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Labor Law - A Standard for Reasonable Concerted Activity

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LABOR LAW–A STANDARD FOR "REASONABLE" CONCERTED ACTIVITY. *NLRB v. Modern Carpet Industries, Inc.*, 611 F.2d 811 (10th Cir. 1979).

INTRODUCTION

In *NLRB v. Modern Carpet Industries, Inc.*,[1] the National Labor Relations Board (Board) asked the Court of Appeals for the Tenth Circuit to enforce a Board order[2] reinstating three employees who walked off the job. The Board had found that the employees had refused to complete their work assignment because they honestly believed that their employer was asking them to melt radioactive lead. The court of appeals enforced the order, holding that the National Labor Relations Act[3] (Act) protected even unreasonable activities by employees, as long as the employees honestly believed that they had acted for their mutual aid or protection. The court, however, failed to analyze the cases which it cited and neglected to discuss the rationale underlying its holding. This note will supply that missing analysis, identify the labor law policies furthered by the decision, and discuss some possible harsh applications of this holding on employers.

STATEMENT OF THE CASE

Modern Carpet Industries operated a small carpet mill in Oklahoma.[4] At the time of the incident, the company's maintenance department consisted of a supervisor, Sanders, and three employees, Clough, Dickson, and Ball. The maintenance department employees occasionally melted lead and poured it around the base of the carpet-tufting machines to stabilize them. In August of 1977, Sanders told two of the maintenance employees that the company had purchased four hundred pounds of lead which had been used at a hospital to store radioactive materials. Clough mentioned this to his wife, a nurse, who warned him that the lead was very dangerous. Clough re-

1. 611 F.2d 811 (10th Cir. 1979).
2. Modern Carpet Industries, Inc., 236 N.L.R.B. 1014 (1978).
3. 29 U.S.C. § § 151-160 (1976 & Supp. III 1980).
4. The administrative law judge found at the hearing that the Georgia corporation had purchased and received goods in excess of $50,000 from points outside Oklahoma during the year before the hearing, thus placing the company under the jurisdiction of the Act. 236 N.L.R.B. 1014 (1978). *See* 29 U.S.C. § 2 (1976).

peated the warning to Ball and Dickson. Approximately one week later, when Sanders told the men that they were going to melt the lead, Ball protested saying, "it possibly could be dangerous from radioactivity."[5] They did help Sanders prepare to melt the lead, however, and left at their normal quitting time.

The following day, Sanders told the men that they must melt the lead or be fired. When Ball asked Sanders if the lead had been tested for radioactivity, Sanders replied that he had called the night before and had been assured that the lead was safe. When the employees continued to question Sanders, he admitted that the comptroller had actually made the call. The employees went to the comptroller to question him about the telephone call. He assured them that the lead was safe, explaining that it had been used to store molybdenum, which has a half-life of forty-eight hours, that government regulations required the seller to wait three months before disposing of the lead, and that the radioactive material could not penetrate it.[6] The employees, however, did no feel reassured and left the mill. The three men soon received termination checks and notices informing them that they had been fired for "insubordination, violation of company rules and failure to follow instructions."[7]

A charge was filed[8] with the National Labor Relations Board alleging that the employees had acted in concert for their mutual aid and protection.[9] The Board issued an order which asserted that the employer could not terminate the employees for walking off the job[10] because they had acted in good faith to protect themselves from what they perceived to be a danger in the workplace.

At the hearing before the administrative law judge,[11] the three

5. 611 F.2d at 813.

6. An OSHA report, sought to be introduced into evidence at the administrative law judge's hearing, confirmed the comptroller's information and concluded the lead was not harmful. The report was excluded, however, because the judge ruled the veracity of the employees' belief was irrelevant to his decision. Brief for Respondent at 6, NLRB v. Modern Carpet Industries, Inc., 611 F.2d 811 (10th Cir. 1979).

7. 611 F.2d at 813.

8. Although the complaint was filed by the International Union, all Industrial Workers of America, AFL-CIO, the Union was not involved in either the employees' refusal to work with the lead or with their subsequent firings.

9. 29 U.S.C. § 157 (1976) (commonly referred to as section 7 of the Nationl Labor Relations Act) grants employees the right "to engage in other concerted activities for . . . mutual aid or protection." Because the three men had talked among themselves about their fears and had walked off the job together, the men acted in concert.

10. Section 7 of the Act is enforced by 29 U.S.C. § 158 (1976) (section a). That section declares that "[i] t shall be an unfair labor practice for an employer (1) to interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in section 157."

