Louisiana Law Review

Volume 1 | Number 3
March 1939

"From Nose-Thumbing to Sabotage" - The Fansteel Sit-Down Decisions

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Comments

"FROM NOSE-THUMBING TO SABOTAGE"

THE FANSTEEL SIT-DOWN DECISION

"As now construed by the Court, the employer may discharge any striker, with or without cause, so long as the discharge is not used to interfere with self-organization or collective bargaining. Friction easily engendered by labor strife may readily give rise to conduct, from nose-thumbing to sabotage, which will give fair occasion for discharge on grounds other than those prohibited by the Labor Act." Thus did Mr. Justice Reed, dissenting, interpret the majority opinion of the Supreme Court in *Fansteel Metallurgical Corp. v. National Labor Relations Board,*[1] and pose the question that may confound labor for some time to come.

The surreptitious burial believed by some[2] to have been the fate of *Coppage v. Kansas*[3] and *Adair v. United States,*[4] appears not to have been as enduring as suspected. Though not discernible, the spirit of these cases seemed present about the chamber of the Supreme Court on the day of the sit-down decision: "As respondent's unfair labor practices afforded no excuse for the seizure and holding of its buildings, respondent had its normal rights of redress. Those rights, in their most obvious scope, included the right to discharge the wrongdoers from its employ." In these words, the Court, speaking through the Chief Justice, upheld the right of an employer to discharge his employees who had gone on strike and had seized and occupied the employer's property.

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1. 59 S.Ct. 490, 500-501 (1939).

2. See, Magruder, Fifty Years of Collective Bargaining (1937) 50 Harv. L. Rev. 1071, 1085; Berman, The Supreme Court Interprets the Railway Labor Act (1930) 20 Am. Econ. Rev. 619, 628 et seq.; Sharp, Movement in Supreme Court Adjudication (1933) 46 Harv. L. Rev. 361, 389; Doskow, Statutes Outlawing Yellow Dog Contracts (1931) 17 A. B. A. J. 516, 518; Notes (1933) 33 Col. L. Rev. 882, 898; (1932) 17 Corn. L. Q. 472, 476; (1928) 42 Harv. L. Rev. 108, 110, n. 21; (1931) 44 id. 1287, 1291; (1935) 48 id. 630, 649, n. 138; (1930) 25 Ill. L. Rev. 310, 313; (1930) 40 Yale L. J. 92, 97, 98. But see Wickersham, The N.R.A. From the Employer's Point of View (1935) 48 Harv. L. Rev. 954, 958; Fraenkel, Recent Statutes Affecting Labor Injunctions and Yellow Dog Contracts (1936) 30 Ill. L. Rev. 854, 861, 862.

3. 236 U.S. 1, 35 S.Ct. 240, 59 L.Ed. 436 (1915). See discussion in note 7, infra.

4. 208 U.S. 161, 28 S.Ct. 277, 52 L.Ed. 436 (1908). See discussion in note 7, infra.

Ever since the Court's decision in *Texas & New Orleans Railway Co. v. Brotherhood of Railway and Steamship Clerks*,[5] there has been speculation concerning the legal content of "the normal exercise of the right" of an employer "to select its employees or to discharge them." For it was in these words that the Court upheld the provisions of the Railway Labor Act[6] designed to prevent an employer from interfering with the union organization or representation of his employees. Notwithstanding the contention that enforcing such provisions would deprive the employer of his liberty of contract without due process of law. This was the language used to put at rest the notion, based on the *Coppage* and *Adair* cases, that the due process clauses of the Constitution prohibited legislative interference with the employer's liberty of control over his employees—the liberty of contract in selecting and discharging for reasons deemed by him sufficient.[7] The difference between the majority and the dissenters can be told in

5. 281 U.S. 548, 50 S.Ct. 427, 74 L.Ed. 1034 (1930).

