

THE RIGHT

JOHN E. TEAGAN*

A recent case¹ decided by the National Labor Relations Board has to some extent clarified the Board's views relating to the right of an employer to close its plant when the reasons therefor are partly economic and partly due to its employees' union activities. In that decision the Board held:

Moreover, even assuming as Respondent contends, that the six genuine economic factors as well as the employees' union activities were responsible for the closing of the mill, Darlington's action was no less unlawful. A plant shutdown resulting in the discharge of employees that is partly due to employees' union activities constitutes an unfair labor practice. At this point we reach the fundamental issue noted above—whether an employer has the absolute right to go out of business even if its reason for doing so is employees' activities.

Section 8(a)(3) provides:

it shall be an unfair labor practice for an employer . . .
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.²

The evidence, as interpreted by the Board, left no doubt that Darlington decided to dissolve because the Textile Workers Union of America had been certified by the National Labor Relations Board as the collective bargaining agent in the mill. Prior to and during the organizing campaign, Darlington was engaged in an extensive plant improvement program involving an expenditure of \$400,000 in a nine-month period. However, just one month before the decision to close the mill was made, the manager reported a projected loss of \$40,000. After the conclusion of the election which the union won and the discontinuance of the renovation program, the directors met and voted to recommend closing the mill. Upon the adjournment of the directors' meeting, which lasted just over an hour, the supervisors told the employees that the election was the cause of the mill shutdown. The Board found that at a subsequent stockholders' meeting, President Milli-

* LL.B. 1929, Suffolk University; Associated with the firm of Morgan, Brown, Kearns & Joy of Boston; former Vice President of the New England Power Service Company and Labor Relations Counsel for the New England Electric System; Member of the Massachusetts and Federal Bars.

¹ Darlington Mfg. Co. & Textile Workers of America, A.F.L.-C.I.O., 139 N.L.R.B. No. 23, 51 L.R.R.M. 1278 (1962). The company has filed a petition for review with the Fourth Circuit Court of Appeals.

² 51 L.R.R.M. at 1280.

ken specifically stated that he had decided to close the mill when the employees selected the union as their bargaining agent.³ In its brief the company made its most damaging admission by conceding that the election was responsible for its decision to call the meeting at which it was decided to recommend liquidation to the stockholders.

The following defenses, among others, were rejected by the Board: (1) That the shutting of the mill "effectively and finally terminated" the existing employer-employee relationship and thereafter, it was not an employer within the meaning of the act; (2) that the South Carolina statutes under which it had incorporated gave it the "absolute right to liquidate."⁴

Prior to the *Darlington* decision, there were several Board and court cases which would, at first glance, lead to the conclusion that if there were justifiable economic reasons for closing or moving a plant, such action would not be a violation of section 8(a)(3),⁵ even though it was partly motivated by the employees' union activities. Those cases were either distinguished from *Darlington* or overruled.

In *Mount Hope Finishing Co. v. NLRB*,⁶ the Board found that the company had moved its plant in order to avoid negotiations with a union which had just won a representation election. In reversing the Board the Fourth Circuit found that the employees' union activities merely accentuated the employer's pre-existing lawful reasons for moving its plant, and that the move was motivated by factors apart from its employees' union activities. In *Darlington*, the Board held that the company itself distinguished *Mount Hope* by conceding that the closing of the *Darlington* mill was partly attributable to the employees' selection of the union. In other words, in *Mount Hope* the plant would have moved for economic reasons, and the presence of anti-union motivation was a coincidental and additional factor; in *Darlington* the anti-union motivation was a substantial part of the decision to close the mill.⁷

The Board found more difficulty in distinguishing *NLRB v. New Madrid Co.*⁸ There the court said that an employer does have the absolute right, at all times, to go out of business, ". . . for whatever reason he may choose, whether union animosity or anything else. . . . No one can be required to stay in private business. . . . And the Act affords no basis on which to order a person to reinstate employees in a business which he has with plain finality put out of existence."⁹

After quoting at length from the *New Madrid* decision the Board

³ *Ibid.*

⁴ *Ibid.*

⁵ LMRA, 61 Stat. 136 (1947), 29 U.S.C. § 141 (1958).

⁶ 211 F.2d 365 (4th Cir. 1954).

⁷ 51 L.R.R.M. at 1280 n.16.

