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Labor Law—National Labor Relations Board
Jurisdiction—Legal Services Have Insufficient
Effect on Interstate Commerce to Justify Exercise of
NLRB Jurisdiction—Bodle, Fogel, Julber,
Reinhardt & Rothschild, 206 N.L.R.B. No. 60,
CCH 1973 Lab. L. Rep. 25,863 (October 23, 1973)

Robert D. Vogel

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LABOR LAW—NATIONAL LABOR RELATIONS BOARD JURISDICTION—
LEGAL SERVICES HAVE INSUFFICIENT EFFECT ON INTERSTATE COM-
MERCE TO JUSTIFY EXERCISE OF NLRB JURISDICTION—*Bodle, Fogel,*
Julber, Reinhardt & Rothschild, 206 N.L.R.B. No. 60, CCH 1973
LAB. L. REP. ¶ 25,863 (October 23, 1973).

Last October, in *Bodle, Fogel, Julber, Reinhardt & Rothschild*,¹ the National Labor Relations Board (“the Board”) refused to assert jurisdiction over the non-professional employees of a law firm.² Pursuant to section 14(c)(1) of the National Labor Relations Act (“the Act”),³ a majority of the Board held that the services provided by law firms as a general class have no more than a minimal effect on interstate commerce.⁴ Further, the majority felt that the confidentiality of the lawyer-client relationship would be imperiled by the unionization of

1. 206 N.L.R.B. No. 60, CCH 1973 LAB. L. REP. ¶ 25,863 (October 23, 1973).

2. *Id.* at —, CCH 1973 LAB. L. REP. at 33,340.

3. Section 14(c)(1) states:

The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: *Provided*, That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959.

29 U.S.C. § 164(c)(1) (1970).

Prior to the passage of this section in September, 1959, the Board had established minimum monetary jurisdictional standards under which it could refuse to assert jurisdiction. Attempting to further effectuate the policies of the Act, the Board, in October, 1958, revised these standards downward to require at least \$50,000 direct inflow or direct outflow annually for an assertion of jurisdiction. *See* *Siemons Mailing Serv.*, 122 N.L.R.B. 81, 82-85 (1958).

Congress then passed, in September, 1959, the Labor Management Reporting and Disclosure Act which added section 14(c)(1) and (2) to the Labor Management Relations Act of 1947 (Taft-Hartley Act), thereby allowing the Board to exercise discretion in declining to assert jurisdiction over an entire class or category of employers and approving the Board's newly-adopted minimum jurisdictional standards but disallowing future increases of such minimums. Section 14(c)(2) was adopted to allow other agencies and courts the statutory right to assert jurisdiction where the Board has declined to do so and thus eliminate the “no-man's land” sanctioned in *Guss v. Utah Labor Relations Bd.*, 353 U.S. 1, 10-12 (1957) and *Amalgamated Meatcutters v. Fairlawn Meats, Inc.*, 353 U.S. 20, 23-24 (1957). Section 14(c)(2) states:

Nothing in this subsection shall be deemed to prevent or bar any agency or the courts of any State or Territory (including the Commonwealth of Puerto Rico, Guam, and the Virgin Islands), from assuming and asserting jurisdiction over labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction.

29 U.S.C. § 164(c)(2) (1970).

4. 206 N.L.R.B. at —, CCH 1973 LAB. L. REP. at 33,340.

a firm's clerical employees⁵ and that, in any event, jurisdictional standards of general application would be "extraordinarily difficult both to devise and to administer."⁶

The defendant law firm specialized in the practice of labor law, representing numerous AFL-CIO local and international unions in the Southern California area.⁷ A Teamsters union local sought to represent the firm's clerical staff (nine secretaries, two receptionists, and one bookkeeper)⁸ and petitioned the Board for a union representation election.⁹ The Board denied the Teamsters' request, announcing that, although it possessed the clear statutory authority to assert jurisdiction, it chose not to do so since "the policies of the Act would not be effectuated" by such a course of action.¹⁰

5. *Id.* at —, CCH 1973 LAB. L. REP. at 33,341.

6. *Id.*

7. *Id.* at —, CCH 1973 LAB. L. REP. at 33,339.

8. Brief for Respondents at 9, Bodle, Fogel, Julber, Reinhardt & Rothschild, 206 N.L.R.B. No. 60, CCH 1973 LAB. L. REP. ¶ 25,863 (October 23, 1973) [hereinafter cited as Respondents' Brief]. An associate attorney is also considered a salaried "law employee," but the local Teamsters union did not attempt to include the seven associates of the law firm in the proposed bargaining unit. See note 44 *infra*.

