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Kaynard v. Palby Lingerie, Inc.: The Second Circuit Reveals a Bargaining Order with a Surprising Shape

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Kaynard v. Palby Lingerie, Inc.: The Second Circuit Reveals a Bargaining Order with a Surprising Shape

In *Kaynard v. Palby Lingerie, Inc.*,[1] the Second Circuit Court of Appeals held that an interim bargaining order could be granted in the district court's discretion when there is a showing of a "substantial basis" to make a unit determination even though the unit of workers that desire union representation has not been finally determined.[2] *Palby* is the first case in which a circuit court has ever granted an interim bargaining order under section 10(j) of the Labor Management Relations (Taft-Hartley) Act[3] in the absence of a final unit determination.[4]

Palby Lingerie is the sales end of a four company operation engaged in the manufacture, sale and distribution of women's lingerie.[5] Local 57, Nassau-Suffolk District Council, International Ladies Garment Workers Union, AFL-CIO, obtained twenty-seven signed authorization cards from employees of the four companies and demanded recognition as the bargaining representative of all fifty production, maintenance, shipping and receiving employees. These cards were signed by nineteen of thirty employees employed by one company, but only seven of fourteen employed by the second and one of six employed by the third.[6] No cards were ob-

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1. 625 F.2d 1047 (2d Cir. 1980).

2. This is usually referred to as final unit determination. This is the determination made by the NLRB as to what unit of workers should be recognized and whether they are a majority of the workers in that unit. For general information on unit determination, *see* R. GORMAN, BASIC TEXT ON LABOR LAW, at 66-92 (1976).

3. 29 U.S.C. § 160(j) (1976), states:

> The Board shall have power, upon issuance of a complaint as provided in subsection (b) of this section charging that any person [that] [*sic*] has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

4. 625 F.2d at 1055.

5. *Id.* at 1049.

6. *Id.* at 1050.

tained from Palby personnel, all of whom are supervisors.[7]

During the Regional Director's hearing, employees testified to a wide range of antiunion activities. These included the discharge of two employees,[8] interrogation of employees about their union affiliation,[9] apparent surveillance of union members,[10] imposing disfavored duties on union supporters,[11] and threatening plant closure and other reprisals in the event Local 57 became the bargaining representative.[12] The district court accepted this testimony for the purposes of the section 10(j) proceeding.[13]

The Regional Director, responding to charges filed by Local 57, issued a complaint against the employer.[14] The charges alleged that the employees constituted an appropriate bargaining unit under section 9(b) of the LMRA[15] and alleged violations by Palby Lingerie of several sections of the LMRA.[16] The District Court for the Eastern District of New York granted the Regional Director's petition for a temporary injunction and issued an interim bargaining order pending the Board's final disposition of the case.[17] The district court also found that there was "sufficient basis in the record"[18] to support a finding of an appropriate bargaining unit to satisfy section 9(b) requirements since twenty-seven of the fifty employees had signed authorization cards.[19] The Second Circuit affirmed. The court reasoned that to preclude the issuance of an interim bargaining order in all cases in which a final unit determination had not been made would, in some cases, "[make] it impossible or not feasible to restore or perserve the status quo. . . ."[20]

A final Board determination in labor law cases may take more than two

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7. *Id.* The court treated these four companies as a multi-plant unit because the record showed that the operations of the family corporations were functionally integrated and the companies were subject to a substantial degree of common control. *Id.* at 1055.

8. *Id.* at 1053. The court's discussion concerning reinstatement of these two employees constitutes a major part of the *Palby* opinion. This note does not address the reinstatement issue.

9. *Id.* at 1053.

10. *Id.* at 1054.

11. *Id.*

12. *Id.* at 1053-54.

13. *Id.* at 1054.

14. *Id.* at 1050.

15. 29 U.S.C. § 159(b) (1976). Section 9(b) states that the Board must determine the bargaining unit.

16. 625 F.2d at 1050. The alleged violations by Palby Lingerie were of §§ 8(a)(1), 8(a)(3) and 8(a)(5) of the Labor-Management Relations (Taft-Hartley) Act, 29 U.S.C. §§ 158(a)(1), (a)(3), (a)(5) (1976). These sections refer to the employer's unfair labor practices.

17. 625 F.2d at 1051.

18. *Id.*

19. *Id.*

20. *Id.* at 1055. *See* note 21 *infra.*

years unless the case is settled during the proceedings. During these two years, a party engaging in alleged unfair labor practices has little incentive to stop these practices; the final resolution is far off and the opposition could become discouraged by a continued and prolonged campaign.[21] Thus, section 10(j) gives the federal district courts the power to grant appropriate temporary relief from unfair labor practices, when petitioned to do so by a Regional Director of the NLRB, as a means for restoring or preserving the status quo while the Board processes the complaint.