⁸ 215 F.2d 908 (8th Cir. 1954).

⁹ *Id.* at 914.

interpreted its holding as being contrary to the court's obiter dictum, and found that the statutory right of an employer to close a plant permanently was not there in issue. Moreover, even if the company (Darlington) had correctly interpreted the court's meaning, the Board declined to follow it.¹⁰ The Board appears to have discounted the fact that in *NLRB v. Missouri Transit*¹¹ the Eighth Circuit reaffirmed its decision in *New Madrid*, and quoted at length from it, saying:

Had the Board in the instant case ordered the respondent to reinstate the drivers in the lines it had sold, and over which respondent no longer had any control, we would consider our decision in *New Madrid* controlling.¹²

In addition to a violation of section 8(a)(3), it was found that Darlington's threat to close its mill if the union became the bargaining representative of its employees was a classic example of a violation of section 8(a)(1),¹³ and that its refusal to furnish the union with wage and related bargaining information independently violated section 8(a)(5).¹⁴

Overruling the trial examiner, the Board awarded back pay as essential to rectify Darlington's violation of section 8(a)(3), and ordered the company to provide back pay until the discharged employees were able to obtain substantially equivalent employment.¹⁵ In a footnote, however, the Board stated that "If . . . the employees are placed on a preferential hiring list at other Deering-Milliken [the parent corporation] mills, we shall toll back pay as of the time they are placed on such list."¹⁶

¹⁰ 51 L.R.R.M. at 1281-82.

¹¹ 250 F.2d 261 (8th Cir. 1957).

¹² Id. at 264.

¹³ 51 L.R.R.M. at 1282.

¹⁴ Id. at 1283.

¹⁵ Id. at 1284.

¹⁶ Id. at 1284 n.44. The Board would normally have awarded reinstatement, with back pay being also given up to the time reinstatement was offered. Because it was fairly certain that Darlington would not reopen, the Board ordered:

It is therefore possible that even in the event Darlington does not resume its operations, so as to enable the discharged employees to be reinstated there, the job rights of these discharged employees may still be afforded a measure of protection. We direct, therefore, that in the event the Darlington plant is not reopened, Deering-Milliken shall offer employment to the discharged employees, if they desire, in its other mills in South Carolina or adjacent states, without prejudice to their seniority and other rights and privileges to the extent that positions are available in such plants. Id. at 1286.

It is significant that the Board included the following in its order:

However, in order not to injure innocent third persons presently employed in the other mills, we shall not require that such persons be dismissed or otherwise prejudiced in order to carry out the reinstatement ordered herein. Any remaining discharged employee for whom no work is available . . . shall be placed upon a preferential hiring list. . . .

We shall also order the respondent Deering-Milliken to offer to pay employees

Again overruling the trial examiner, the Board held that because of common ownership, control and exercise of control by the Milliken family over labor relations, sales, tax matters, insurance, purchasing and engineering, Deering-Milliken and its affiliated corporations including Darlington constituted a single employer responsible for the unfair labor practices committed by Darlington (including back pay).

Deering-Milliken was thus ordered to bargain with the union for the purpose of reaching an agreement as to the mode of operation of the preferential hiring lists, and as to the terms and conditions under which the former employees of Darlington Mills may, if they desire, obtain employment at other mills in South Carolina and adjacent states.

Member Leedom dissented on two points. He felt that Deering-Milliken and its affiliates did not occupy a single employer status with Darlington and would have dismissed the complaint as to them.¹⁷ Further, he would award back pay only from the date of discrimination to the date when Darlington closed its plant—not until the discharged employees found substantially equivalent jobs elsewhere.¹⁸

Member Rodgers, while agreeing that Darlington violated section 8(a)(1), dissented for the following reasons. The burden of proof as to whether Deering-Milliken and its affiliated corporations constituted a single employer rested upon the General Counsel and it was not met.¹⁹ Moreover, he found no violation of section 8(a)(3), observing that "there is nothing contained in the basic Act or amendments thereto, which limits an employer's right to go out of business at such time and under such circumstances as he chooses."²⁰

In *Mount Hope*,²¹ the Fourth Circuit considered a closely analogous situation. There the company had been considering the removal of operations to the South because of unfavorable business conditions. Two days after the union won a representation election, the President of Mount Hope "gave an interview to the press indicating that the plant would close permanently in thirty days, and that management could and would no longer stand the economic and financial pressures incited by the union."²² The court said that "it was obvious to the company that if it could not make a go of the business prior to 1951, before the union was formed, it would be no better able to succeed after the pressure of the union was added to its existing difficulties. . . ."²³

the travel and moving expenses entailed in moving their families and household effects to other mills in the event employees accept such offers or reinstatement. Id.

