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Criteria for Judging Unfair Labor Practices and Specific Examples

I. Introduction

Article 33 Paragraph 1 of the Constitution stipulates that workers have the right to independent association, collective bargaining and collective action in order to improve their working conditions. These three labor rights are basic rights of the people guaranteed by the Constitution. The Trade Union and Labor Relations Adjustment Act (hereafter, the Labor Union Act) mentions these three labor rights and provisions on unfair labor practices. It describes in detail what amounts to violation of each of the three labor rights, stipulates the procedure for applications for remedy against unfair labor practices through the Labor Relations Commission, and allows criminal punishment for unfair labor practices through the Labor Office. According to the courts, a system to deal with unfair labor practice was specifically established by the Labor Union Act to quickly normalize labor relations by securing the three rights of labor, and preventing and stopping the actions of employers that destroy the order of collective labor relations.[1]

Unfair labor practices can be said to infringe on the three labor rights, and are divided into five types of actions (as described in Article 81 of the Labor Union Act) by the employer and any person in a position equivalent to employer that disadvantage the union or its members. In this regard, I would like to take a detailed look at the specific criteria for deeming a labor practice unfair, and examples of each type that occur in reality.

II. Criteria for Judging Labor Practices as Unfair

There are three elements that must be present for a labor practice to be deemed unfair: it should include actions by the employer, at least one of the five items described in Article 81 of the Labor Union Act should exist, and the employer must intend to engage in the unfair labor practice.

1. Actions by the employer

Unfair labor practices are a result of actions of an employer. In the Labor Union Act, an employer is excluded from membership in a labor union, is someone in charge of managing the business, someone acting on behalf of the employer in matters relating to the employed workers, or someone always acting specifically in the employer's interest (Articles 2 and 4). Here, the acts by “someone acting on behalf of the employer in matters relating to the employed workers” refer to matters such as determining the working conditions of workers, managing personnel, salaries, welfare, and labor, or giving orders or supervising work—a person who has been given certain powers and responsibilities by the employer. “Someone always acting specifically in the employer’s interest” refers to ① those directly participating in labor relations decisions such as personnel management, salary, disciplinary action, auditing, and labor management of workers, or ② those working to implement the employer’s plans and policies

[1] Supreme Court ruling May 8, 1998: 97nu7448.

for employment relations, and has the authority to handle confidential matters.[2]

Even if a worker who does not fall within the scope of employer follows the employer's instructions or acts specifically under the tacit approval of the employer, acts that obstruct the organization or operation of the union must be regarded as an employer's acts.[3] However, if an ordinary worker personally engages in unfair labor practices that infringe on the three labor rights, it cannot be regarded as an unfair labor practice by the employer.

2. Five types of unfair labor practice

① Disadvantageous treatment due to labor union activity: Dismissal or unfavorable treatment of a worker on the grounds that he/she has joined or intends to join a labor union, or has attempted to organize a labor union, or has performed any other lawful act for operation of a labor union (Infringement of the right to organize);

② Anti-union contract: Dismissal or unfavorable treatment of a worker is written into the contract for joining or intending to join a labor union, or attempting to organize a labor union, or performing any other lawful act for operation of a labor union (Violation of the right to organize);

③ Refusing or neglecting to engage in collective bargaining: Refusing or delaying execution of a collective agreement or other collective bargaining with the representative or other person authorized by the labor union, without justifiable reason (Infringement of the right to collectively bargain);

④ Domination of, interference in, or subsidizing operating expenses for labor union activities: Dominating or interfering in the organization or operation of a labor union by workers, and paying wages to full-time officers of a labor union or financially supporting labor union operations (Violation of the right to organize);

⑤ Disadvantageous treatment for reporting on collective actions or unfair labor practices: Dismissal of workers or acts against their interest on the grounds that they have participated in justifiable collective activities, or that they reported to or testified before the Labor Relations Commission the fact that the employer has violated the provisions of this Article, or that they have presented other evidence to the relevant administrative agencies (Violation of the right to take industrial action);

3. Intention to engage in unfair labor practice

In order to judge a labor practice as unfair, it must be done with a clear intention by the employer to engage in what he/she knows is unfair, such as an employer intentionally disadvantaging a worker for his/her legitimate union activities. According to a related court ruling, “Whether an employer’s conduct falls under the unfair labor practices stipulated in the Labor Union Act is determined after comprehensively reviewing all circumstances that can infer whether the employer intends to engage in unfair labor practice.”[4]

III. Criteria for Judgment of Unfair Labor Practice, by Type

1. Unfavorable treatment

[2] Supreme Court ruling on Sep. 8, 2011: 2008doo13873.
[3] Lim, Jong Ryul, 「Labor」 18th ed, Parkyoungsa, 2020, p. 283.
[4] Supreme Court ruling on Nov. 15, 2007: 2005 doo 4120.