11. After the complaint was filed, the employer had an opportunity to file an answer. The case was then tried in Oklahoma before the administrative law judge pursuant to section 10 of the Act, 29 U.S.C. § 160(b)-(c) (1976).

employees testified about their fears of the "radioactive lead" and their attempts to have their employer test the lead. Modern Carpet Industries defended the alleged unfair labor practice by arguing that the employees' fears were unfounded and hence unreasonable.[12] The administrative law judge dismissed this defense, stating that the unreasonableness of the fear "is not an element to be considered when employees are discharged."[13] Finding that the three men had actually feared for their safety, the administrative law judge held that the employer had committed an unfair labor practice. He ordered Modern Carpet Industries to reinstate the employees.

On appeal by the employer, a three-member panel of the National Labor Relations Board affirmed the administrative law judge's findings and conclusion and adopted his recommended order.[14] The Board applied to the Court of Appeals for the Tenth Circuit for enforcement of its order when the employer refused to comply with the order.[15] The court affirmed the decision and ordered enforcement of the Board's order.[16]

ANALYSIS OF THE OPINION

The issue in *Modern Carpet Industries* was whether the National Labor Relations Act should protect employees who, while acting in good faith, participate in unreasonable concerted activities. The Board had determined that the Act should protect the employees in this case, even if, in retrospect, their apprehensions about the lead were unrealistic. Although failing to adequately analyze the issue, the court of appeals accepted the Board's interpretation of the case law and reached the same conclusion. While the court's decision in *Modern Carpet Industries* appears equitable under the facts of the case, the court's language sweeps too broadly. Employers, unaware that their employees consider themselves to be involved in a labor dispute, now run the grave risk of being found to have committed an unfair labor practice when they discipline employees for their actions.

Section 7 of the Act gives employees the right to engage in con-

12. Modern Carpet Industries was not represented by legal counsel at the hearing with the administrative law judge. The comptroller presented the company's evidence. The company had two other defenses: 1) the employees were discharged for economic reasons, and 2) the employees violated company policy by walking off the job; neither defense was proven at the hearing. 236 N .L.R.B. at 1015; Brief for Respondent at 4, NLRB v. Modern Carpet Industries, Inc., 611 F.2d 811 (10th Cir. 1979).

13. 236 N.L.R.B. at 1015.

14. Modern Carpet Industries, Inc., 236 N.L.R.B. 1014 (1978).

15. *See* 29 U.S.C. § 160(3) (1976).

16. NLRB v. Modern Carpet Industries, Inc., 611 F.2d 811 (10th Cir. 1979).

certed activities for their mutual aid or protection.[17] Section 8 protects that right by stating that an employer's interference with the exercise of section 7 rights shall be an unfair labor practice.[18] While the two sections appear at first glance to afford unlimited protection to employees who engage in concerted activities for their protection, the federal courts have limited this protection. For example, employees' concerted activities for their mutual protection are not protected by the Act if the activities are unlawful,[19] violent,[20] call for an employer to breach a contract,[21] or are otherwise indefensible.[22] The employer in this case urged the court to hold that unreasonable conduct by employees was similarly unprotected by the Act. Thinking that the issue had been foreclosed by a United States Supreme Court case, *NLRB v. Washington Aluminum Co.*,[23] the court of appeals in *Modern Carpet Industries* rejected this argument. Citing *Washington Aluminum*,[24] the court held that it could not examine the reasonableness of either the underlying labor dispute[25] or the

17. 29 U.S.C. § 157 (1976).

18. 29 U.S.C. § 158(a) (1976).

19. Southern Steamship Co. v. NLRB, 316 U.S. 31 (1942) (an unlawful mutiny or work stoppage on board a vessel by seamen).

20. NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240 (1939) (a week-long physical takeover of the plant buildings).

21. NLRB v. Sands Manufacturing Co., 306 U.S. 332 (1939) (an attempt by employees to force the employer to violate seniority clauses in a contract).

22. NLRB v. IBEW Local 1229 (Jefferson Standard), 346 U.S. 464 (1953). The employees of Jefferson Standard Broadcasting Company, a new television station in North Carolina, were in dispute with their employer over wages, hours and working conditions. The employees distributed handbills which criticized the policies and limited programming of the television station, but did not mention the underlying labor dispute. The U.S. Supreme Court found the handbills "reasonably calculated to harm the company's reputation and reduce its income," 346 U.S. at 471, and hence their distribution was unprotected concerted activity under section 7 of the Act.

In Modern Carpet Industries' argument before the court, the employer argued that the employees' conduct was indefensible and hence unprotected by section 7 of the Act. Brief for Respondent, NLRB v. Modern Carpet Industries, Inc., 611 F.2d 811 (10th Cir. 1979). In support of this defense the employer argued that the employees were spreading false, harmful rumors about safety conditions at the mill and were disparaging the company. The court rejected the argument without responding to it in its opinion.