6. 44 Stat. 577 (1926) as amended by 48 Stat. 1185 (1934), 45 U.S.C.A. § 152, subd. 9 (Supp. 1938).

7. In the *Coppage* case a railway superintendent was prosecuted under a Kansas statute making it a criminal offense punishable with fine and imprisonment for an employer or his agent to require, or otherwise procure, as a condition upon which one might secure employment, or remain in such employment, an agreement not to become or remain a member of any labor organization while so employed. In denying validity to the statute as applied the court said: "Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense." Coppage v. Kansas, 236 U.S. 1, 14, 35 S.Ct. 240, 59 L.Ed. 436 (1915).

In the *Adair* case an agent had discharged an employee because of his membership in a labor organization. The question before the Supreme Court was, "May Congress make it a criminal offense against the United States—as by the tenth section of the act of 1898 it does—for an agent or officer of an interstate carrier, having full authority in the premises from the carrier, to discharge an employee from service simply because of his membership in a labor organization?" In answering this question in the negative the court said: "In our opinion that section, in the particular mentioned, is an invasion of the personal liberty, as well as of the right of property, guaranteed by that [the fifth] Amendment. Such liberty and right embraces the right to make contracts for the purchase of the labor of others and equally the right to make contracts for the sale of one's own labor; each right, however, being subject to the fundamental condition that no contract, whatever its subject matter, can be sustained which the law, upon reasonable grounds, forbids as inconsistent with the public interests or as hurtful to the public order or as detrimental to the common good. . . . So the right of the employee to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employee. . . . In all such particulars the employer and the employee have equality of right, and any legislation that disturbs that equality is an arbi-

terms of this treatment which the due process argument received in the *Texas & New Orleans* case, and also in the subsequent case of *National Labor Relations Board v. Jones & Laughlin Steel Corporation*,[8] wherein the Court took a like view of similar provisions of the National Labor Relations Act.[9]

Based on the cases just mentioned, the argument presented to the Court, in the instant case, was that the N. L. R. A. prevented the discharge for any cause of an employee "whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice." To this, the court replied: "Apart from the question of the constitutional validity of an enactment of that sort, it is enough to say that such a legislative intention should be found in some definite and unmistakable expression. We find no such expression in the cited provision."[10] Even more to the point, and perhaps as sig-

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trary interference with the liberty of contract which no government can legally justify in a free land." Adair v. United States, 208 U.S. 161, 171, 172, 174, 175, 50 S.Ct. 427, 74 L.Ed. 1034 (1908).

In the *Railway* case the Court said: "The petitioners invoke the principle declared in *Adair v. United States*, 208 U.S. 161, and *Coppage v. Kansas*, 236 U.S. 1, but these decisions are inapplicable. The Railway Labor Act of 1926 does not interfere with the normal exercise of the right of the carrier to select its employees or to discharge them. The statute is not aimed at this right of the employers but at the interference with the right of employees to have representatives of their own choosing. As the carriers subject to the Act have no constitutional right to interfere with the freedom of the employees in making their selections, they cannot complain of the statute on constitutional grounds." Texas & New Orleans R. R. Co. v. Brotherhood of Railway and Steamship Clerks, 281 U.S. 548, 570-571, 50 S.Ct. 427, 74 L.Ed. 1034 (1930). See, also, Virginian Railway Co. v. System Federation No. 40, 300 U.S. 515, 57 S.Ct. 592, 81 L.Ed. 789 (1937).

8. 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893 (1937). The Court here said: "As we said in *Texas & N. O. R. Co. v. Railway & S. S. Clerks, supra,* and repeated in *Virginian Railway Co. v. System Federation No. 40,* the cases of *Adair v. United States,* . . . and *Coppage v. Kansas,* . . . are inapplicable to legislation of this character. The Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them. The employer may not, under cover of that right, intimidate or coerce its employees with respect to their self-organization and representation, and, on the other hand, the Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than such intimidation and coercion." (301 U.S. at 45-46.)