Three conditions must be met for an action to be deemed unfavorable treatment. First, workers must organize or join a labor union or participate in collective action. Second, workers were disadvantaged because they joined or participated in a labor union or because they participated in collective action. Third, any unfavorable treatment from the employer towards the workers must be in direct response to legitimate union activities of the workers.

(1) A case related to a job transfer stipulates that "If it is recognized that the practical reason the employer ordered a transfer was because the worker engaged in legitimate labor union activity, it should be regarded as unfair labor practice despite the employer ostensibly citing work-related reasons." [5]

(2) In a case related to dismissal, "Despite the apparent reason for dismissal when an employer dismisses a worker, if it is recognized that the dismissal is based on the fact that the worker actually performed a justifiable union act, dismissal must be regarded as an unfair labor practice. Whether a worker's justifiable act for the union's work is the actual reason for dismissal depends on the reasons for dismissal as suggested by the employer, the content of the worker's justifiable actions for union affairs, the timing of dismissal, the relationship between the employer and the union, and so on. The judgment must be made by comprehensively examining whether or not there is an abuse of disciplinary discretion and various circumstances that can presume existence of the employer's intention to engage in unfair labor practices."[6]

2. Anti-union contracts

An anti-union contract consists of efforts to obstruct the right to organize, coercion of unity, and union shop rules for a union with fewer than 2/3 of the employees as members.

(1) Interference with the right to organize involves setting as a condition of employment that a worker will not join or will withdraw from a union. Here, when it comes to any union, in the era of multiple labor unions, membership in the company's favored union can be a condition of employment. In addition, requiring withdrawal from a union as a condition of employment can be seen as including the intention to neutralize the majority union in the existing employment relationship.

(2) The coercion of unity is an act in which workers are required to become members of a specific union as a condition of employment. This can be judged that the employer intends to make a particular union become the majority union, which the employer can then exercise influence over, and to render the majority union less powerful.

(3) In union shop, when a labor union represents at least two-thirds of the workers in the relevant workplace, a collective agreement stipulating that workers shall become a member of the union as a condition of employment is an exception. This clause is an exception to the coercion of unity, and can only be concluded when at least two-thirds of the workers in the relevant workplace are represented. It amounts to an anti-union contract and unfair labor practice for the union shop clause to refer to a union with less than two-thirds of the workers employed at the relevant workplace. Even if a union shop is properly included, the employer may not act disadvantageously to

[5] Supreme Court ruling on Nov. 7, 1995: 95 nu 9792.
[6] Supreme Court ruling on Dec. 23, 1994: 94 nu 3001.

a worker expelled from the union or because he or she has left the union and formed a new one or joined another (Article 81 (2) of the Labor Union Act).

3. Refusing or neglecting to bargain collectively

The purpose for establishing a labor union is to improve working conditions through collective agreements. In order to conclude these collective agreements, the union must determine the working conditions in writing through collective bargaining with the employer. An employer refusing or neglecting to sign a collective agreement or engage in other collective bargaining with a union representative or a person delegated by the union without justifiable reasons is an unfair labor practice.

Here, refusal to bargain collectively means failing to engage in the collective bargaining demanded by the labor union, while neglecting to engage in collective bargaining means to formally comply with the collective bargaining requirement, but not in good faith.

Even if the union demands collective bargaining, the company may refuse if justifiable reason exists. For that reason, the court precedent stated, "Whether or not there is a justifiable reason for the employer refusing or neglecting to engage in collective bargaining is determined after taking into account the bargaining powers of the union, the negotiating time, place, matters to be negotiated on, and the employer's attitude towards negotiating with the union. In general, it should be judged according to whether it is unreasonably difficult to expect the employer to fulfill the collective bargaining obligation.[7]