9. The local Teamsters union petitioned the Board under Section 9(c)(1)(A)(i) of the Taft-Hartley Act which provides:

Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a) of this section, . . .

. . . .
the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and certify the results thereof.

29 U.S.C. § 159(c) (1970).

10. 206 N.L.R.B. at —, CCH 1973 LAB. L. REP. at 33,339. Sections 2(6) and (7) of the Act state:

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

29 U.S.C. § 152(6) (1970).

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

29 U.S.C. § 152(7) (1970).

MINIMAL EFFECT ON INTERSTATE COMMERCE

It was stipulated that the employer firm annually grossed more than \$50,000 for legal services furnished to clients who met the Board's jurisdictional standards.¹¹ However, the majority stated that neither the total income of the firm nor the amount attributable to interstate clients could in any way control the decision as to whether or not jurisdiction should be asserted.¹² The major consideration was to be "whether the stoppage of business by reason of labor strife [in a law firm] would tend substantially to affect [interstate] commerce."¹³

The Board recognized that a client's production, distribution, buying, and selling of goods and services could substantially affect interstate commerce.¹⁴ It was also admitted that:

[T]oday's law firms . . . frequently assist large corporate entities, labor unions, and other institutional entities in their interstate commerce activity. Thus, the guiding hand of the lawyer can, and in many instances does, assist in the negotiation and ultimate formulation of complex interstate agreements relating to trade and business.¹⁵

Yet, the majority characterized an attorney as a mere "helper" to the client who alone functions as the "principal,"¹⁶ "the moving force in commerce."¹⁷ Thus, "no matter in how high esteem that legal assist-

11. 206 N.L.R.B. at —, CCH 1973 LAB. L. REP. at 33,339.

12. *Id.* at —, CCH 1973 LAB. L. REP. at 33,340. The parties also stipulated that the total income of the employer law firm was in excess of \$500,000. *Id.* at —, CCH 1973 LAB. L. REP. at 33,339.

13. *Id.* at —, CCH 1973 LAB. L. REP. at 33,340, quoting *Service Stores Corp.*, 62 N.L.R.B. 1161-63 (1945). See also, *J.L. Brandeis & Sons v. NLRB*, 142 F.2d 977, 980 (8th Cir.), cert. denied, 323 U.S. 751 (1944), enforcing 53 N.L.R.B. 352 (1943).

Although the two cases cited support the language quoted by the majority, the Board in both cases had asserted jurisdiction notwithstanding the fact that the service was primarily local in nature. The Board in *Bodle* could apparently cite no case where jurisdiction was denied, or an insufficient impact on interstate commerce found, regarding an employer who provided extensive services for other employers who themselves met the Board's jurisdictional guidelines. 206 N.L.R.B. at —, CCH 1973 LAB. L. REP. at 33,342 n.3. But see *Seattle Real Estate Bd.*, 130 N.L.R.B. 608 (1961), where the Board declined to assert jurisdiction over real estate agents because "the services rendered [were] primarily at the local level, and [were] therefore essentially local and have at best only a remote relationship to interstate commerce . . ." *Id.* at 610. However, the services of a real estate agent who buys and sells land for an interstate client does not appear materially distinguishable from the many other services over which the Board has consistently asserted jurisdiction. Thus, *Seattle Real Estate Board* may be an aberration. See note 32 *infra* and accompanying text.

14. 206 N.L.R.B. at —, CCH 1973 LAB. L. REP. at 33,340.

15. *Id.*

16. *Id.*

17. *Id.*

ance might be held,"¹⁸ the majority thought it highly unlikely that a labor conflict in a law firm could substantially impede or interrupt the client's interstate business.¹⁹ In short, the majority concluded that the very nature of legal services precluded any but the most minimal effect on interstate commerce.²⁰

The decision, however, was based on two closely interrelated premises, each of which appears untenable. Apparently the majority assumed that, once a client's commercial mechanism is functioning in interstate commerce, legal assistance is not essential to the continuation of its operation.²¹ This clearly overlooks the fact that

[t]he legal profession plays a vital role at all stages [of a client's business] from the act of incorporation through the obtaining of licenses or certificates which might be needed, governmental approval of rates and/or routes, the issuance and sale of stocks and bonds, the negotiations and preparation of legal contracts necessary for the holding of property, and the purchase and sale of materials and products²²

Recent escalation in the quantity of corporate litigation and the concomitant danger of large awards in class action suits²³ demonstrate that it is much "more realistic to say that without . . . [legal] services . . . clients would be *unable* to engage in . . . [interstate] commerce" ²⁴ The risk of incurring liability while temporarily unrepresented would certainly force industrial clients to restrict their participation in interstate commerce until their legal counsel was again available.²⁵ Such a forced limitation of commercial activities to the scope safely established through the prior assistance of counsel would seem, beyond question, to affect commerce.²⁶

18. *Id.* at —, CCH 1973 LAB. L. REP. at 33,341.

