagree with the Fifth Circuit's approach seem to include allurements within the scope of the evil of force and pressure, and argue that "Interference is no less interference because it is accomplished through allurements rather than coercion . . ."¹³ Unconditional benefits are classified by these courts as allurements on the theory that they interfere with the "right of self-

⁹ *NLRB v. Pyne Molding Corp.*, 226 F.2d 818 (2d Cir. 1955); *NLRB v. Jamestown Sterling Corp.*, 211 F.2d 725 (2d Cir. 1954); *Indiana Metal Prod. Corp. v. NLRB*, 202 F.2d 613 (7th Cir. 1953); *M. H. Ritzwoller Co. v. NLRB*, 114 F.2d 432 (7th Cir. 1940).

¹⁰ "The company argues that no strings were attached to the offer and no threats to withdraw the benefits if the employees persisted in supporting the union, but such considerations are by no means controlling." *Indiana Metal Prod. Corp. v. NLRB*, *supra* note 9, at 620.

¹¹ "[Since] . . . no other compelling legitimate reason for the announcement [of new benefits] at that time has been shown, we [the Board] find . . . that the announcement was timed to induce employees to reject the Union." *Indiana Metal Prod.*, 100 N.L.R.B. 1040, 1042, 30 L.R.R.M. 1393 (1952).

¹² 304 F.2d at 375. The Fifth Circuit insists on objective evidence of restraint or coercion, such as conditioning the benefits on how the employees vote in the election. *Id.* at 372. This evidentiary requirement may have two drawbacks. The first is the premium placed on subtlety. An employer engaging in unlawful activity will hardly "shout it from the housetops." *Electrical Workers v. Civil Rights Comm.*, 30 L.R.R.M. 2447, 2448 (Conn. Super. Ct. 1952). While the activity may have the guise of propriety, the motives behind and the expected coercive consequences of such activity may be clearly unlawful. A second drawback, is the harmful effect such a limited judicial test may have on the role of the Board. "One of the purposes which lead to the creation of such boards is to have decisions . . . made by experienced officials with an adequate appreciation of the complexities of the subject . . ." *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 800 (1945). To what extent should courts override presumptions of the Board? The Supreme Court has suggested that "like a statutory presumption or one established by regulation, the validity . . . depends upon the rationality between what is proved and what is inferred." *Id.* at 804-05. The Board, itself, is not immune from destroying its own presumptions and limiting decisions to the facts of each case. *Upholsterers' Union (Minneapolis House Furnishing Co.)*, 132 N.L.R.B. 40, 48 L.R.R.M. 1301 (1961). (Effects of a picket line directed toward customers.) Whether the presumption that anti-union benefits are unlawful will be overruled remains to be seen.

¹³ *Western Cartridge Co. v. NLRB*, 134 F.2d 240, 244 (7th Cir.), cert. denied, 320 U.S. 746 (1943).

organization by emphasizing . . . that there is no necessity for a collective bargaining agent"¹⁴ The difficulty with the syllogism that benefits are allurements, and allurements are interference, and therefore benefits are interference is that *all* allurements may not be interference. The two cases which originated the previously quoted and frequently cited adages on "allurements" and "necessity" differed crucially in their fact situations from the cases of unconditional pre-election benefits. In *Western Cartridge Co.*,¹⁵ the unfair practice alleged was the support of a company dominated union, which was competing with an A.F. of L. union of recognition. In *May Dept. Stores*,¹⁶ the company planned wage increases without consulting a duly certified union. This total disregard of a lawfully established bargaining representative was held an unfair labor practice in violation of Section 8(a)(5). The distinctions between these cases and the instant case are clear. Employees have a right to support and establish a union. If this right is manifested, but the effect is nullified by the actions of an employer, interference is plainly present. The court in *Exchange Parts* recognized the lack of factual similarity.¹⁷ Other courts have also acknowledged the difference.¹⁸ Those courts, however, which cite these cases to justify the rule that unconditional pre-election benefits constitute unlawful interference fail to reconcile the dissimilarity.