9. 49 Stat. 449 (1935), 29 U.S.C.A. §§ 151, et seq. (Supp. 1938).

10. If the court had had a contrary inclination it might not have gone begging for support, e.g., "Nor can the committee sanction the suggestion that the bill should prohibit fraud or violence by employees or labor unions. The bill is not a mere police court measure. The remedies against such acts in the State and Federal courts and by the invocation of local police authorities are now adequate, as arrests and labor injunctions in industrial disputes throughout the country will attest. . . . In addition, the procedure set up in this bill is not nearly so well suited as is existing law to the prevention of fraud and violence. . . . The only result from introducing proposals of this sort into the bill, in the opinion of the committee, would be to overwhelm the Board in every case with countercharges and recriminations that would pre-

nificant, was the expression of Mr. Justice Stone in his concurring opinion: "If a plainer indication of such a purpose had been given by the language of sec. 2 (3), I should have thought it of sufficiently dubious constitutionality to require us to construe its language otherwise, if that could reasonably be done, . . ." Thus was the feeling of the majority of the Court made manifest, and the protection saved for the "normal exercise of the right of the employer to select its employees or to discharge them" made meaningful. In fine, the due process clause still was considered as having a sufficient relation to the employer-employee relationship to protect the general control of the former over the latter, even during a period of industrial strife, and notwithstanding that the employer had been guilty of unfair labor practices under the Act.

How the line might have been drawn is plainly indicated in the dissenting opinion of Mr. Justice Reed:

> "The constitutional problem involved in such a conclusion is not different from the one involved in compelling an employer to reinstate an employee, discharged for union activity. There is here no protection for unlawful activity. Every punishment which compelled obedience to law still remains in the hands of the peace officers. It is only that the act of ceasing work in a current labor dispute involving unfair labor practices suspends for a period, not now necessary to determine, the right of an employer to terminate the relation. The interference with the normal exercise of the right to discharge extends only to the necessity of protecting the relationship in industrial strife."[11]

The basic point of departure now seems apparent—the importance of protecting the employer-employee status in industrial strife as opposed to the importance of protecting the employer's power of control over his employees, even during the existence of a labor dispute, when they engage in unlawful conduct. On the one hand, the belief plainly held by the majority was that the legislative power is limited to the correction or prevention of conditions calculated to interfere with the self-organization or representation of employees for purposes of collective bargaining,

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vent it from doing the task that needs to be done." Sen. Rep. No. 573, 74th Cong. 1st Sess. (1935) 16, 17. And see the dissenting opinion of Treanor, Cir. J., in Fansteel Metallurgical Corp. v. N. L. R. B., 98 F. (2d) 375, 383 (C.C.A. 7th, 1939). The Fansteel sit-down strikers were prosecuted for contempt of an injunction, substantial fines were imposed and some jail sentences given.

11. 59 S.Ct. 490, 501 (1939).

and that it does not exist with reference to conduct or conditions having no legitimate connection with self-organization or representation. On the other hand, the thesis of the dissent was that the power, bottomed on the correction of conditions of industrial strife affecting commerce, is plenary in the presence of industrial strife, whatever the overt manifestations which accompany it. Underlying these views was a matter of opinion as to whether the Board's order could reasonably promote the legitimate purpose of the legislation. If ordering the reinstatement of an employee who had engaged in unlawful conduct during a strike and had consequently been discharged was necessary to "effectuate the policies" of the Act, such order might lawfully issue, otherwise not.[12] The suggestion of unconstitutionality unfolds the court's belief that interfering with the power of discharge under circumstances such as those disclosed by the record would be, to use the usual expression, unreasonable, arbitrary and capricious. The opposing position stems from a contrary view.