19. *Id.* at —, CCH 1973 LAB. L. REP. at 33,340-41.

20. *Id.* See notes 11-19 *supra* and accompanying text.

21. 206 N.L.R.B. at —, CCH 1973 LAB. L. REP. at 33, 340-41.

22. *Id.* at —, CCH 1973 LAB. L. REP. at 33,342 (emphasis added).

23. See Caruth, *The Legal Explosion Has Left Business Shell-Shocked*, FORTUNE, Apr. 1973, at 64. The article also listed the types and numbers of law suits filed against corporate entities in federal district court for the last six years.

	1966	1968	1970	1972
Environmental issues	—	42	140	268
Fair-employment practices	—	—	—	1,015
Anti-trust	480	707	929	1,379
Patents, Copyrights, and Trademarks	1,832	1,829	2,150	2,194
Labor Law	3,336	3,518	3,999	4,987

Id.

24. 206 N.L.R.B. at —, CCH 1973 LAB. L. REP. at 33,342 (emphasis added).

25. *Id.*

26. See, e.g., *Guss v. Utah Labor Relations Bd.*, 353 U.S. 1, 3 n.4 (1957); *NLRB v. Fainblatt*, 306 U.S. 601, 606-09, *modified*, 307 U.S. 609 (1939).

Even accepting, *arguendo*, the proposition that the availability of legal services plays no part in the continued operation of established interstate commercial mechanisms, one must inquire as to the role of the attorney in their establishment. The majority asserted that "no matter in how high esteem . . . legal assistance [may] be held,"²⁷ a client would enter interstate commerce with or without prior counseling.²⁸ This assertion was required since to admit that the temporary unavailability of legal counsel would postpone client participation in interstate commerce would be to admit the appreciable, if indirect, impact of attorneys. Clearly, law firms do "have [a substantial] impact on how, where, and when a business may operate."²⁹ Or, as the majority carelessly admitted, a client "*doubtless* consults its lawyers" before entering interstate commerce.³⁰ To assume that prior legal assistance does not measurably affect client entrance into interstate commerce is thus to ignore the realities of commercial practice.³¹

The Board was also faced with the fact that jurisdiction has been repeatedly asserted over providers of intangible services whose impact upon the flow of interstate commerce appears as "incidental" and "indirect" as that of the legal profession.³² The majority, however, concluded that engineering, architectural, or advertising firms provide "services relat[ed] directly to commerce — i.e., manufacturing, con-

27. 206 N.L.R.B. at —, CCH 1973 LAB. L. REP. at 33,341.

28. *Id.*

29. *Id.* at —, CCH 1973 LAB. L. REP. at 33,342.

30. *Id.* at —, CCH 1973 LAB. L. REP. at 33,340 (emphasis added).

31. See text accompanying notes 26-30 *supra*.

32. See, e.g., Truman Schlup, Consulting Eng'r, 145 N.L.R.B. 768 (1963) (engineering and surveying services); Browne & Buford, Eng'rs & Surveyors, 145 N.L.R.B. 765 (1963) (surveying, design, and inspection services); Hazelton Laboratories, Inc., 136 N.L.R.B. 1609 (1962) (research and development services); Gray, Rogers, Graham & Osborne, 129 N.L.R.B. 450 (1960) (architecture, engineering, and surveying); *In re De Leuw, Cather & Co.*, 72 N.L.R.B. 191 (1947) (appraisal, investigation, and surveys of property); *In re The Austin Co.*, 70 N.L.R.B. 851 (1946) (branch engineering, office making layouts, and blueprint specifications); *In re Electrical Testing Laboratories, Inc.*, 65 N.L.R.B. 1239 (1946) (testing of electrical products); *In re Franque A. Dickins, Eng'r*, 64 N.L.R.B. 797 (1945) (engineering services); *In re Salmon & Cowin, Inc.*, 57 N.L.R.B. 845 (1944) (appraisal of mining property); *In re W.J. Cochran*, 44 N.L.R.B. 617 (1942) (assaying and analyzing lead and zinc ores); *In re United States Testing Co.*, 5 N.L.R.B. 696 (1938) (chemical and physical analysis of industrial commodities).