4. Domination of or interference in labor union activities

(1) Domination/interference

The act of controlling or intervening in the organization or operation of a labor union constitutes unfair labor practice. Employers dominating or interfering in union activities refers to an employer controlling or interfering with the organization or operation of the union through anti-union remarks or specific actions to obstruct the independent decision-making authority of the union. According to a court precedent, "The unfair labor practices of domination and interference refer to the employer influencing the organization and/or operation of the union, thereby influencing the decision-making of the union or interfering with its autonomous operation and activities. It includes acts such as interfering with the union or encouraging division. In the event of such employer actions, if the intention to dominate or interfere in the organization or operation of the union is recognized, unfair labor practice is determined by taking into account the circumstances, place, content, method, and impact on the operation or activities of the union, etc."[8]

(2) Paying salaries to full-time union employees

It is unfair labor practice for an employer to pay wages in excess of the working hours exemption limit or

[7] Supreme Court ruling on Feb. 24, 2006: 2005 do 8606.
[8] Supreme Court ruling on May 22, 1998: 97 nu 8076.

subsidize the operating expenses of the labor union. In consideration of the number of union members who are employed by a business or workplace, those exempt for a certain number of hours from the obligation to perform company business are subject to this Act but may perform the duties prescribed by other laws and related to maintenance and management of the labor union and the development of sound labor-management relations. The problem here is receiving wages in excess of the working hours exemption limit. However, the act of subsidizing wages for workers who are simply full-time union workers and have not been designated as exempt from working hours is itself an unfair labor practice.[9] The wages paid to those exempt from working hours shall correspond to the working hours exempt from the duty to provide work. Even if it is based on a collective agreement between labor and management, paying wages to full-time employees beyond the working hour exemption limit constitutes unfair labor practice.[10]

(3) Aid for operating expenses

It is an unfair labor practice for an employer to subsidize a labor union's operating expenses. Provided, however, that workers can donate funds to workers' welfare funds, to help each other in the event of financial disaster or other misfortune, and the employer may provide a minimally-sized union office. Exceptions are made for assistance to the extent that there is no risk of infringing on the independent operations or activities of the union.

In aiding the labor union with its operating expenses, a certain employer's domination-interference in the union was strictly regarded as unfair labor practice.[11] However, the Constitutional Court ruled, “The prohibition against aid for operating expenses prohibits any act of aid with operating expenses with the two exceptions stipulated in the proviso to Article 81, No. 4 of the Labor Union Act, which regulates more than required, so it cannot be regarded as an appropriate means to achieve the legislative purpose.”[12]

(4) Anti-union speech, dominance and intervention

Behaviors that can affect workers and labor unions include expressing opinions through speeches or in-house broadcasting and acting to express opinions through home correspondence-letters. If it is judged that such media expression by an employer has the intention to suppress union activity or coerce union members, it can be presumed that there is intent to dominate or interfere with union activity.

Accordingly, employers have restrictions on freedom of public expression, while the labor union has regulations prohibiting unfair labor practice in exercising the three labor rights. Therefore, determining whether the expression of opinion or written notice of an employer or a person in the employer's position is an unfair labor practice should be based on whether the employer intends to infringe on any of the three labor rights. According to a related

[9] Supreme Court ruling on Jan. 28, 2016: 2012 du 12457.
[10] Supreme Court ruling on Apr. 2, 2016: 2014 du 11137; Supreme Court ruling on May 15, 2018: 2018 du 33050.
[11] Jeon, Min-kyung, “Criteria for judging unfair labor behavior, such as aid for labor union operating expenses,” Critique of Labor Cases, Vol. 21, Lawyers for a Democratic Society, Aug. 2016, p. 197.
[12] Constitutional Court decision on May 31, 2018: 2012Hunba 90 decision; Kim, Hyeong-bae/Park, Ji-soon, 「Labor Law Lecture」 8th ed., Shinsho, 2019, p. 656.

precedent, “In order for an employer’s anti-union speech to be considered domination or interference, there must reasonably be fear among the union that such speech seeks to undermine its independence or organizational strength, and the existence of such concern depends on the content, place, method and situation surrounding the statement, and the labor union. It should be judged individually by comprehensively considering the impact on employees and the presumed intent of the employer.”[13]

IV. Conclusion

The three labor rights are basic rights of the people guaranteed by the Constitution, and the Trade Union Labor Relations Adjustment Act was enacted to materialize them. Through union activities, it is possible to maintain and improve the working conditions of workers. It is the regulations against unfair labor practice in Chapter 6 of the Labor Union Act that enable the exercise of these three labor rights. The system determining whether unfair labor practice has occurred is designed to enhance the viability of the union by guaranteeing the three labor rights and works towards development of mutually-beneficial labor-management units.

[13] Supreme Court ruling on Sep. 2006: 2006 do 388.