Principles in collision: The right of workers to unionize v. the right of an employer to close the business

Barry Winograd

Arbitrator and mediator in Oakland, California.
Adjunct law school faculty of the University of California, Berkeley, and the University of Michigan

In 1956, hundreds of textile workers lost their jobs at the Darlington Manufacturing Company when the employer closed its plant immediately after the workers voted to unionize. Nine years later, a unanimous U.S. Supreme Court decided that the company was free to close the business even if it was motivated by anti-union hostility.[1] Few cases in U.S. legal history so sharply illuminate the colliding interests of workers seeking to unionize, and owners seeking to avoid unionization.

Darlington Manufacturing Company was a textile maker in South Carolina. The corporation was part of an interlocking web of nearly two dozen corporations in the textile industry that were controlled by the Milliken family. The Textile Workers Union began an organizing drive at the Darlington plant early in 1956, hoping to expand its base. In the preceding decade, many companies in the industry transferred textile mills from the widely unionized New England area in the Northeastern U.S., to the mostly non-union Southeast.

The company resisted the union's organizing drive. However, the company lost an election for union representation in September 1956. Within days, Darlington's board of directors decided to liquidate the corporation. Plant operations ended in November, and the equipment and machinery were sold by December. Over 500 workers lost their jobs. The small mill town in which the plant was located was devastated.

Based on unfair labor practice charges filed by the union, a complaint was issued by the National Labor Relations Board (NLRB). The NLRB is the agency that oversees enforcement of the National Labor Relations Act (NLRA), a statute passed by the U.S. Congress in 1935. The NLRA was intended to authorize and protect union organizational activity in the private sector of the U.S. economy.[2]

As relevant here, after an administrative hearing the NLRB concluded that the company violated

[1] *Textile Workers. Union of America v. Darlington Manufacturing Co.*, 380 U.S. 263 (1965). The facts recited in this article are drawn from the Supreme Court's opinion, and from other decisions related to the dispute. Previous rulings can be found at: 325 F.2d 682 (4th Cir. 1963), and 139 NLRB 241 (1962).
[2] 29 U.S.C. 151, et seq.

Sections 8(a)(1) and 8(a)(3) of the NLRA.[3] In addition, the NLRB determined that the corporation was part of a single, integrated enterprise. Alternatively, the Board stated that the plant closure was part of the larger business, and was done for discriminatory reasons.

The NLRB's remedy did not include an order, as proposed by the union, that the enterprise be reopened and jobs restored. Instead, the NLRB directed that the former employees be paid what they would have earned, until equivalent employment was found. The NLRB also ordered that employees be given preferential hiring status at other plants within the far-flung Milliken domain.

The company resisted the NLRB's order, and sought appellate review. An intermediate court of appeals declined to enforce the NLRB's decision. The appellate court determined that an employer has a right to close all or part of its business, even if anti-union hostility is the cause.

On review, the unanimous ruling of the U.S. Supreme Court held that, "an employer has the absolute right to terminate his entire business for any reason he pleases."[4] The court cautioned, however, that an employer cannot close part of its business, "if motivated by a purpose to chill unionism in any of the remaining plants of the single employer and if the employer may reasonably have foreseen that such closing would likely have that effect."[5]

Ever since, the juxtaposition of these reasons has prompted labor law analysts to express concern about the logic of the court's decision. Regarding the issue of interference with employee rights under Section 8(a)(1) of the NLRA, the court asserted that the closing of an entire plant is one of those employer decisions that, "are so peculiarly matters of management prerogative that they would never constitute a violation of 8(a)(1), whether or not they involved sound business judgment...."[6] In a footnote to this portion of the case, the court argued that, "the ambiguous act of closing a plant following the election of a union is not, absent an inquiry into the employer's motive, inherently discriminatory."[7]

Considering the issue of alleged discrimination under Section 8(a)(3), the court acknowledged the NLRB's factual finding that the company's action was based on its goal of avoiding a union at the plant. Regardless, the court reasoned that, "[A] proposition that a single businessman cannot choose to go out of business if he wants to would represent such a startling innovation that it should not be entertained without the clearest manifestation of legislative intent or unequivocal

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[3] The provisions at issue are the following:
Sec. 8 (a). It shall be an unfair labor practice for an employer
(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;....
.....
(3) 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.

