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Newspaper Guild v. NLRB: The Duty to Bargain and the Press

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Newspaper Guild v. NLRB: The Duty to Bargain and the Press

In *Newspaper Guild v. NLRB*,[1] the Court of Appeals for the District of Columbia Circuit held that collective bargaining was not mandatory on all aspects of a newspaper's Ethics Code and Office Rules.[2] The court also held that the penalty provisions attached to these rules could not be separated from the substantive provisions that they were designed to enforce: both were either mandatorily bargainable or they were not.[3] This decision is the most recent one reported that considers the applicability of the National Labor Relations Act[4] (NLRA) to a newspaper in light of the newspaper's assertion of its first amendment rights.

The Pottstown *Mercury*, a newspaper in suburban Philadelphia owned by Peerless Publications, Inc. (both the newspaper and the publisher will be referred to as the *Mercury*), operated under a collective bargaining agreement with the Newspaper Guild of Greater Philadelphia, Local 10, AFL-CIO (Guild).[5] On July 1, 1968, the *Mercury* posted on its bulletin boards a list of twenty-five General Office Rules,[6] prepared by the publisher. The general scope of the rules was employee conduct,[7] and each employee was bound to adhere to the rules under penalty of discharge. At no time prior to the posting was there any collective bargaining with the Guild over the formulation, effectuation, or impact of the rules.

In addition to the General Office Rules, on April 15, 1974, the *Mercury* posted in its offices and published in its pages a Code of Ethics.[8] The Code contained a preliminary statement of general principles and four substantive sections designated Ethics, Accuracy and Objectivity, Fair

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1. 105 L.R.R.M. 2001 (Aug. 13, 1980).
2. *Id.* at 2008.
3. *Id.* at 2010.
4. 29 U.S.C. §§ 141-158 (1976 & Supp. III 1979).
5. 105 L.R.R.M. at 2002. All facts are from the court's opinion.
6. The General Office Rules are given in their entirety in an appendix to the court's opinion, *Id.* at 2015-16.
7. Among other things, the rules dealt with abuse of liquor, disorderly conduct, use of company equipment for private purposes, garnishment of wages for personal debts, posting of circulars, treatment of company property, solicitation of funds on company premises, and various reporting and record keeping procedures.
8. The Code of Ethics is given in its entirety in an appendix to the court's opinion, 105 L.R.R.M. at 2014-15.

Play, and Pledge. The Code was loosely based on an ethics code adopted by the national society of professional journalists. Its stated purposes were to spell out the *Mercury's* standards of integrity, objectivity, and fairness, and to protect and enhance its quality and credibility.

The Ethics section of the Code was the primary issue. This section was said to be based upon the principle that "newspaper people must be free of obligation to any interest other than the public's right to know the truth".[9] The Ethics section prohibited "first, acceptance of anything of value which could 'compromise the integrity of newspaper people and their employers,' including gifts, favors, free travel, special treatment or privileges; and second, conflicts of interest, real or apparent, including secondary employment, political involvement, holding of public office, and service in community organizations."[10] Employees were bound to adhere to the Code under penalty of discipline.

On June 4, 1974, the Guild notified the *Mercury* that the Code of Ethics was an unfair labor practice in that it involved unilateral changes in the terms and conditions of employment. The Guild then requested that management engage in collective bargaining concerning the matter.[11] The *Mercury* refused on the ground that the imposition of the Code and Office Rules was a management prerogative. The Guild thereupon filed charges with the National Labor Relations Board (NLRB).

An Administrative Law Judge (ALJ) ruled on September 23, 1975, that the Code of Ethics and the General Office Rules were mandatory bargaining subjects, and that the *Mercury's* failure to comply with its duty to bargain was an unfair labor practice.[12] The NLRB affirmed part and rejected part of the ALJ's conclusions. It held that "the *Mercury's* Code of Ethics did not affect the terms and conditions of employment so as to constitute a mandatory subject of bargaining; however, it agreed with the ALJ that the penalty provisions were mandatory bargaining subjects.[13] In addition, the ALJ's holding that the Office Rules were mandatory bargaining subjects, both substantively and with regard to penalties, was affirmed by the NLRB.[14] The *Mercury* appealed on the ground that under the first amendment it had an absolute right to impose the conditions and penalties embodied in the two sets of rules, and that it therefore could not be compelled to bargain concerning such matters, irrespective

9. *Id.* at 2004.