In addition, the Board must consider *all* law firms in determining the class' impact on interstate commerce and not base an exemption of all employers on an examination of a single law firm that is of medium size. See *NLRB v. Reliance Fuel Oil Corp.*, 371 U.S. 224, 226-27 (1963); *Polish Nat'l Alliance v. NLRB*, 322 U.S. 643, 648 (1944); *NLRB v. Fainblatt*, 306 U.S. 601, 607-08 (1939). See note 13 *supra*.

struction, and sales activity,"³³ while the attorney's primary function is "relate[d] to law, not commerce or commercial activity."³⁴ Of course, this semantic choice, as to *what* the service is deemed to relate, begs the question. Is the service a condition precedent in the client's mind to his commercial activity? If so, as is obviously the case as regards legal counsel, the service markedly affects that activity.³⁵

The majority also felt that the infrequency with which jurisdiction is requested by clerical legal employees somehow threw light on the profession's impact on interstate commerce.³⁶ This neglects the obvious fact that such an infrequency is at best a rough barometer of the general satisfaction of legal employees with *current* employer labor practices. Regardless, "it is within the province of the Board to protect and foster interstate commerce *before* actual industrial strife materializes to obstruct that commerce."³⁷ Furthermore, to assert jurisdiction over a general class of employers at the earliest possible moment effectuates the Act's dual policies of fostering employee organization and of deterring employers from discouraging such efforts to organize.³⁸

ATTORNEY-CLIENT CONFIDENTIALITY

The Board was also influenced by other considerations which it felt mandated a denial of jurisdiction over law firms as a general class. The majority sensed the difficulty in accommodating the collective bargaining desires of legal employees "when such [a] unit must of necessity include employees with access to information coming within the peculiarly confidential relationship between lawyer and client."³⁹ However, this fear would only seem justified when the legal employees "are . . . represented by, and owe a substantial loyalty to, an organization which may well have interests conflicting with those of clients whom the lawyers represent."⁴⁰ In *Bodle*, the Board maintained that

33. 206 N.L.R.B. at —, CCH 1973 LAB. L. REP. at 33,340.

34. *Id.*

35. See text accompanying notes 22-24 *supra*.

36. 206 N.L.R.B. at —, CCH 1973 LAB. L. REP. at 33,341.

37. NLRB v. Davis Motors, Inc., 192 F.2d 782, 783 (10th Cir. 1951).

38. At least one author has stated that the primary purpose of the Act is the statutory recognition of the right of employees to exert economic pressure on their employers. See Getman, *The Protection of Economic Pressure by Section 7 of the National Labor Relations Act*, 115 U. PA. L. REV. 1195-97 (1967). See also Labor Management Relations Act of 1947 §§ 7, 8, 29 U.S.C. §§ 157, 158 (1970). See note 10 *infra* and accompanying text.

39. 206 N.L.R.B. at —, CCH 1973 LAB. L. REP. at 33,341.

40. *Id.*

clients of the firm in question (*e.g.*, the AFL-CIO) "compete with and engage in rival or even adverse activity" with the union (Teamsters) which sought to represent the legal employees.⁴¹ But the particular local involved had not been previously involved in a labor dispute with *any* client of the firm.⁴² Moreover, the speculative fear that the Teamsters local might subsequently become embroiled in a dispute with a union represented by the employer could hardly outweigh a present need for balanced collective bargaining.⁴³

Admittedly, a conflict of interest might arise if a union were to represent the clerical employees of a firm whose clients included corporations or other unions which have or might have dealings with the representative union. But exclusion from the Act's coverage would then seem to apply at most to a rather limited class of legal employers, including the defendant in *Bodle*, but not to all law firms as a general class.⁴⁴

The justification for even such a partial exclusion would require the assumption that employees aware of the activities of the firm's client would divulge confidential information to their union. Such an assumption calls into question the employees' personal integrity, loyalty to their firm and to their jobs.⁴⁵ Even if this assumption were appro-

41. *Id.*

42. Respondents' Brief, *supra* note 8, at 26.

43. See notes 37-38 *supra* and accompanying text. Even assuming such an embroilment, the Teamsters disclaimed any intention of procuring information from the law employees, except that which is relevant to their position as bargaining agent. Proceedings Before the NLRB, No. 31-RC-2180, at 61, 66 (Aug. 22, 1972).