In comparing the present case with the *Jefferson Standard* example of indefensible conduct, it is clear why the court found the comparison inapplicable. First, the rumors about the "radioactive lead" were not directed toward the mill's customers or the public at large, as were the pamphlets in *Jefferson Standard.* Second, the rumors concerned a suspected health hazard in the workplace while the pamphlets in *Jefferson Standard* did not mention the underlying labor dispute. Third, the employees in the present case were genuinely concerned about health and safety risks to themselves and had no intent to harm their employer.

23. 370 U.S. 9 (1962).

24. *Id.*

25. A "labor dispute" is defined in 29 U.S.C. § 152(9) (1976) as "any controversy concerning terms, tenure or conditions of employment. . . ." The Board must find that a labor dispute exists before the Board has the power to order reinstatement of a wrongfully discharged employee. 29 U.S.C. § 152(3) (1976).

means by which the employees chose to communicate the dispute to their employer. *Washington Aluminum,* however, stood only for the latter proposition. The court in *Modern Carpet Industries* extended the holding of *Washington Aluminum* to cover a factual situation which the United States Supreme Court had never considered.

In *Washington Aluminum,* the employer had discharged seven men who walked out one bitterly cold morning to protest the lack of heat in their plant. The Board found that the men had acted in protest over the lack of heat and held that the walkout, while extreme conduct under the circumstances, was protected by section 7 of the Act. The Court of Appeals for the Fourth Circuit refused to enforce the Board's order, however, because the employees had never made an actual demand for heat to the employer before leaving the plant.[26] The Supreme Court reversed, writing that the fact that the employees left "without affording the company an 'opportunity to avoid the work stoppage' by granting a concession to the demand' "[27] did not render the walkout unprotected. That fact merely meant that, in retrospect, the employees' actions appeared unwise. The Court held that once it had determined that a labor dispute existed, the Court would not attempt to weigh the reasonableness of the employees' concerted activities to determine whether those activities were protected by the Act. As the Court explained, "the reasonableness of workers' decisions to engage in concerted activities is irrelevant to the determination of whether a labor dispute exists or not."[28] Hence, once the Court had determined 1) that a labor dispute existed,[29] 2) that the concerted activities of the employees arose as a consequence of that labor dispute,[30] and 3) that the activities were not unlawful, violent, or indefensible, the Court concluded that those activities were protected by section 7 of the Act.

In its brief submitted in *Modern Carpet Industries,* the Board cited *Washington Aluminum* as holding that the merits of the underlying dispute were irrelevant in determining whether the Act protects certain concerted activities by employees.[31] The court of appeals in *Modern Carpet Industries* adopted this statement as the controlling

26. 291 F.2d 869 (4th Cir. 1961), *rev'd,* 370 U.S. 9 (1962).

27. 370 U.S. at 13.

28. 370 U.S. at 16, citing as authority NLRB v. Mackay Radio & Telegraph Co., 304 U.S. 333 (1948).

29. Note 25, *supra.*

30. The U.S. Supreme Court addressed this issue in NLRB v. Mackay Radio & Telegraph Co., 304 U.S. 333 (1938). The Court admonished the Board that it was unnecessary to determine at what stage labor negotiations were when determining that a labor strike was the consequence of a labor dispute. The issue was causation, not the reasonableness of calling a strike.

31. Brief for Petitioner at 7, NLRB v. Modern Carpet Industries, Inc., 611 F.2d 811 (10th Cir. 1979).

legal principle of the case, without considering that the United States Supreme Court itself had examined the merits of the labor dispute over lack of heat in the plant in *Washington Aluminum* before granting the Act's protection to the employees' walkout. In that case, the Supreme Court examined the evidence and determined for itself how cold it was in the plant that morning. Noting the inadequate furnaces installed in the workplace, the fact that one furnace had stopped working overnight, and the range in temperature from eleven degrees to twenty-two degrees Fahrenheit that day, the Court concluded that the employees had a legitimate dispute with their employer about heat in the plant. Thus, the Court did not find itself barred from examining the evidence concerning the dispute which caused the employees to walk out. It was precluded only from weighing the reasonableness of a walkout as a means of communicating the demand for heat to the employer against a less drastic measure of communicating that demand.[32]

The Board adopted a broad interpretation of *Washington Aluminum* in order to protect the employees in *Modern Carpet Industries* from 20/20 hindsight after all the information about the "labor dispute" was before the court. The Board realized that the employees in this case had no means of testing the lead to see if it was radioactive. The employees followed the only course of action open to them; they asked their employer to test the lead and, when their employer seemingly refused to do so, they walked out of the mill.[33] The em-

