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Labor Law - Right to Strike - No-Strike Clause Bars Strike Where Unfair Labor Practice Is Not Serious in Nature

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LABOR LAW—RIGHT TO STRIKE—NO-STRIKE CLAUSE BARS STRIKE WHERE UNFAIR LABOR PRACTICE IS NOT SERIOUS IN NATURE.

Arlan's Dep't Store, Inc. (NLRB 1961).

Petitioner labor union was the bargaining agent of respondent department store's employees. The collective bargaining agreement between petitioner and respondent required that no employee be discharged except for cause, and provided a grievance system culminating in arbitration for all disputes arising under the agreement. It also contained a standard no-strike clause.[1] Respondent's manager discharged a union steward because of union connected activities. Although the union offered to contest the discharge through the grievance system, the discharged steward refused,[2] and thirty-nine other employees staged a strike to protest the discharge. After warning the strikers that they were in violation of the no-strike clause, respondent discharged them[3] and the union filed unfair labor practice charges with the National Labor Relations Board. The trial examiner found that the discharge of the steward was a violation of Sections 8(a)(1) and (3) of the National Labor Relations Act,[4] but that the striking employees were not engaged in protected concerted activity under Section 7 of the Act,[5] and hence could lawfully be discharged. The National Labor Relations Board, with one member dissenting, affirmed, *holding* that the dispute was within the scope of the contract grievance procedure and that, in striking in violation of the no-strike clause, the employees were not protected by Section 7. *Arlan's Dep't Store, Inc.*, 133 N.L.R.B. No. 56 (1961).

The National Labor Relations Act in Section 7 protects the right of employees to engage in concerted activities for "mutual aid or protection," which includes the right to strike.[6] Collective bargaining agreements, however, frequently include "no-strike" clauses waiving this right

1. "The Union agrees that during the term of this agreement there shall be no strikes, stoppages, or slowdown of work by the Union or any of its employees. . . ."

2. At this time there was a decertification contest, and it appeared that the steward had circulated several petitions for another union.

3. The strikers were subsequently reinstated but without back pay.

4. National Labor Relations Act § 8(a), 49 Stat. 449 (1935), as amended, 73 Stat. 519 (1947), 29 U.S.C. § 158(a) (1958): "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 . . . to encourage or discourage membership in any labor organization. . . ."

5. National Labor Relations Act § 7, 49 Stat. 449 (1935), as amended, 73 Stat. 519 (1947), 29 U.S.C. § 157 (1958): "Employees shall have the right to . . . engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection. . . ."

6. NLRB v. Fansteel Metallurgical Corp., 306 U.S. 241, 59 S. Ct. 490 (1939); NLRB v. Kennametal, Inc., 182 F.2d 817 (3d Cir. 1950); Carter Carburetor Corp. v. NLRB, 140 F.2d 714 (8th Cir. 1944); Berkshire Knitting Mills v. NLRB, 139 F.2d 134 (3d Cir. 1943); NLRB v. Peter Cailler Kohler Swiss Chocolates Co., Inc., 130 F.2d 503 (2d Cir. 1942).

of workers to enforce their economic demands.[7] That a union can waive the right to strike for the achievement of economic objectives is well-settled, and employees striking in violation of such a clause are unprotected by Section 7.[8] In *Shirley-Herman Co. v. Int'l Hod Carriers,*[9] the Second Circuit concluded:

> The constitutional right of the employees to strike is not impaired by their voluntary agreement to forego use of that weapon, nor do no-strike clauses prevent the purposes of the . . . Act from being carried out.[10]

Some courts have analyzed the no-strike clause from a contract point of view, finding that the parties should be bound "to the same effect as the parties to any other character of contract."[11] However, the question of whether a no-strike clause is to be construed as prohibiting strikes for other than economic reasons is a source of more difficulty. In *United Biscuit Co. v. NLRB*[12] the Seventh Circuit "doubted" that it would matter whether the breach of the clause was caused by the employer's unfair labor practices. However, the National Labor Relations Board in *Scullin Steel Co.*[13] made special reference to the fact that the strike was not caused by any employer unfair labor practices in dismissing a complaint against the company for discharging employees who had violated a no-strike clause. The following year, in citing the *Scullin* case, the Board again found that *in the absence of any employer unfair labor practices,* the employees were not protected by the Act in breaching their contract.[14] In *National Electronics Products Corp.,*[15] however, the Board appeared to modify this rule. In that case, the strike was caused by the discharge of an employee in a factual situation quite similar to that in the present case. The Board held that, since there was an established grievance procedure, there was a breach of the agreement and the employer was privileged to discipline the strikers.[16]

> No convincing argument has been made . . . to regard this [the unfair labor practice] . . . as sufficient justification for overriding

7. *E.g.,* Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 76 S. Ct. 349 (1956); Ezrine, *Nadir of the No-Strike Clause,* 8 LAB. L. J. 769 (1957).