One form of appropriate relief under section 10(j) can be an interim bargaining order. This remedy, however, is the most controversial of the various section 10(j) remedies.[22] Interim bargaining orders are troubling because their issuance can force bargaining on a company when less than a majority of employees desire union representation.

A bargaining order was first issued in the landmark case of *NLRB v. Gissel Packing Co., Inc.*[23] *Gissel* was a consolidation of four cases. In each case, a union had obtained authorization cards from a majority of employees and demanded recognition from the employer.[24] In all four cases the employers refused to recognize the workers and claimed that the authorization cards were not sufficiently reliable to support a bargaining demand.[25] All of the employers either continued or began antiunion campaigns.[26] The Supreme Court upheld the bargaining order issued by the Board and noted that authorization cards may be the best means of assuring employee choice if the employer has engaged in conduct disruptive of the election process.[27] Otherwise, an employer could avoid his bargaining obligation indefinitely by continually interfering with elections.[28]

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21. The Senate Report on the bill which became section 10(j) states:
> Experience under the National Labor Relations Act has demonstrated that by reason of lengthy hearing and litigation enforcing its order, the Board has not been able in some instances to correct unfair labor practices until after substantial injury has been done . . . it has sometimes been possible for persons violating the act to accomplish their unlawful objective before being placed under any legal restraint and thereby to make it impossible or not feasible to restore or preserve the status quo pending litigation.

S. REP. No. 105, 80th Cong., 1st Sess., 8, 27 (1947), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 433 (1948).

22. *See* Note, *The Use of Section 10(j) of the Labor-Management Relations Act in Employer Refusal-to-Bargain Cases*, 1976 ILL. L.F. 845 (1976), for a good overview of the standards courts have used in granting § 10(j) relief and the policies underlying § 10(j) bargaining orders.

23. 395 U.S. 575 (1969).

24. *Id.* at 580.

25. *Id.*

26. *Id.* at 580-81 n.1.

27. *Id.* at 602.

28. *Id.* at 603.

In dictum, the Court in *Gissel* recognized that there could be exceptional cases in which an employer's unfair labor practices are so outrageous and pervasive that the possibility of a fair and reliable election would be precluded. In those cases, the Court suggested that the issuance of a bargaining order should be permitted regardless of whether the union has obtained a majority.[29]

Since *Gissel*, the circuit courts of appeal have been trying to decide when a bargaining order should be used in fashioning section 10(j) interim relief. To date, there is no consensus among the circuits.[30] A comparison of the Fifth Circuit's approach and the Second Circuit's approach will illustrate the fundamental disagreement over the public policies involved.

In *Boire v. Pilot Freight Carriers*,[31] the Teamsters attempted to organize truck drivers and dockworkers. Pilot's president and vice-president gave one "captive audience" speech in which drivers who had made substantial investments in their own equipment were told that, if the company unionized, the men would no longer be able to drive their own trucks but would have to use company equipment.[32] Despite the concern caused by this speech, the union had majority support within nine days after the first card was signed and requested that Pilot bargain.[33] Pilot repeatedly refused. The Regional Director issued a complaint and petitioned the district court for section 10(j) interim relief.

The district court enjoined Pilot from further unfair labor practices but refused to order interim bargaining.[34] The Fifth Circuit affirmed and stated that interim bargaining orders are not appropriate when there is no established bargaining relationship prior to the order.[35] The court reasoned that until the Board has found unfair labor practices, the employer has no duty to accept a card majority but may petition the Board for an election.[36]

The Second Circuit reached the opposite result in *Seeler v. Trading*

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29. *Id.* at 613-14. For an interesting discussion of this issue, *see* Golub, *The Propriety of Issuing Gissel Bargaining Orders Where the Union Has Never Attained a Majority*, 29 LAB. L.J. 631 (1978).

30. *Compare* Seeler v. Trading Port, Inc., 517 F.2d 33 (2d Cir. 1975); *accord*, Levine v. C & W Mining Co., 610 F.2d 432 (6th Cir. 1979); *with* Boire v. Pilot Freight Carriers, 515 F.2d 1185 (5th Cir. 1975), *cert. denied*, 426 U.S. 934 (1976).

31. 515 F.2d 1185 (5th Cir. 1975), *cert. denied*, 426 U.S. 934 (1976).

32. *Id.* at 1190.