[4] *Darlington, supra*, 380 U.S. at 268.

[5] *Id*., 380 U.S. at 275.

[6] *Id*., 380 U.S. at 269.

[7] *Id*., fn. 10.

judicial precedent so construing the Labor Relations Act."[8]

In assessing legislative and judicial history, the court found that neither supported the NLRB's ruling. In the court's view, the legislative history was silent, and prior judicial decisions were construed as generally supporting an employer's right to permanently go out of business. In this respect, the court likened a plant closure to a group of employees deciding, en masse, to quit working for the same employer.

The court's reasoning distinguished the facts in *Darlington* from the case of a "runaway shop" designed to evade an employer's duty to bargain after a union has been chosen by employees. Compared to the "runaway" situation, "a complete liquidation of a business yields no such future benefit."[9] Even if the employer, "may be motivated more by spite against the union than by business reasons...it is not the type of discrimination which is prohibited by the Act."[10]

Turning to the question of whether the shutdown by Darlington was only a partial closing of a larger business, the court remanded the case for further deliberation. In doing so, the court explained that the "repercussions" on the remainder of the business could give rise to an unfair labor practice violation, if the closure was done to chill union activity elsewhere, and that such an outcome was reasonably foreseeable.[11]

After the case was remanded for further findings of fact, the NLRB ruled against the company. In 1968, the court of appeals upheld the order.[12] Despite this action, years remained before the matter was resolved. A settlement reached in 1980, 24 years after the saga began, resulted in $5.0 million being paid to Darlington workers or their estates. Many workers died in the interim. One employee attending the meeting to decide if the settlement should be approved is quoted as saying that the delay was caused by, "bureaucratic red taping and winding through the loopholes in the labor laws."[13]

The *Darlington* decision has been criticized by practitioners and scholars, with several principal points being made.[14]

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[8] *Id*., 380 U.S. at 270.
[9] *Id*., 380 at 272
[10] Id.
[11] *Id*., 380 U.S. at 274-275.
[12] *Darlington Mfg. Co. v. NLRB*, 397 F.2d 760 (4th Cir. 1968).
[13] 105 Lab.Rel.Rptr. 320 (1980).
[14] See, e.g., Ray, Sharpe & Strassfeld, *Understanding Labor Law* (2d ed., 2005), pp. 102-105; Gorman and Finkin, *Basic Text on Labor Law* (2d ed., 2004), pp. 170-174, 448-451; Van Wezel Stone, *Labor and the Corporate Structure: Changing Conceptions and Emerging Possibilities*, 55 U.Chi.L.Rev. 73, 96-102 (1988); Atleson, *Values and Assumptions in American Labor Law*, pp. 138-142 (1983); Summers, *Labor Law in the Supreme Court: 1964 Term*, 75 Yale L.K. 59, 64-67 (1965); Christensen & Svanoe, *Motive and Intent in the Commission of Unfair Labor Practices: The Supreme Court and the Fictive Formality*, 77 Yale L.J. 1269, 1323-24 (1968). A comment in the Harvard Law Review from that period observed that the Supreme Court "confused the elements involved in a

First, the extended delay in resolving the dispute compounded the injury to the workers who were terminated, and to the small town affected by the closure. Justice delayed not only meant that justice was long denied for individual workers, but the extended process brought discredit upon the federal agency, no matter how worthy its goals.

Second, the court's analysis on the issue of an employer's plant closure seemed to turn the NLRA on its head. Legislation designed to grant and protect the right to unionize was, instead, construed to permit an employer to penalize those same workers with impunity. Despite the language of the NLRA prohibiting specific misconduct, the employer in *Darlington* was given leave to ignore the terms of the statute by relying on an implied right for an employer to close its doors, a subject about which the text of the NLRA is silent.