8. NLRB v. Sands Mfg. Co., 306 U.S. 332, 59 S. Ct. 509 (1939).

9. 182 F.2d 806 (2d Cir. 1950).

10. *Id.* at 809. See also Consolidated Edison Co. v. NLRB, 305 U.S. 197, 237, 59 S. Ct. 206, 220 (1938), where Mr. Chief Justice Hughes in commenting on such a provision in relation to the Act stated: "Moreover the fundamental purpose of the Act is to protect interstate . . . commerce from interruption and obstruction caused by industrial strife. This purpose appears to be served by these contracts in an important degree . . . [P]recluding strikes and providing for the arbitration of disputes, these agreements are highly protective to interstate . . . commerce."

11. United Biscuit Co. v. NLRB, 128 F.2d 771, 775 (7th Cir. 1942). See also NLRB v. Columbia E. & S. Co., 96 F.2d 948 (7th Cir. 1938), *aff'd,* 306 U.S. 292, 59 S. Ct. 501 (1939); Nat'l Linen Service, 48 NLRB 171 (1943); Cox, *The Legal Nature of Collective Bargaining Agreements,* 57 MICH. L. REV. 1, 17 (1958).

12. 128 F.2d 771 (7th Cir. 1942).

13. 65 N.L.R.B. 1294, 1318 (1946), *aff'd as modified,* 161 F.2d 143 (8th Cir. 1947).

14. Joseph Dyson & Sons, 72 N.L.R.B. 443, 447 (1947).

15. 80 N.L.R.B. 995 (1948).

16. *Id.* at 999, 1000.

> the salutary objectives of a no-strike clause . . . . In our opinion . . . the purposes of the Act can best be effectuated by requiring employees to honor their no-strike commitments and rely on the remedial processes of the Board.[17]

Thus, the Board seemed to conclude that, where there were such "remedial processes," the employees had breached their contract and the employer was free to discharge them notwithstanding the fact that the strike was precipitated by an unfair labor practice. In *NLRB v. Wagner Iron Works*,[18] however, the Seventh Circuit rejected this interpretation that a no-strike clause necessarily bars any strike for any cause:

> The no-strike clause must be interpreted in the light of other terms of the contract. Since the contract does not purport to reach all conceivable phases . . . this clause can not well be interpreted as a surrender of the right of self-help, as a measure to protest against unfair labor practices.[19]

Thus the court concluded that, since the contract did not include anything concerning unfair labor practices, a strike provoked by such practices was not covered by the no-strike clause.

The United States Supreme Court, in the landmark case of *Mastro Plastics Corp. v. NLRB*,[20] adopted the approach of *Wagner* by declaring that the issues involved must be answered by an interpretation of the particular contract.[21] In *Mastro*, the employer tried to coerce its employees into abandoning an incumbent union and joining a rival union, and fired an employee who was persistent in his refusal to do so.[22] The Court construed the standard no-strike clause in the *Mastro* contract[23] as not waiving the right to strike against the employer's unfair labor practices. "We believe that the contract taken as a whole deals solely with the economic relationship between the employer and the employee,"[24] and thus the contract could not cover the unfair labor practice strike. The Court also classified Mastro's coercive action as "flagrant" in that it was

17. *Id.* at 1000.
18. 220 F.2d 126 (7th Cir. 1955).
19. *Id.* at 140.
20. 350 U.S. 270, 76 S. Ct. 349 (1956).
21. *Id.* at 279, 76 S. Ct. at 356.
22. Another union began a campaign among Mastro's employees. Due to its alleged belief that this union was communist-controlled and that the incumbent union was too weak to cope with the situation, the company suggested that the latter union transfer its bargaining rights to a third union which the company regarded as stronger. This suggestion was refused and the company started a very active movement to obtain this end, in the course of which certain employees who received membership cards in the new union were told that those who refused to sign would be "out." One employee was fired due to his activity in support of the incumbent union. This discharge precipitated a strike in violation of a no-strike clause. Significantly, Mastro engaged in these acts while the incumbent union was attempting to negotiate a new contract.
23. "The Union further agrees to refrain from engaging in any strike or work stoppage during the term of this agreement."
24. Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 281, 282, 76 S. Ct. 349, 357-58 (1956).

a practice destructive of the very foundation of the collective bargaining relationship.[25] However, the Court qualified this by stating that it assumed that, by "explicit contractual provisions," the employees could have waived the right to strike against such unfair labor practices.[26] Thus it would appear that the usual no-strike clause will not waive the right to strike against employer unfair labor practices, at least when the latter are so serious as to threaten the existence of the bargaining relationship.