If one changes the nature of the employer's actions, the nature of the allurements and hence the nature of the interference is changed. The less coercive the action, the less the interference. Similarly, remove all accompanying threats and implied conditions from benefits and still perhaps they are allurements, but yet are they not something less than interference?¹⁹

The foregoing analysis suggests that something more than a literal interpretation of the words of the statute is needed to justify the finding of unfair labor practices by the *Indiana Metal* and *Pyne Molding* courts. "The problem finally posed is that of the philosophy of the Act."²⁰ The courts which equate "allurements" with "interference" emphasize the preliminary words of the act:

It is declared to be the policy of the United States to [encourage]
 . . . the practice and procedure of collective bargaining . . . by pro-

¹⁴ *May Dept. Stores Co. v. NLRB*, 326 U.S. 376, 385 (1945).

¹⁵ *Supra* note 13.

¹⁶ *Supra* note 14.

¹⁷ "[W]e regard as vital the fact that the benefits were announced before the certification of the union" 304 F.2d at 375.

¹⁸ "[R]espondent refused to deal with the union This prima facie warranted a finding of a violation of § 8(a)(5)." *NLRB v. Gorbea, Perez & Morell, S. En C.*, 300 F.2d 886, 887 (1st Cir. 1962), citing *NLRB v. Whitelite Prod., etc., Corp.*, 298 F.2d 12 (1st Cir. 1962).

¹⁹ "[I]n this case there was no certified union with which the employer could bargain and therefore the case does not fall within the ruling that an employer should not grant an increase in wages without notice to a duly appointed bargaining agent, since such action minimizes the influence of organized bargaining." *NLRB v. W. T. Grant Co.*, 208 F.2d 710, 712 (4th Cir. 1953).

²⁰ "To make one of the alternatives open to the worker more desirable than it was before does not affect his freedom; it may influence, but, without more, it does not interfere." Note, 54 Harv. L. Rev. 1036, 1039 (1941).

²⁰ *Id.* at 1040.

protecting the exercise by workers of full freedom of . . . self-organization²¹

"If the ultimate purpose of the NLRA is frankly to aid labor unions . . . there can be no quarrel here with the Board's action."²² In attempting to effectuate such a goal, the *Indiana Metal* and *Pyne Molding* courts are quick to restrain employers who use their vast economic power to discourage unionization.²³ Such economic power—in the form of increased wages and benefits—when used to hamper the organizational rights of employees, may be more subtle than overt threats and conditions, but is, nevertheless, a potent force in the path of effective collective bargaining.²⁴ Sudden, well timed bursts of employer generosity unjustly force on the employees a moral obligation to vote against the union. Fear of employer dissatisfaction and possible economic retaliation may be uppermost in the mind of a worker on election day, for the worker may be ignorant of the unlawfulness of such economic revenge. Finally, the long term advantages of unionization might be lost due to the inability of the employee to see through last minute attempts by the company to disguise what is actually a dismal labor situation.²⁵

Thus, in the final analysis, to what extent will courts shield an employee from his employer where union organization is concerned?²⁶ Beyond the limits of non-coercive free speech,²⁷ the *Indiana Metal* and *Pyne Molding*

²¹ NLRA, 61 Stat. 136 (1947), 29 U.S.C. 151 (1958).

²² Supra note 19, at 1040. See also 2 Teller, Labor Disputes and Collective Bargaining § 243, at 688 (1940).

²³ NLRB v. Crown Can Co., 138 F.2d 263 (8th Cir. 1943) (threat to close plant plus wage increase); NLRB v. Peyton Packing Co., 142 F.2d 1009, 1010 (5th Cir. 1944) (anti-union intent motivated no-solicitation rule). "Such conduct . . . adroitly timed to cripple the strength of the union during its formative period, clearly warranted the findings . . . that the right of the employees to organize . . . was interfered with . . ." Petition of appellant, NLRB, for a writ of certiorari to the Fifth Circuit in *Exchange Parts*, Oct. term 1962, at 9:

Section 8(a)(1) of the Act bars the employer from using his economic power—whether it takes the form of coercion or allurements—for the purpose of influencing his employees' choice of a representative. For an employer to grant benefits . . . before a Board election, for the specific purpose of inducing the employees to reject the union, is a flagrant example of such use of economic power.