10. *Id.*

11. This was subsequently expanded to include the Office Rules.

12. Peerless Publications, Inc., 231 N.L.R.B. 244, 95 L.R.R.M. 1612 (1977), *enforcement denied sub nom.* Newspaper Guild v. NLRB, 105 L.R.R.M. 2001 (Aug. 13, 1980).

13. *Id.* at 245, 95 L.R.R.M. at 1613.

14. *Id.*

of the language of sections 8(a)(5) and 8(d) of the NLRA.[15]

Three earlier cases are essential to an understanding of the court's decision in *Newspaper Guild—Fibreboard Paper Products Corp. v. NLRB*,[16] *The Capital Times Co.*,[17] and *Associated Press v. NLRB*.[18] These cases furnish the necessary background for understanding the relationship between the NLRA, the press, and the types of management decisions exempt from the duty to bargain.

In *Fibreboard*, the Supreme Court had occasion to consider the scope of the phrase "terms and conditions of employment" within the meaning of section 8(d) of the NLRA. The Court held that, on the facts of this case,[19] the replacement of employees in an existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment was a statutory subject of collective bargaining under section 8(d).[20]

Mr. Justice Stewart, in a concurrence to the Court's opinion, was concerned over what he perceived to be the broad implications of the opinion. He stated that there were passages in the Court's opinion which, if given an expansive interpretation, seemed to imply "that any issue which may reasonably divide an employer and his employees must be the subject of compulsory collective bargaining."[21]

Mr. Justice Stewart expressed particular concern that one portion of the Court's opinion, if interpreted broadly, might lead to the conclusion that every decision which could affect job security would be a subject of compulsory collective bargaining.[22] He said that there were decisions by management that would clearly imperil job security without properly

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15. Section 8(a)(5) of the NLRA, 29 U.S.C. § 158(a)(5), provides that "[i]t shall be an unfair labor practice for an employer to refuse to bargain collectively with representatives of his employees . . ." and § 8(d), 29 U.S.C. § 158(d) (Supp. III 1979), defines collective bargaining as meeting and conferring in good faith "with respect to wages, hours, and other terms and conditions of employment. . . ."

16. 379 U.S. 203 (1964).

17. 223 N.L.R.B. 651, 91 L.R.R.M. 1481 (1976).

18. 301 U.S. 103 (1937).

19. Fibreboard had become greatly concerned with the high cost of its maintenance operation and had undertaken a study of the possibility of effecting cost savings by engaging an independent contractor to do the maintenance work. Fibreboard found an independent contractor to do the same maintenance work as its union employees at a price that would save Fibreboard $225,000 annually. On July 31, 1959, the maintenance employees represented by the union were discharged and the independent contractor took over. The union filed unfair labor practice charges against the employer. 379 U.S. at 206-07, 219.

20. *Id.* at 215.

21. *Id.* at 221.

22. The Court had said that the words of section 8(d) plainly cover termination of employment. *Id.* at 210.

coming within the scope of section 8(d).[23] Mr. Justice Stewart emphasized that:

> Nothing the Court holds today should be understood as imposing a duty to bargain collectively regarding such managerial decisions, which lie at the core of entrepreneurial control. Decisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment.[24]

He said that the purpose of section 8(d) was to describe a limited area subject to the duty of collective bargaining and that those management decisions which were "fundamental to the basic direction of a corporate enterprise or which impinge only indirectly upon employment security should be excluded from that area."[25]

In *Capital Times*, the NLRB was confronted with a factual situation remarkably similar to that of *Newspaper Guild*. In this case the publisher instituted a code of ethics that prohibited the acceptance of gifts from outside sources which were used in the performance of employees' duties. The employees were bound to adhere to the code under penalty of discharge.