¹⁷ Id. at 1287.

¹⁸ Ibid.

¹⁹ Id. at 1287-88.

²⁰ Id. at 1288.

²¹ Supra note 6.

²² Id. at 370.

²³ Id. at 372.

Moreover, the court pointed out that "the union was doubtless aware of the fact . . . that the company, having committed no unfair labor practice had the undoubted right to decide unilaterally and without consultation with the union to close its plant for economic reasons and to endeavor to save some of its investment."²⁴

Contrary to the statement of the Board in *Darlington*, it would seem that the employees' union activity in *Mount Hope* actually was a motivating cause of management's decision to close the plant. The only real difference between *Mount Hope* and *Darlington* is that in the latter the company refused to bargain, while in the former it declined in good faith to recognize the union without an election since the union's majority status and the eligibility of working foremen were in doubt. Yet, after the union election, Mount Hope did sit down with the union and engage in discussion. It is difficult, therefore, in view of the statement of Mount Hope's President, to understand the Board's position in *Darlington*—that Mount Hope's decision to move its plant was motivated by factors apart from its employees' union activity.²⁵

In *Darlington* the trial examiner found that the mill would not have closed but for the employees' union activity. The Board stated that the trial examiner's finding gave rise to the presumption that *Darlington* would have continued to operate absent that union activity.²⁶ Both statements are pure conjecture and lack one shred of evidence to support them. Furthermore, insofar as *Darlington* was found to have violated section 8(a)(3), such finding could not have been made without speculation as to whether the plant would have remained in operation in the absence of union activity.

The fact that *Darlington* had spent \$400,000 on plant improvement during the nine month period preceeding the election is not inconsistent with a poor financial condition. It is a fact of business life that improved machinery and equipment are necessary under present day conditions to meet competition. The report by the general manager of a projected loss of \$40,000 is consistent with the conclusion that *Darlington* faced severe financial problems.

The holding of the Board that "a plant shutdown resulting in the discharge of employees that is partly due to employees' union activities constitutes an unfair labor practice,"²⁷ is inconsistent with its statement that "There is no decided case directly dispositive of *Darlington's* claim that it had an absolute right to close its mill, irrespective of motive."²⁸ The case which the Board cites as authority for the former proposition

²⁴ Id. at 374.

²⁵ Supra note 7.

²⁶ 51 L.R.R.M. at 1284 n.38.

²⁷ Id. at 1280, citing *NLRB v. Jamestown Sterling Corp.*, 211 F.2d 725 (2d Cir. 1954).

²⁸ Id. at 1282.

involved discharge of employees partly because of their participation in a union campaign and partly because of some "absenteeism" and "visiting."²⁹ It is difficult to see how this case supports the Board's conclusion.

Deering-Milliken and its affiliated corporations, including Darlington, were found to constitute a single employer because of the common ownership and control of Darlington and Deering-Milliken. In so holding the Board appears to have departed from its own unanimous decision in *Printing Pressman's Union & Knight Newspapers, Inc.*,³⁰ a secondary boycott case, wherein it held that "Notwithstanding the fact of single ownership, the potentiality of common control and integrated operation is not a sufficient basis to support a finding of a single employer." In that case Knight Newspapers, which operated the Detroit Free Press, was parent of the corporation owning and publishing the Miami Herald. It exercised almost complete control of Miami Herald—yet the Board refused to find them one employer.

It is surprising that the Board did not mention *Walter C. Phillips, Regional Director v. Burlington Indus. Inc.*,³¹ which involved a petition by the Regional Director for a temporary injunction prohibiting an employer from liquidating his plant. The petition was denied since injunctive relief would have been futile. The court observed that "It cannot be said from the record that the decision to close the plant was not influenced at least in part, by defendant's necessity to recognize the union. It is undisputed that the plant was losing money."³² It then quoted from *NLRB v. Rapid Bindery*, wherein the Second Circuit stated:³³

If in fact the . . . employer . . . was opposed to unionization and if in fact, it was actually losing money, the mere fact, if shown, that the unionization with its consequent increase in costs was a material factor in its decision to liquidate would not affect the case. As stated in *Jay's Foods, Inc. v. NLRB* . . . [292 F.2d 317, 320 (7th Cir. 1961)]:

An employer has a right to consider objectively and independently economic impact of unionization of its shop and to manage the business accordingly, and fundamentally, if he makes a change in operations because of reasonably anticipated increased costs, regardless of whether they are caused by or contributed to by the advent of union or some other factor, his action does not constitute

²⁹ *NLRB v. Jamestown Sterling Corp.*, supra note 27.