32. Interestingly enough, after the United States Supreme Court decided *Washington Aluminum*, the Court of Appeals for the Fifth Circuit weighed the employees' method of communicating their demand to their employer (a walkout) against other available means and concluded that the method chosen by the employees was unreasonable and was thus unprotected concerted activity. Dobbs Houses, Inc. v. NLRB, 325 F.2d 531 (5th Cir. 1963), involved waitresses who walked off the job during the dinner hour to protest the firing of the assistant manager. Conceding that the firing was within the "realm of proper employee interest," 325 F.2d at 539 and that the firing caused the walkout, the court concluded, nevertheless, that the walkout was unprotected because it was not "reasonably related to the ends sought to be achieved." 325 F.2d at 538. The court distinguished *Washington Aluminum* saying there "the walkout, while extreme under the circumstances, was reasonably related to the complaint." 325 F.2d at 539. The Board has specifically rejected this analysis stating "we must respectfully disagree with any rule which would base the determination of whether a strike is protected upon its reasonableness in relation to the subject matter of the 'labor dispute.'" Plastilit Corporation, 153 NLRB 180, 183 (1965), enf'd 375 F.2d 343 (8th Cir. 1967).

33. If the employees were represented by a union, presumably they would have had more options open to them. The union could have demanded, perhaps in a more articulate manner, that the lead be guaranteed to be non-radioactive. The United States Supreme Court, in construing section 502 of the Act, 29 U.S.C. § 143 (1976), seemed to recognize that unions would have more power in this situation than individual employees would have. Thus, a work stoppage occurring because of dangerous work conditions which would ordinarily violate the no-strike provision of a work contract, will not be held to be a "strike" only if the union can present "ascertainable, objective evidence supporting [the union's]

ployer held the balance of power in this situation because the employer had the knowledge and the ability to convince the employees that there was no safety risk if they worked with the lead. The court apparently adopted this rationale when it wrote,

> The company did not act with intelligence in the matter. If indeed the lead was harmless, management could at least have told the employees who made the appraisal or, better still, they could have made a statement in writing assuming liability for any harm that might be sustained.[34]

The court assumed that by purposefully withholding information from the employees or by refusing to respond adequately to the employees' question, the employer precipitated the dispute which led to the concerted activities. Thus, since the employer had the wherewithal to avoid the dispute, the employer ought to bear the blame for causing the dispute, in effect, by being found guilty of committing an unfair labor practice.

Similar considerations based on balance of power were present in two cases cited by the court with approval in *Modern Carpet Industries.*[35] In both cases, the employer fired employees for participating in concerted activities, activities which the employees thought were necessary for their protection. As in the present case, objective evidence was unavailable to support the employees' beliefs that a labor dispute existed. In *Du-Tri Displays, Inc.,*[36] an employee was discharged for complaining to OSHA on behalf of himself and his fellow employees about lacquer fumes in their plant. Even though the laboratory tests later conducted at the plant showed that the level of potentially harmful chemicals in the air was acceptable, the Board still held that the employees' actions were protected by section 7 of the Act. The Board found that the employee actually believed the fumes were making him and his co-workers ill. His honest belief that a danger existed in the workplace, the Board held, meant that the Act protected his activities. The second case cited by the court in

conclusion that an abnormally dangerous work condition for work exists." Gateway Coal Co. v. United Mine Workers, 414 U.S. 368, 386-87 (1974). The standard under section 502 is a strict, objective standard presumably because the union would be able to gather such evidence before concluding a walkout was necessary to protect the safety of employees.

34. 611 F.2d at 814-15.

35. Du-Tri Displays, Inc., 231 N.L.R.B. 1261 (1977); Ben Pekin Corporation, 181 N.L.R.B. 1025 (1970), enf'd, 452 F.2d 205 (7th Cir. 1971). Both the Board and the court in *Modern Carpet Industries* cited Alleluia Cushion Co., Inc., 221 N.L.R.B. 999 (1975), but that case did not involve an unreasonable belief on the part of an employee that a labor dispute existed. In that case an employee was discharged for making complaints about safety violations in the plant to OSHA. The subsequent OSHA report, however, verified those violations.

36. 231 N.L.R.B. 1261 (1977).