The NLRB held that gifts received by news personnel in their professional capacities from news sources did not constitute wages within the meaning of section 8(d), and that the code of ethics did not affect the "terms and conditions of employment such as to make it a mandatory subject of bargaining."[26] But the NLRB also held that since the suspension and discharge provision of the code of ethics directly affected employment security, the publisher was obligated to bargain about this section.[27]

The NLRB relied in large part upon *Fibreboard* for its decision. The NLRB considered the Court in *Fibreboard* to have set out three characteristics that determined whether a subject was appropriate for collective-bargaining resolution. These three characteristics were: (1) whether the subject involved an economic decision by the employer; (2) whether the subject was commonly bargained about in the industry in question; and

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23. Mr. Justice Stewart gave as examples an enterprise's decision to invest in labor-saving machinery or to liquidate assets and go out of business. *Id.* at 223.

24. *Id.*

25. *Id.*

26. 223 N.L.R.B. at 651, 91 L.R.R.M. at 1481.

27. Chairman Fanning dissented from the NLRB's treatment of the penalties as separate from the substantive provisions that they were designed to enforce. He stated that "[t]he penalty provision is a constituent part of the rules. It has no separate existence and, standing alone, has no meaning whatsoever." *Id.* at 657, 91 L.R.R.M. at 1488. (Member Fanning, dissenting).

(3) whether the subject affected the job security of the employee.[28]

The NLRB considered none of these characteristics applicable to the code of ethics; therefore, it held that the code of ethics was not a mandatory subject of collective bargaining. However, relying upon *Fibreboard*, the NLRB concluded that the penalty provision affected the employees' job security and was an appropriate subject for collective bargaining.

The third case that is essential to an understanding of *Newspaper Guild* is *Associated Press*. In this case, the Associated Press had discharged an employee on the grounds that his work was not satisfactory. The Associated Press intimated that the employee had shown bias in the course of the performance of his duties; however, the evidence suggested that the true reason the employee was discharged was because of his union activity. The union filed unfair labor practice charges against the Associated Press and the Associated Press argued that any regulation protective of union activities was invalid as applied to the press because of the special protection accorded the press by the first amendment.

The Supreme Court held that, on the facts of this case, the NLRA did not abridge the freedom of press safeguarded by the first amendment and that the Act did not permit a newspaper to discharge an employee because of his union activity or agitation for collective bargaining.[29] The Court's holding was purposely narrow, undoubtedly because the Court was sensitive to the fact that it was coming perilously close to impinging upon the first amendment rights of the press.

To emphasize the narrowness of its holding the Court stated that proper implementation of the Act would have "no relation whatever to the impartial distribution of news."[30] Furthermore, the Court went on to state that its decision "in nowise circumscribes the full freedom and liberty of the petitioner to publish the news as it desires it published or to enforce policies of its own choosing with respect to the editing and rewriting of news for publication. . . ."[31]

In *Fibreboard*, the Supreme Court had occasion to consider section 8(d) of the NLRA and the scope of the duty to bargain collectively. In *Associated Press*, the Court considered the applicability of the NLRA to the press in the narrow confines of a situation in which an employee had been discharged solely due to his union activity. In *Newspaper Guild*, as in *Capital Times*, the court had to consider the scope of the duty to bargain collectively as applied to the press in a situation other than an unlawful discharge.

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28. *Id.* at 653-54, 91 L.R.R.M. at 1485-86.
29. 301 U.S. at 130-32.
30. *Id.* at 133.
31. *Id.*

The court's opinion in *Newspaper Guild* consisted of three main parts; in each part the court considered the respective positions of the *Mercury*, the Guild, and the NLRB. In the first part of the opinion, the court considered the *Mercury's* contention that under the first amendment it had an absolute right to impose the conditions and penalties embodied in the two sets of rules, and that it therefore could not be compelled to bargain concerning such matters. The court disposed of the *Mercury's* contention in the first two sentences of part IV of the opinion. It stated that "[t]he Mercury's reliance on the First Amendment is plainly foreclosed by long-standing precedent. It is firmly established that a newspaper is not immune from the coverage of the National Labor Relations Act merely because it is an agency of the press."[32]