With further reference to the proper operative scope of the Act, the majority opinion said:

> "We held[13] that the power to command affirmative action is remedial, not punitive, and is to be exercised in aid of the Board's authority to restrain violations and as a means of removing or avoiding the consequences of violation where those consequences are of a kind to thwart the purposes of the Act. . . . There is not a line in the statute to warrant the conclusion that it is any part of the policies of the Act to encourage employees to resort to force and violence in defiance of the law of the land. On the contrary, the purpose of the Act is to promote peaceful settlements of disputes by providing legal remedies for the invasion of the employees' rights. . . . We are of the opinion that to provide for the reinstatement or reemployment of employees guilty of the acts which the Board finds to have been committed in this instance would not only not effectuate any policy of the Act but would directly tend to make abortive its plan for peaceable procedure."[14]

The underlying thought is sufficiently apparent: The Act was aimed at substituting peaceable procedure such as elections and

12. The Act confers upon the Board authority ". . . to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act." Section 10 (c) N.L.R.A.

13. The Court is here referring to Consolidated Edison Co. v. N.L.R.B., 59 S.Ct. 206, 219 (1938).

14. 59 S.Ct. 490, 497 (1939).

conferences for industrial strife which stilled the movement of commerce. To protect the conduct involved in the case before the Court would be to encourage disorder with its demoralizing effect on commerce.

The challenge to this issue can be seen clearly in the dissenting opinion. In the first place it reminds that one of the most prolific sources of labor strife is the exercise of the power of discharge by employers. Under the majority view the range of unlawful conduct which would justify a discharge as resting upon "an independent and adequate basis," might extend from "nose-thumbing to sabotage," thus encouraging labor unrest and industrial strife. Finally, courts should be reluctant to interfere with the "normal action of administrative bodies" in a determination, after the sifting of charges and counter charges, of "the adjustment most conducive to industrial peace."

Normal Exercise of Right to Discharge

The question troubling the dissenters, and which will provide no little trouble for labor unions, is, what kind of conduct is embraced in the rule adopted by the majority? That the decision represents only an American disapproval of an un-American practice can hardly be believed. Of course, there was no quibbling about the legal position of a sit-down strike. "It was a high-handed proceeding without shadow of legal right."[15] But this was not all the Court said concerning the kind of conduct which falls without the protection of the Act. Although the "right to strike" is defended by an express provision of the Act, employees have "no license to commit acts of violence or to seize their employer's plant." The recognition of the right to strike "plainly contemplates a lawful strike—the exercise of the unquestioned right to quit work." And so the Court found "abundant opportunity for the operation of section 2 (3) without construing it as countenancing lawlessness or as intended to support employees in acts of violence against the employer's property by making it impossible for the employer to terminate the relation upon that independent ground." Therefore, "When the employees resorted to

15. For a consideration of the legal position of the sit-down strike see Green, The Case for the Sit-Down Strike (1937) 90 New Republic 199; Sit-Down Strikes: A New Problem for Government (1937) 31 Ill. L. Rev. 942. General Motors Corp. v. International Union United Automobile Workers, C. C. H. Labor Law Serv., par. 16354 (Circ. Ct. Genesee Co., Mich. 1937); Chrysler Corp. v. International Union United Automobile Workers, C. C. H. Labor Law Serv., par. 16358 (Circ. Ct. Wayne Co., Mich. 1937); Plecity v. Local No. 27, C. C. H. Labor Law Serv., par. 16357 (Sup. Ct. Los Angeles Co., Calif. 1937).

that sort of compulsion they took a position outside the protection of the statute and accepted the risk of the termination of their employment upon grounds aside from the exercise of the legal rights which the statute was designed to conserve."[16]