Modern Carpet Industries involved a labor dispute over wages. In *NLRB v. Ben Pekin Corp.*,[37] the Union told an employee, whose employer had an informal agreement with the Union concerning wages, that he and his fellow employees would receive a $75 monthly raise. When the raise came only to $27, the employee confronted his supervisor and a Union official asking both, "Is there a pay-off here?"[38] The supervisor fired the employee for the remark. The court, concluding that the employee's remark was not so defamatory as to make it indefensible, held that the issue was whether the employee actually believed a labor dispute over wages existed. Concluding that his remark resulted from his actual belief that he and his fellow employees[39] were being cheated out of a promised raise, the court held that the Act protected his activities.

Like the employees in *Modern Carpet Industries,* the employees in *Du-Tri* and *Ben Pekin* had few options available to them. Once they believed they were embroiled in a labor dispute with their employers, and once their employers refused to respond to the employees' concerns, the employees took the only course of action they saw available. The employer held the balance of power in both situations; the employer had the means to "solve" the labor dispute but chose not to exercise those means. Thus, because the employer could have prevented the "labor dispute" from erupting in the first place, the employer was held responsible for firing its employees when they acted in response to the "labor dispute."

What both the court and the Board failed to consider in the present case is whether it is fair to impute the knowledge of the "labor dispute" to the employer. The employer in *Modern Carpet Industries* admitted in its brief that the president of the company knew that there was a rumor in the mill that the lead was unsafe.[40] Thus, the court may have assumed that it was not unjust to impute to the employer the knowledge that a labor dispute over safe working conditions existed in the minds of some employees, because the employer admitted having some notice of the dispute. But the court's opinion did not articulate this limitation. The holding of *Modern Carpet Industries* also extends the sanctions of the Act to those employers who are totally unaware that their employees consider themselves to be

37. 452 F.2d 205 (7th Cir. 1971).

38. *Id.* at 206.

39. Even though the employees in *Du-Tri Displays* and *Ben Pekin* acted alone, their actions were deemed to be concerted actions because they acted to protect or help fellow employees as well. *See* Alleluia Cushion Co., Inc., 221 N.L.R.B. 999 (1975).

40. Brief for Respondent at 3-4, NLRB v. Modern Carpet Industries, Inc., 611 F.2d 811 (10th Cir. 1979).

embroiled in a labor dispute. Since the existence of a labor dispute now depends, at least in the Tenth Circuit,[41] on the honest belief of an employee that a dispute over terms, tenure, or conditions of employment exists, employers will have to be especially responsive to employees' perceptions. While furthering increased consideration by employers for employees' concerns may be an admirable goal of the Act, the court has chosen a very harsh method to achieve this goal. Employers who attempt to discipline employees for work stoppages or walkouts will first have to consider whether the employees might have thought that these actions were necessary for their health or safety. Even if the employer cannot perceive the danger, the employer will be held to have committed an unfair labor practice by disciplining employees who acted because they honestly believed there was a danger in the workplace. This case provides a clear example of a perceived danger in the workplace that the employees actually and honestly believed existed, but of which the employer could be totally unaware. If the employer had not heard a rumor that employees thought certain material was radioactive, the employer would have had no notice of the perceived danger. Nevertheless, the court would hold the employer responsible under the Act for all disciplinary measures taken against the employees, solely because the employees actually believed they had to walk off the job to protect themselves.

CONCLUSION

The Tenth Circuit Court of Appeals has extended the protection of the National Labor Relations Act to employees who act in good faith for their mutual aid or safety even when their actions later seem unreasonable. Once the court had adopted this legal conclusion, the sole issue was whether the employees honestly believed the lead their employer was asking them to work with was radioactive. Adopting the Board's finding concerning the employees' belief, the court held that the employer had committed an unfair labor practice when the employer fired the three employees. Although the employer acknowledged some notice of a rumor in the mill that the lead was dangerous, the court did not limit its holding to those situations where the employer had notice that the employees thought a danger existed in the

41. The Tenth Circuit is probably not alone, although no other court has addressed this issue as precisely as the court did in *Modern Carpet Industries*. *See, e.g.*, NLRB v. Ben Pekin Corp., 452 F.2d 205 (7th Cir. 1971); Owens-Corning Fiberglass Corp. v. NLRB, 407 F.2d 1357 (4th Cir. 1969); NLRB v. Halsey W. Taylor Co., 342 F.2d 406 (6th Cir. 1965); *But, c.f.*, Wheeling-Pittsburgh Steel Corp. v. NLRB, 618 F.2d 1009 (3rd Cir. 1980) n. 15.

workplace. Such notice should be required in future cases, especially when employees have an unreasonable belief in the existence of some invisible danger. Otherwise, the subjective beliefs of the employees become the sole determining factor when the court decides whether a labor dispute exists, whether the activities arising out of the dispute are protected activities, and whether the employer has committed an unfair labor practice when the employer interferes with those activities.

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