The court went on to cite several cases in which statutes of general applicability (such as the National Labor Relations Act) had been enforced against the press.[33] In this part of the opinion, the court concluded that its ruling would preserve to the *Mercury* exclusive control over the aspects of its operation, without the burden of mandatory bargaining, which were fundamental to its enterprise (such as editorial content and other matters at the heart of a newspaper's independence) and thus avoid any constitutional problem.[34]

In the second part of the opinion, the court confronted the Guild's contention that every matter touching in any way upon conditions of employment was mandatorily bargainable under the NLRA. As was the case with the *Mercury's* position, the court disposed of the Guild's contention very quickly. In so doing, the court relied principally upon Mr. Justice Stewart's concurrence in *Fibreboard* and the NLRB's holding in *Capital Times*.

The court considered that a publisher's decision to institute a code of ethics was largely analogous to those decisions alluded to by Justice Stewart[35] which "lie at the core of entrepreneurial control . . . [and] are fundamental to the basic direction of a corporate enterprise . . . or concern its basic scope. . . ."[36] Other cases were cited by the court as having elaborated upon the *Fibreboard* concurrence, but the court considered none of them to have added anything of substance to opinion.[37]

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32. 105 L.R.R.M. at 2005-06, *citing* Associated Press v. NLRB, 301 U.S. at 132.

33. *See* Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1947) (Fair Labor Standards Act); Associated Press v. United States, 326 U.S. 1 (1945) (antitrust laws); Grosjean v. American Press Co., 297 U.S. 233 (1936) (general taxation).

34. 105 L.R.R.M. at 2006.

35. 379 U.S. at 223.

36. 105 L.R.R.M. at 2007, *quoting* Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. at 223, 225.

37. *See* Allied Chem. Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157, 179 n.19 (1971); International Ladies Garment Workers Union v. NLRB, 463 F.2d 907, 915-16 (D.C.

The court also expressed agreement with the NLRB's conclusion in this case and in *Capital Times* that "protection of the editorial integrity of a newspaper lies at the core of publishing control."[38] The court stated that, with respect to news publications, credibility was central to the ultimate product and to the conduct of the enterprise.[39] It went on to say that "editorial control and the ability to shield that control from outside influences are within the First Amendment's zone of protection and therefore entitled to special consideration."[40]

Finally, in the third part of the opinion, the court addressed the NLRB's position in the case, and in so doing, announced its guidelines for determining whether the provisions of a newspaper's code of ethics were appropriate subjects of mandatory collective bargaining. The NLRB considered that the Office Rules were subjects for mandatory bargaining in all their aspects;[41] that the substantive provisions of the Code constituted a subject properly reserved for management and were not bargainable; and that enforcement of any of the provisions through punitive action was subject to mandatory bargaining.

The court concluded that the NLRB had been cognizant of the problems presented by the tension between the employees' right to bargain collectively and the right of the owner of a newspaper to safeguard the credibility of his publication; however, the court considered the NLRB's approach to be faulty in two respects. First, the NLRB improperly lumped together the entire Code of Ethics in a single category, holding all of it, without individualized analysis, exempt from mandatory bargaining. Second, the NLRB erroneously separated the penalty provisions of the Code from the substantive provisions that they were designed to enforce.

The court stated that each of the provisions of the Code should be scrutinized to distinguish those provisions that were central to the *Mercury's* interest in the preservation of its legitmate management prerogatives and affected the employees only minimally, from those that, although not essential to the publication's freedom to conduct its business, had a significant impact on the employees.[42] The court thus advocated a type of balancing process that would take into account the relative impor-

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Cir. 1972); NLRB v. Royal Plating & Polishing Co., 350 F.2d 191, 195-96 (3d Cir. 1965).

38. 105 L.R.R.M. at 2007.

39. *Id.* at 2007 n. 33.

40. *Id.* at 2007-08.

41. Rule 11, which dealt with confidentiality of news and advertising matter, etc., was not considered to be truly a part of the Office Rules. It was more properly considered as a part of the Code of Ethics. *Id.* at 2015-16 (Appendix).