Since 1956, the Board has twice had occasion to consider the implications of *Mastro*. In *Mid-West Metallic Products*,[27] the contract contained a clause forbidding strikes until the procedure for settling disputes had been exhausted, which would take approximately five days; there was no explicit waiver of the right to strike due to unfair labor practices. The Board in construing the contract held that such a clause was a bar to unfair labor practice strikes until the grievance procedures were complied with, since the union promised not to strike for only a short period, while in *Mastro* there was such a limitation for the entire duration of the contract. In 1961, in *Ford Motor Co.*,[28] the Board affirmed the findings of the trial examiner who had held that where there was a discriminatory discharge, the *Mastro* rule should not be confined only to serious unfair labor practices.

It would seem clear that the rigid enforcement of no-strike clauses in connection with economic strikes is consistent with the basic policies of the National Labor Relations Act[29] in that it eliminates serious obstructions to the normal flow of commerce and at the same time does not impair the right of collective bargaining.[30] The prevention of strikes and the protection of the rights of the employee to organize and to contract freely are, of course, principal objectives of the Act. The holding of the *Mastro* case is a reasonable limitation on the enforcement of such clauses. In the *Mastro* situation, the employer had engaged in a concerted course of unfair labor practices in order to dominate the employee's selection of a bargaining agent. Such selection is, of course, central to the right of free organization and collective bargaining. The Court emphasized that such action constitutes a *flagrant* example of unfair practice,[31] and it clearly based its decision on a construction of the terms of the contract:[32] "[W]e conclude that *the contract* did not waive the employees' right to strike solely against the unfair labor practices of their employer."[33] (Emphasis added). Essentially, this amounted to a finding that such a

25. *Id.* at 281, 76 S. Ct. at 357.
26. *Id.* at 279, 76 S. Ct. at 356.
27. 121 N.L.R.B. 1317 (1958).
28. 131 N.L.R.B. No. 174 (1961).
29. National Labor Relations Act § 1, 49 Stat. 449 (1935), as amended, 73 Stat. 519 (1947) 29 U.S.C. § 141 (1958).
30. Mastro Plastic Corp. v. NLRB, 350 U.S. 270, 279, 76 S. Ct. 349, 356 (1956).
31. *Id.* at 279, 76 S. Ct. at 356.
32. *Ibid.*
33. *Id.* at 284, 76 S. Ct. at 358.

flagrant violation could not have been in the contemplation of the parties when they adopted the no-strike clause. One commentator has construed the *Mastro* holding to mean that, in any contract where there has not been an explicit provision so providing, the right to strike against *any* unfair labor practice[34] has not been waived. If this is so, any isolated discriminatory discharge opens the door to a strike with the resultant obstruction of commerce, even though the bargaining relationship itself is unimpaired and the injured employee has ample remedies both under the contract and before the Board. The *Mid-West Metaleics*[35] case supports the approach to *Mastro* taken in the instant case. There the right to strike was only waived for a very short length of time, and the Board held *Mastro* inapplicable. To have held otherwise would have opened the door to both "wild-cat" strikes and strikes for trivial reasons. Also, it was reasonable to conclude that such a short waiver was intended to apply even to unfair labor practice situations. A more difficult case to reconcile is the *Ford Motor Co. case.*[36] The majority of the Board now contends that the reason they upheld the finding of the trial examiner in *Ford* was due to the seriousness of the unfair labor practice involved.[37] This contention, however, finds little support in the *Ford* decision. Be that as it may, the present case may clear up certain difficulties in construing *Mastro;* it would appear that the employee has not waived his right to strike and is acting within a protected area where: (a) there is a "flagrant" unfair labor practice as defined in *Mastro;*[38] (b) there is no clause expressly barring a strike in such a case, and (c) the terms of the contract do not merely waive the right for a short period as in *Mid-West Metaleics.* The principal difficulty with the result is the Board's criterion of seriousness, to be applied in order to determine whether *Mastro* should govern: "experience, good sense and good judgment." However, it would seem that no other test is suitable. The Board certainly has the experience in situations of this type to make a practical determination as to the seriousness of the unfair labor practices involved. The dissenting opinion of Member Fanning argues that any discharge which is an unfair labor practice under the Act is per se a serious matter. Such an approach, while upholding one policy of the Act by giving maximum protection to the organizational rights of workers, would also undermine the equally basic objective of maintaining industrial peace. On balance, therefore, the approach of the majority would seem more in line with the policies enunciated by Congress.

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34. Cox, *The Legal Nature of Collective Bargaining Agreements,* 57 MICH. L. REV. 1, 17 (1958). For a contrary view see, Ezrine, *Nadir of the No-Strike Clause,* 8 LAB. L. J. 769, 796 (1957).

35. See note 28 *supra.*

36. See note 29 *supra.*

37. Footnote 14 of the majority opinion.

38. "Those practices destructive of the foundation on which collective bargaining must rest . . . ," 350 U.S. 270, 281, 76 S. Ct. 349, 357 (1956).