What does this language mean? As shown by the quotations given, the opinion first employs the expression "acts of violence" broadly, and later with the qualifying phrase "against the employer's property." May this be treated as an indication that acts of violence against the employer's property are alone condemned? Significant in this connection, and generally, is the Court's indication of its conception of what the protected "right to strike" embraces; that is, "a lawful strike—the exercise of the unquestioned right to quit work." Or, as put in the Senate Committee Report relied upon by Mr. Justice Stone, "collectively refraining from work during the course of a labor controversy."[17] This indicates convincingly that the character of any conduct that may accompany "collectively refraining from work" will always be open to question concerning its legality and possible effect on the provisions of the Act. But, beyond this, did the Court mean to indicate that some strikes may not be lawful? Past decisions in the general field of labor disputes indicate that merely collectively refraining from work may not always be legal.[18] However, the Act undoubtedly was meant to protect this simple practice, which the Court seems to find is the statutory meaning of the word "strike," so that the real problem concerns the legal effect of conduct which may accompany the collective cessation of work, such as occupying the employer's premises.

Under the majority opinion, the proper solution doubtless depends upon whether or not the employer may justify the discharge by showing that it rests upon, in the words of the court, an "independent and adequate basis." This probably means whether he can satisfy the court that he had sufficient cause to discharge the employee notwithstanding that such discharge might have the effect of discouraging union membership or activity. In the absence of unequivocal facts constituting adequate cause, motive may become obscure. Functionally, the most sig-

16. Mr. Justice Stone added, in his concurring opinion, "The language which saves the employee status for those who have ceased work because of unfair labor practices does not embrace also those who have lost their status for a wholly different reason—their discharge for unlawful practices which the Act does not countenance." (59 S.Ct. at 500.)

17. Sen. Rep. No. 573, 74th Cong. 1st Sess. (1935) 6, 7.

18. See Plant v. Woods, 176 Mass. 492, 57 N.E. 1011 (1900); Aberthaw

nificant word in the expression is "adequate." When will the alleged ground for the discharge be considered as adequate or inadequate? Plenty of latitude for control is here reserved.

There can hardly be any doubt that the legislation was not designed to interfere with the employer's control over the relation as long as he does not wield such control to interfere with his employees' rights of self-organization or representation for the purpose of collective action.[19] There is no cause for alarm in discovering that the employer "may discharge any striker"—as he might any working employee—"with or without cause, so long as the discharge is not used to interfere with self-organization or collective bargaining." The important point is that, if a striker is discharged, the employer may not have such an easy time convincing the court that his action rested upon an independent and adequate basis.[20] Surely, using the presence of "industrial strife" (a strike?) as a necessary prerequisite to justifiable interference with the employer's power of discharge would do violence to the purpose of the Act. Employer interference with union organization or activity might occur subtly in the utter absence of labor strife. Likewise, any existing labor controversy might be manifestly unconnected with the discharge of some employee. To say that in such a case the Board might order reinstatement, secure in the knowledge that the courts would not interfere with its administrative action, would be an extreme position indeed. What would place such a discharge beyond the operation of the Act would be the fact that there was no connection between it

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Construction Co. v. Cameron, 194 Mass. 208, 80 N.E. 478 (1907); and cases collected and authorities cited in Landis, Cases on Labor Law (1934) 310 n. Concerning the legality of the strike when used against third parties to the labor dispute see, Smith, Coercion of Third Parties in Labor Disputes (1939) 1 LOUISIANA LAW REVIEW 277.

19. "The act does not compel the petitioner to employ any one; it does not require that the petitioner retain in its employ an incompetent editor or one who fails faithfully to edit the news to reflect the facts without bias or prejudice. The act permits a discharge for any reason other than union activity or agitation for collective bargaining with employees. The restoration of Watson to his former position in no sense guarantees his continuance in petitioner's employ. The petitioner is at liberty, whenever occasion may arise, to exercise its undoubted right to sever his relationship for any cause that seems to it proper save only as a punishment for, or discouragement of, such activities as the act declares permissible." Associated Press v. N.L.R.B., 301 U.S. 103, 57 S.Ct. 650, 653, 81 L.Ed. 953 (1937). See, also, N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 57 S.Ct. 615, 628, 81 L.Ed. 893 (1937), note 8, supra.