²⁴ Cf. NLRB v. Valley Broadcasting Co., 189 F.2d 582, 585 (6th Cir. 1951). "For the ability to grant wage increases or other economic benefits at crucial junctures in an organizing campaign is a subtle and effective weapon in the hands of employers who wish to block unionization of their plants." Petition of appellant, supra note 23, at 12.

²⁵ "It is difficult to justify the Board's decisions except on the assumption that the only lasting benefits available to the working classes are achieved through the concerted activities of labor unions; the benefits directly granted by an employer are essentially 'bread and circuses' to delude the workers." Supra note 19, at 1040. See also, Note, 58 Harv. L. Rev. 137, 138 (1944), criticizing the *Schweitzer* case, supra note 6.

²⁶ In *Radio Officers Union of the Commercial Telegraphers Union, AFL v. NLRB*, 347 U.S. 17 (1959), the Court held that discriminating wage scales though economically justified, which tended to discourage union membership, violated Section 8(a)(3). Justices Douglas and Black, dissenting, argued that "the Court's new interpretation of Section 8(a)(3) imputes guilt to an employer for conduct which Congress did not wish to outlaw."

²⁷ NLRA, § 8(c), 61 Stat. 142 (1947), 29 U.S.C. § 158(c) (1958).

courts leave management little leeway to discourage unionization.²⁸ In contrast with this restrictive approach, the Fifth Circuit in *Exchange Parts* relies heavily on the ability of the worker to withstand the economic onslaughts of his employer. A presumably rational being would realize that if he votes against the union, he gets no special economic bonus. Similarly, if he votes for the union, he loses nothing in terms of newly granted wages or benefits.²⁹ Any loss of favor with management will be offset by the certification of a union to represent the workers at the bargaining table.

Whether or not Congress intended to prohibit employers from granting pre-election benefits—even unconditionally—for the purpose of opposing unionization is a question which will probably never be answered with any historical certainty.

STEPHEN WILLIAM SILVERMAN

Negotiable Instruments—Forged Endorsement—Drawer's Right against Collecting Bank.—*Stone & Webster Eng. Corp. v. First Nat'l Bank & Trust Co. of Greenfield*.¹—Between January and May 1960 Stone & Webster became indebted to the Westinghouse Electric Corporation for goods and services. To pay the debt it drew checks on the First National Bank of Boston. An employee of the drawer did not deliver the checks to Westinghouse but instead "cashed" them at the defendant bank, by forging the payee's indorsement. When the First National refused to re-credit the drawer's account it sued the defendant as the collecting bank which cashed the checks for the forger. The Massachusetts Supreme Judicial Court sustained the defendant's demurrer to the declaration. HELD: The drawer had no cause of action against the collecting bank for money had and received, contract, conversion or negligence. Since the drawer was not a holder or payee and did not therefore have a right to present the checks to the drawee for payment, the value of its rights in the checks were only their physical paper value; and it had suffered no legal harm since the defendant had received the funds of the drawee, not the drawer's funds.

When a signature on a check is forged, there results a confusing conflict of the rights and liabilities of the drawer, drawee, payee, indorsers and collecting bank (the bank which cashes or takes the check for deposit). Where the signature of the drawer is forged, he may recover from the

²⁸ [A]dministrative and judicial constructions of the Act threaten almost any activity that substantially hinders an organizational drive . . . [E]ven though an employer makes a careful attempt to maintain his activities within the terms of the Act, the danger that his actions may be used to void the election or that they will result in an unfair labor practice is always present.

Comment, 36 Texas L. Rev. 651, 657 (1958).

²⁹ "An offer of vacation with pay not always has the desired result; the employees may accept the offer without ceasing union activities." 2 Teller, Labor Disputes and Collective Bargaining § 288, at 786 (1940), citing Metropolitan Eng. Co., 4 N.L.R.B. 542, 1-A L.R.R.M. 348 (1937).

¹ 1962 Mass. Adv. Sh. 1267, 184 N.E.2d 358.