³⁰ 138 N.L.R.B. 137, 51 L.R.R.M. 1169 (1962).

³¹ 199 F. Supp. 589 (N.D. Ga. 1961).

³² Id. at 591.

³³ Id. at 592, citing 293 F.2d 170, 174 (2d Cir. 1961).

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discrimination within Section 8(a)(1), (3) or (5) of the Act.

The *Burlington* court held that it had no authority under the law to require the restoration of some 600 employees already discharged. It noted that an injunction in these circumstances would be without legal precedent.

The *Darlington* decision was dated November 13, 1962. On the same day, the First Circuit handed down its decision in *NLRB v. New England Web, Inc.*,³⁴ overruling the Board and agreeing with the trial examiner to the effect that the company had a right to liquidate its business. There the court said:³⁵

We start with the proposition that a businessman still retains the untrammelled prerogative to close his enterprise when, in the exercise of a legitimate and justified business judgment, he concludes that such a step is either economically desirable or economically necessary. This prerogative exists quite apart from whether or not there is a union on the scene.

. . . .

'The advent of the union was a new economic factor which necessarily had to be evaluated by the respondent as a part of the overall picture pertaining to costs or operation.' . . . [NLRB v. Lassing, 284 F.2d 781, 783 (6th Cir. 1960)]

Certainly the company could reasonably expect the advent of the union to affect its already precarious cost picture. . . . Again, in the language of the Court in Lassing, supra:

'It is completely unrealistic in the field of business to say that management is acting arbitrarily or unreasonably in changing its method of operation based on reasonably anticipated increases in costs, instead of waiting until such increased costs actually materializes.'

In *NLRB v. Kingsford*,³⁶ the Sixth Circuit reversed a Board finding that the employer's "predominant motive" for closing his shop was discriminatory and in violation of sections 8(a)(1) and (3). The court observed that the Board's finding was not supported by "substantial evidence" and described the problem as follows:

. . . In a case such as this, the task of determining motivation is truly difficult, when the employer advances economic reasons of any substance as that which brings about the

³⁴ 51 L.R.R.M. 2426 (1st Cir. 1962).

³⁵ Id. at 2430-31.

³⁶ 52 L.R.R.M. 2555 (6th Cir. 1963).

change. Indeed, the problem is intensified by the obviously true proposition that the employer is free to make bad business judgments without contravening the Act, even though there is a resultant loss of employment. It is not the wisdom or business acumen reflected by the change, which is determinative of whether there is a violation. It is the *predominant* motive behind the change. . . . Where there is no apparent reason for the change, the employer's claim of economic motivation is obviously suspect and if inferences may be reasonably drawn from the evidence that the requisite illegal motivation was *predominant* in effecting the change, the Board's decision must stand. [Emphasis supplied.]

However, animosity toward the union is an insufficient basis for an inference that the employer's motive for change is illegal under the Act where there is convincing evidence that the change was economically motivated.³⁷

Because of its complicated factual situation and the variety of issues involved, *Darlington* may perhaps not be the best case from which to analyze and define the basic issues involved in a company's decision to close down or liquidate its business. And in the light of *New Madrid*, *Mount Hope* and *New England Web*, which have recognized that the advent of the union is a new economic factor which a company may supposedly evaluate and take into account in deciding to close down, the Board's decision will have rough going in the courts when enforcement is sought.³⁸ The ultimate question then, which still awaits final clarification, is to what extent is an employer obliged to present and document the economic justification of his decision to dissolve.

³⁷ Id. at 2558-59.

³⁸ Cf. *NLRB v. Preston Feed Corp.*, 309 F.2d 346 (4th Cir. 1962), discussed in Comment, Recent Developments in Labor Law, p. 671 *infra*. [Editor's note.]