42. *Id.* at 2008.

tance of the proposed actions to the two parties.[43] As an example of what it meant, the court said that it perceived significant differences between "a gift from a news source designed to influence news coverage, and a freebie (*e.g.*, a ticket to a major league baseball game) given relatively indiscriminately to journalists and other well-known persons."[44] In this instance, regulation of the former category would be reasonably related to the core concerns of the newspaper's management without vitally affecting the interests of the employees; regulation of the latter would likely not be reasonably related to core concerns and would interfere substantially with the private lives of the employees.

With respect to the NLRB's treatment of the penalty provisions as separate from the substantive provisions of the Code, the court said simply that it could not understand how penalties could be separated for NLRA purposes from the substantive provisions that they were designed to enforce.[45] The court concluded that if the substantive provision was an appropriate subject for mandatory collective bargaining, then the corresponding penalty provision was likewise mandatorily bargainable. If the substantive provision was not an appropriate subject for mandatory collective bargaining, then likewise the corresponding penalty provision was not mandatorily bargainable.[46]

The court's result in *Newspaper Guild* appears to be correct, notwithstanding the fact that the court erred in its treatment of the *Mercury's* argument and in its corresponding first amendment analysis. The court mistakenly understood the *Mercury's* argument to be that the NLRA was inapplicable to the press due to the first amendment. In actuality, the *Mercury's* argument was that the conditions and penalties embodied in its Code and Office Rules represented a type of management decision which was protected by the first amendment and that this type of management decision was outside the scope of the NLRA. Also, the court erred in stating that the *Mercury's* reliance on the first amendment was precluded by long-standing precedent. The court's reasoning is unclear,

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43. *See* Allied Chem. Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157, 179 (1971); Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 223 (1964); International Ladies Garment Workers Union v. NLRB, 463 F.2d 907, 915-16 (D.C. Cir. 1972). *See* also 105 L.R.R.M. at 2009 nn. 43, 44 & 45.

44. 105 L.R.R.M. at 2009 (footnotes omitted). Other examples given by the court were: (1) differences between a reporter's secondary employment constituting a clear conflict of interest (*i.e.*, working for a major advertiser) and such activities as holding public office and service in community organizations; and (2) differences for bargaining purposes between categories of employees (*i.e.*, reporters and editorial personnel vs. maintenance and circulation employees). *Id.*

45. The court expressed agreement with a similar conclusion of Chairman Fanning in The Capital Times Co., 223 N.L.R.B. at 656-57, 91 L.R.R.M. at 1487-88.

46. The court remanded the case to the NLRB. 105 L.R.R.M. at 2010.

particularly in light of its subsequent statement that "editorial control and the ability to shield that control from outside influences are within the First Amendment's zone of protection and therefore entitled to special consideration."[47]

Despite the court's trouble in comprehending the *Mercury's* argument and in correctly articulating the proper first amendment analysis, the decision is admirable in one important respect. The balancing process advocated by the court is both logical and desirable in that it takes into account the relative importance of the provisions to the two parties.[48] The publisher's property rights in his newspaper plus the first amendment rights accorded to the press are weighed against the employees' right to organize.

As a practical matter the first amendment protection of the press, when coupled with the publisher's property rights in his newspaper, will nearly always tip the scales in the publisher's favor. However, this is perhaps as it should be. Justice Sutherland, in his dissenting opinion in *Associated Press*, graphically described the special position occupied by the press:

> The destruction or abridgment of a free press—which constitutes one of the most dependable avenues through which information of public and governmental activities may be transmitted to the people—would be an event so evil in its consequences that the least approach toward that end should be halted at the threshold.[49]

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47. *Id.* at 2007-08.

48. The Supreme Court detailed a similar balancing process in NLRB v. Great Dane Trailers, Inc., 363 F.2d 130 (5th Cir. 1966), *rev'd on other grounds*, 388 U.S. 261 (1966).

49. 301 U.S. at 136 (1937) (Sutherland, J., dissenting).

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I certify that the statements made by me above are correct and complete.

THERESE D. STIFFLER, *Managing Editor*