44. In 1972 the Board declined to assert jurisdiction over an Arizona law firm of four to six attorneys with a relatively smaller gross income than the law firm in *Bodle*. *Evans & Kunz, Ltd.*, 194 N.L.R.B. 1216 (1972). In *Evans*, the Board expressly stated that its decision was limited *solely to the particular facts of that case* and was not an expression of Board opinion as to law firms as a general class of employers. *Id.* The Board, in two instances prior to *Evans*, had ruled that attorneys are covered by the Act. In *Lumberman's Mut. Cas. Co.*, 75 N.L.R.B. 1132 (1948), the Board allowed the unionization of a group of attorneys working in the legal department of an insurance company without ever considering the conflict of interest problem. It must be observed, however, that these attorneys were governed by a *single* client-employer relationship. Additionally, they possessed narrow responsibilities and exercised limited discretion under the direction of a supervising attorney and were closely regulated by the employer. *Id.* at 1134-35. The other Board decision dealing with the unionization of attorneys was *Syracuse Univ.*, 204 N.L.R.B. No. 85, CCH 1973 LAB. L. REP. ¶ 25,517 (June 29, 1973), which dealt extensively with the issue of whether law professors can constitute a separate bargaining unit under the Act. "[W]e have recognized that [the law] faculty, whatever the differences, . . . have a legitimate interest under the Act in their terms and conditions [of employment]." *Id.* at —, CCH 1973 LAB. L. REP. at 32,887.

45. *Bodle, Fogel, Julber, Reinhardt & Rothschild*, D-7233, official opinion at 16-18

prate, exclusion would not necessarily be justified, for if an employee were to divulge confidential or privileged information, "the remedy for . . . neglect of duty, collusion, or other improper conduct on the part of . . . employees . . . lies in the power of the [e]mployer to discipline or discharge."⁴⁶

Mere access to confidential information is not a sufficient basis to deny legal employees the benefits of the Act nor to preclude them from exercising their statutory right to bargain collectively with respect to employment conditions in law firms.⁴⁷ "[T]he Board has often held that there is no incompatibility between faithful performance of duty and the enjoyment of benefits under the Act."⁴⁸

JURISDICTIONAL STANDARDS

The final concern expressed by the majority was the hardship envisioned in the establishment of jurisdictional standards of general application for law firms.⁴⁹ "[T]he problems involved in attempting to establish any reasonable jurisdictional yardsticks of general application would be extraordinarily difficult both to devise and to administer."⁵⁰ Admittedly, such standards might be difficult to formulate, but, however difficult, "the statute compels the task,"⁵¹ and there exists no reason why a reasonable standard could not be formulated.⁵²

A firm's total income could well reflect merely the representation of a large number of wholly local interests and would be inappropriate as a general standard for determining the effect on interstate commerce.⁵³ Likewise, a standard based on the amount of the firm's income derived from interstate clients would not be generally appropriate since "any impact on commerce alleged to result from a law firm's activity would . . . arise out of the *nature* of the law firm's activity rather than the amount of its income therefore."⁵⁴

Instead, the Board should focus solely on the business activities of the clients represented. If a client falls within the Board's estab-

(portion of dissent not published in loose-leaf service report, on file at Loyola of Los Angeles Law Review Office) [hereinafter cited as Dissent].

46. *In re Art Metal Constr. Co.*, 75 N.L.R.B. 80, 82 (1947).

47. *See Phillips Oil Co.*, 91 N.L.R.B. 534 (1950).

48. *E.I. DuPont DeNemours & Co.*, 107 N.L.R.B. 734, 744 (1954).

49. 206 N.L.R.B. at —, CCH 1973 LAB. L. REP. at 33,341.

50. *Id.*

51. *Local 761, Elec. Radio & Mach. Workers v. NLRB*, 366 U.S. 667, 674 (1961).

52. Dissent, *supra* note 45, at 19.

53. 206 N.L.R.B. at —, CCH 1973 LAB. L. REP. at 33,341.

54. *Id.*

lished criterion of "affecting commerce"⁵⁵ and, therefore, within the Act's coverage, legal services utilized in furtherance of that commerce should logically and appropriately be also subject to the Board's jurisdiction, regardless of aggregate amount.⁵⁶ Thus, only those firms whose services *do* affect interstate commerce would be within the Board's jurisdiction.⁵⁷

CONCLUSION

The National Labor Relations Board's analysis that legal services play a purely incidental role in the affairs of interstate commerce is both logically and legally untenable. Further, the holding is undesirable in that it denies legal employees their statutory right to exert collective economic pressure as a counterbalance to their employers' power over employment conditions. By forcing legal employees to rely exclusively on their own individual influence for productive negotiations with their employer firms, the Board has not only denied them their statutory right to the added power of collective bargaining, but has guaranteed that their bargaining power will remain relatively minuscule.

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55. See note 10 *supra*.

56. See notes 24-25, 53-55 *supra* and accompanying text.

57. Dissent, *supra* note 45, at 18-19.