Third, instead of examining the facts in terms of whether the employer was retaliating for a unionization vote at Darlington, a question at the heart of the statutory structure, the court imported a different perspective; that is, whether the employer stood to benefit in the future by its action. The comparison to workers having the freedom to leave their jobs en masse, even if not to their benefit, overlooked both the extreme unlikelihood of such an event in a poor community, and the explicit statutory prohibition that *employers* cannot, by discrimination, discourage employees in their exercise of rights under the NLRA.

Fourth, by shifting the focus to employees at other plants, the court made protection of the rights of Darlington's workers dependent on the rights of employees at other company facilities. Had the ultimate ruling been that a chilling effect was *not* proven, the Darlington employees would have been denied any amount as an award for their lost jobs.

Last, even without an order to compel reopening of the plant because of the practical difficulty of overseeing a private employer's operations, the court's decision falls short. The deterrent value of the law to avoid similar, future misconduct was severely undermined by the court's rejection of meaningful monetary remedies to compensate employees, at least partially, for losses suffered. The NLRB's original remedy awarding make whole relief and continued pay until substitute employment was obtained, coupled with preferential transfer rights, provided an incentive for the employer to act responsibly and quickly. This would have been a more satisfactory remedy, even without a plant reopening, than the prospect of no remedy at all. In effect, the court's decision placed the entire risk of loss on employees at the Darlington plant, subject to vagaries of proof about the intended goal of the closure as to employees elsewhere.

The harsh outcome of the *Darlington* decision has been partially limited because of its narrow

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violation of Sectin 8(a)(3)," and failed to take proper account of the "discouragement" phrase in the statue. (Comment, 79 Harv. L. Rev. 197-199 (1965).) Nevertheless, the analyst concluded that the court's focus on future benefit, and the lack thereof for Darlington, supported a doctrine consistent with the "free withdrawal of capital from marginal enterprises (without the threat of illegality because of improper motivation)."

facts, which deal with an employer's prerogative to close an entire plant, even if motivated by hostility toward the union. In other instances, specific findings of anti-union intent continue to matter, including, for example, for disputes over runaway shops, partial closings, transfers of work, and subcontracting of operations.[15] When an employer's anti-union intent is demonstrated, not an easy task in most cases, remedies assisting those who are displaced or victimized can issue, although often subject to constraints based on the economic burdens that are imposed on an employer.[16] Still, in the final analysis, an employer's leeway to permanently close its operations - proverbially, to "take the money and run" - can be a powerful disincentive to workers relying on their legal right to unionize.

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[15] For more recent examples, see *Naperville Ready Mix, Inc.*, 242 F.3d 744 (7th Cir. 2001); *Dorsey Trailers, Inc. V. NLRB*, 233 F.3d 831 (4th Cir. 2000); *Reno Hilton Resorts v. NLRB*, 196 F.3d 1275 (D.C . Cir. 1999); *NLRB v. Joy Recovery Technology Corp.*, 134 F.3d 1307 (7th Cir. 1998); *Carrier Corp. v. NLRB*, 768 F.2d 778 (6th Cir. 1985); *Purolator Armored v. NLRB*, 764 F.2d 1423 (llth Cir. 1985); *Big Bear Supermarkets*, 640 F.2d 924 (9th Cir. 1980); *Great Chinese Am. Sewing Co. v. NRLB*, 578 F.2d 251 (9th Cir. 1978); also see *ILGWU v. NLRB (Garwin Corp.)*, 374 F.2d 295 (D.C. Cir. 1967).

[16] *Id.*; also see *Coronet Foods, Inc. v. NLRB*, 158 F.3d 782 (4th Cir. 1998); *Lear Siegler, Inc.*, 295 NLRB 857 (1989).