33. *Id.*

34. *Id.* at 1192. Specifically, the district court enjoined Pilot from any further section 8(a)(1), 8(a)(3) and 8(a)(5) violations.

35. *Id.* at 1194.

36. *Id. See* Linden Lumber Div. v. NLRB, 419 U.S. 301 (1974).

Port, Inc.[37] In that case, the union had obtained forty-two authorization cards from forty-nine wholesale and retail grocery workers at Trading Port. But, the president of Trading Port refused either to recognize the union or to have a neutral third party count the cards to verify the majority. After a strike, approximately twenty workers were permanently laid off. When an NLRB election was held one month after the lay-offs, the union lost. In the district court, testimony tended to show that Trading Port had threatened employees with the loss of their jobs, promised benefits to employees if they abandoned the union, threatened to close the warehouse, coercively interrogated employees about how they would vote in the upcoming election and discriminated against union supporters in rehiring.[38] As their only defense, Trading Port denied that some of these conversations took place and asserted that others were in jest. The district court, basing its conclusions on two earlier cases,[39] held that it is not just and proper for a district court to order interim bargaining when a union has never had a bargaining relationship with the employer and has failed to win an election, even though the Board is free to find that the union's card majority coupled with subsequent unfair labor practices justifies such an order.[40]

The Second Circuit reversed and held that when the Regional Director makes a showing based on authorization cards that a union at one time had a clear majority and that the employer then engaged in such egregious and coercive unfair labor practices as to make a fair election virtually impossible, the district court should issue a bargaining order under section 10(j).[41] The court reasoned that in these cases the election process has been rendered so meaningless by the employer that the authorization cards are a superior gauge of employee sentiment.[42] The bargaining order then becomes a just and proper means of restoring the status quo and preventing further frustration of the purposes of the Act.[43]

The different results in these two cases indicate antithetical views on

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37. 517 F.2d 33 (2d Cir. 1975).

38. *Id.* at 36.

39. Fuchs v. Steel Fab, Inc., 356 F. Supp. 385 (D. Mass. 1973) and Kaynard v. Lawrence Rigging, Inc., 68 CCH Lab. Cas. ¶ 12,735 (E.D.N.Y. March 31, 1972).

40. 517 F.2d at 37.

41. *Id.* at 40.

42. *Id.*

43. *Id. See* Levine v. C & W Mining Co., 610 F.2d 432 (6th Cir. 1979). This court decided the issue in accord with *Seeler* and is the only other circuit to pass on this question. *See also* Hirsch v. Trim Lean Meat Products, Inc., 479 F. Supp. 1351 (D. Del. 1979); Henderson v. Gibbons & Reed Co., 53 CCH Lab. Cas. ¶ 11,081 (D.N.M. February 18, 1966). These district courts have also decided the issue in accord with *Seeler*. The two district courts in *Steel-Fab* and *Lawrence Rigging* have agreed with the *Boire* rationale. *See* note 39 *supra*.

the policy issues that underlie the decision of whether to order bargaining when there has been no prior bargaining relationship. There are three areas of disagreement. First, there is disagreement over whether other less extreme remedies are effective in coping with the alleged unfair labor practice before the Board can review the problem. Next, the courts take opposing views as to whether the status quo or true majority can be discovered by the use of authorization cards. Finally, there is disagreement over whether a bargaining order does violence to the Act when issued before final Board action.

The Fifth Circuit believes that a cease and desist order or other remedial measures can be effective in coping with the problem during the interim period, that when the union never had a bargaining relationship with the employer a section 10(j) bargaining order would upset the status quo, and that the bargaining order is "radical relief" that frustrates the purpose of the Act.

The Second Circuit maintains that a bargaining order is the only adequate method of discouraging an employer's unfair labor practices in some extreme cases, that the status quo which deserves protection is not the illegal status quo but the status quo as it existed before the onset of the unfair labor practices, and that an interim bargaining order is far from "radical relief" but fits well within the general principles of the Act. Clearly, the cases turn on the opinion of the courts as to whether certain policies apply and if they do, to what degree.

Palby Lingerie is only one step beyond the Second Circuit's reasoning in *Seeler*.[44] The court in *Palby* had to decide whether an interim bargaining order should issue despite the lack of a final unit determination[45] and despite the lack of the "clear majority" shown in *Seeler*.

Palby made two arguments against issuance of the interim bargaining order. First, it pointed out that the Board may ultimately disagree with the Regional Director as to the appropriate unit. If an agreement has already been made based on the unit designated by the Director, the employer will then be contractually bound to a union that does not have the authority to represent all the employees, and a majority of employees would be represented in bargaining by a union they did not choose.[46] Second, management argued that if the Board eventually sets aside the unit determination the orderly collective bargaining process would be upset.[47] As an illustration, it noted that the only two district courts that have considered interim bargaining orders prior to a final Board determination

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44. In *Seeler*, there had been a final unit determination which was a prerequisite to the representation election.