20. See Associated Press v. N.L.R.B., 301 U.S. 103, 57 S.Ct. 650, 81 L.Ed. 953 (1937); N.L.R.B. v. Mackay Radio & Telegraph Co., 304 U.S. 333, 58 S.Ct. 904, 82 L.Ed. 1381 (1938); N.L.R.B. v. The Sands Mfg. Co., 59 S.Ct. 508 (1939); N.L.R.B. v. American Potash & Chemical Corp., 98 F. (2d) 438 (C.C.A. 9th, 1938); N.L.R.B. v. Kentucky Fire Brick Co., 99 F. (2d) 89 (C.C.A. 6th, 1938).

and the evils which the Act was calculated to prevent, or, in other words, an absence of a sufficient basis for affirmative action to effectuate the policies of the Act.

On the same day that the Court decided the *Fansteel* case it also handed down an opinion in the case of *The Sands Manufacturing Company*,[21] in which the right of the employer to discharge two employees for incompetence, notwithstanding a Board finding that such discharge constituted an unfair labor practice, was upheld. The Court felt that the evidence supporting a charge of employer hostility toward the employees' union did not "amount to a scintilla when considered in the light of [the company's] long course of conduct in respect of union activities and in dealing freely and candidly" with the union.[22] The employer's dismissal of its employees coincident with shutting down its plant because of a threatened strike growing out of a dispute concerning the proper application of a collective contract was also approved. A breach of the contract by the union was found, and the Court said: "The Act does not prohibit an effective discharge for repudiation by the employee of his agreement, any more than it prohibits such discharge for a tort committed against the employer."[23]

The problem of reinstatement has always been a troublesome one. Although there has been a refusal by two Circuit Courts of Appeals to apply the clean hands doctrine of equity for the purpose of denying reinstatement when the employees in question were charged with unlawful conduct,[24] other federal circuit courts have found such conduct sufficient to justify a discharge or a refusal to reinstate. Prior to the *Fansteel* decision, the Fifth Circuit Court of Appeals held that where seamen were threatening a sit-down strike and sabotage and there was good reason to believe that the threats would be carried out, the owners were justified in dismissing the crew.[25] The court recognized that tak-

21. 59 S.Ct. 508 (1939).

22. For a consideration of the character of the evidence required to support rulings of the Board see, Consolidated Edison Co. v. N.L.R.B., 59 S.Ct. 206, 216, 217 (1938); N.L.R.B. v. Thompson Products, 97 F. (2d) 13 (C.C.A. 6th, 1938).

23. The court cited in support of this proposition its decision in the *Fansteel* case.

24. N.L.R.B. v. Carlisle Lbr. Co., 94 F. (2d) 138 (C.C.A. 9th, 1937), cert. denied 58 S.Ct. 1045 (1938), 99 F. (2d) 533 (1938). The Second Circuit has reached a like conclusion. N.L.R.B. v. Remington Rand, Inc., 94 F. (2d) 862 (C.C.A. 2d, 1938). See, Comment (1938) 33 Ill. L. Rev. 187, 193, 194.

25. Peninsular & Occidental Steamship Co. v. N.L.R.B., 98 F. (2d) 411 (C.C.A. 5th, 1938). The company had suffered three sit-down strikes growing out of inter-union rivalries before it used its power of discharge.

ing such action was a measure necessary for the safety of the ships and the public.[26] The Fourth Circuit has held likewise that the Act does not empower the Board to order reinstatement of strikers convicted of terrorism.[27] And in line with the theory which the Supreme Court applied in the *Fansteel* case, the Sixth Circuit Court of Appeals has taken the view that to compel reinstatement of employees guilty of violent or unlawful conduct would tend "to promote discord among employers and employees."[28]