45. 625 F.2d at 1054.

46. *Id.*

47. *Id.* at 1055.

of the unit have considered the order inappropriate.[48]

The Second Circuit rejected the employer's arguments and felt the outcome of the case was to be determined by a balancing of policies. In answer to Palby's first argument, the court stated defensively that "there are risks to the carrying out of sound labor law policy whether an interim bargaining order is granted or denied."[49] As to the second argument, the court reasoned that, if the bargaining order was later reversed by the Board, orderly collective bargaining might indeed be upset.[50] However, if the denied interim bargaining order was later approved by the Board the final disposition of the case would come at a time when the employer's unlawful acts would make it very difficult to restore or preserve the true majority.[51]

The court embraced the Sixth Circuit's recognition in *Levine v. C & W Mining Co.*[52] that to require "prior Board certification would preclude an interim bargaining order whenever recognition was sought on the basis of authorization cards."[53] The court also stated that if the dispute as to the bargaining unit is substantial then the district court has the discretion to refuse to grant an interim bargaining order.[54]

The Second Circuit's superficial reasoning and its conclusion that a final unit determination is not necessary before issuance of an interim bargaining order does violence to the majoritarian concept of section 9 of the Act. It is this concept that renders it impossible to take literally the dictum in *Gissel*,[55] in which the Court leaves open the possibility that a bargaining order might issue "without need of inquiry into majority status,"[56] and that raises doubts as to the wisdom of the Second Circuit's decision in *Palby*. Justice Rutledge upheld this majoritarian principle in the Supreme Court years ago when he announced that the courts do not want to "force men into unions and into dealing with their employers through unions contrary to the employees' own wishes."[57]

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48. *Id. See* Taylor v. Circo Resorts, Inc., 458 F. Supp. 152, 157 (D. Nev. 1978); Dick v. Sinclair Glass Co., 283 F. Supp. 505, 511-12 (N.D. Ind. 1967).

49. *Id.*

50. *Id.*

51. *Id. See* note 21 *supra.*

52. 610 F.2d 432 (6th Cir. 1979).

53. 625 F.2d at 1055. *See* Levine v. C & W Mining Co., 610 F.2d at 436. In *Levine*, the Sixth Circuit did not address the issue of the appropriate bargaining unit. However, the issue was in dispute in the district court. Levine v. C & W Mining Co., 465 F. Supp. 690, 694 (N.D. Ohio 1979), *aff'd*, 610 F.2d 432 (1979).

54. 625 F.2d at 1055. The court cited Kaynard v. Steel Fabricators Ass'n, 95 L.R.R.M. 2015 (E.D.N.Y. 1976), in which section 10(j) relief was denied when rival unions competing for representation of the employees caused substantial dispute as to the bargaining unit.

55. *See* note 29, *supra*, and accompanying text.

56. 395 U.S. at 613.

57. Medo Photo Supply v. NLRB, 321 U.S. 678, 697-98 (1943).

Protection of the majoritarian concept is the single greatest problem with issuance of an interim bargaining order. Put simply, Congress only intended that unions be allowed to represent workers when a true majority desires representation. In *Palby*, a majority was never finally ascertained. Even if a majority had been recognized there was no indication of what unit or which of the four companies the majority would represent. The Second Circuit tried to ignore this irritating question by ending the opinion with the conclusory statement that a multi-plant unit was justified because the four companies were functionally integrated and subject to common control.[58] But, at best, only twenty-seven of fifty authorization cards were signed. If the authorization cards were inaccurate, then not only was injustice done to the employer but also to the majority of employees who did not want to be represented by the union.

The union is given an undue advantage even if the bargaining order is only binding during the interim period. The issuance of the bargaining order could produce the additional support necessary to reach a majority even if the authorization cards inaccurately indicate majority support. A *Gissel* bargaining order may be appropriate as applied in most cases, but it simply should not be used in an interim situation when no final unit has been determined by the Board.

Section 10(j) actions are necessary because of the lengthy time delays before allegations of unfair labor practices are settled. The result of this case could have a negative impact on the body of labor law if the decision props up the Act and forestalls the solution of the real problem, which is long delays before final Board action. However, until these time problems are solved, *Palby* will remain significant as the first case in which a circuit court of appeals ordered a section 10(j) bargaining order despite the lack of a final unit determination.

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58. 625 F.2d at 1055.