If determination of the effectiveness of a discharge is to involve a discovery of the motive of the employer, the presence of an actual belief that unlawful conduct has been committed or will be committed, should be sufficient, although contrary to the facts.[29] However, such process of discovery should properly involve a consideration of all of the relevant facts touching upon the background of the controversy and the employer's operative policy. The opportunities available for discovering the true facts must likewise be taken into account. Hence an alleged "honest belief, reasonably entertained" that employees whom the employer refused to reinstate were guilty of violence and unlawful acts against the employer's property, when based on an insufficient investigation and not supported by the evidence adduced before the Board, should not be considered as justification for a refusal to reinstate.[30] Naturally, unless inclination is closely guarded, discovery of motive may follow projection of belief.[31]

The Board itself has refused to order reinstatement where employees have been convicted of unlawful conduct under applicable laws, or have plead guilty thereto, such as causing injury with firearms during a strike,[32] stealing dynamite and con-

26. That the incidence of public contact will be weighed when considering whether disciplinary action is justified is also shown by N.L.R.B. v. Union Pacific Stages, 99 F. (2d) 153 (C.C.A. 9th, 1938), wherein an order of the Board was reversed.

27. Standard Lime & Stone Co. v. N.L.R.B., 97 F. (2d) 531 (C.C.A. 4th, 1938).

28. N.L.R.B. v. Thompson Products, 97 F. (2d) 13 (C.C.A. 6th, 1938).

29. Peninsular & Occidental Steamship Co. v. N.L.R.B., 98 F. (2d) 411 (C.C.A. 5th, 1938); Titmus Optical Co., N.L.R.B. Case No. C-716 (Nov. 21, 1938), 3 Lab. Rel. Rep. 399 (1938). On the point that the problem involves a discovery of motive see, Associated Press v. N.L.R.B., 301 U.S. 103, 57 S.Ct. 650, 81 L.Ed. 953 (1937). See, also, Comments (1938) 32 Ill. L. Rev. 568, 577 et seq.; (1938) 33 Ill. L. Rev. 187, 198, on the opinion of the Circuit Court of Appeals in the *Fansteel* case.

30. N.L.R.B. v. Kentucky Firebrick Co., 99 F. (2d) 89 (C.C.A. 6th, 1938).

31. Consider N.L.R.B. v. Union Pacific Stages, 99 F. (2d) 153 (C.C.A. 9th, 1938); N.L.R.B. v. Bell Oil & Gas Co., 98 F. (2d) 406 (C.C.A. 5th, 1938).

32. Kentucky Firebrick Co., 3 N.L.R.B. 455, 465 (1937). With reference to

spiring to destroy property,[33] or the possession and use of explosives for the destruction of property.[34] But the Board has not been willing to receive evidence of a less formal kind for such purposes,[35] nor to consider as sufficient misdemeanor convictions under local laws where no serious violence was involved. Thus, the Board ordered reinstatement of the sit-down strikers in the *Douglas Aircraft* case where no violence or substantial damage to property was found, notwithstanding their conviction under a California statute.[36] A real danger in permitting discharge or in disallowing reinstatement where acts of violence have been committed is the possibility of the employer's use of *agents provocateurs*.[37] The Board has refused, and with reason, to protect the employer's "normal right of discharge" in such event.[38] Integrity of motive is absent. In the light of the *Fansteel* decision, the Board's position in requiring a conviction for unlawful conduct, and in refusing to consider a sit-down strike unaccompanied by acts of violence or substantial destruction of property as sufficient justification for discharge, is very questionable.[39]

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violent conduct the Board said: "This Board cannot condone violence by any party to a labor dispute. An employer cannot, however, use the fact that violence has been committed during a strike as a pretext for not reinstating some of his employees where the real motive behind his refusal is the union activities of such employees and not an honest belief that they have engaged in illegal acts." Stackpole Carbon Co., 6 N.L.R.B. 171 (1938), is to the same effect.

33. Standard Lime & Stone Co., 5 N.L.R.B. 106 (1938). The Board refused to order the reinstatement of eight strikers who had been given indeterminate sentences of from one to ten years in the penitentiary, on felony charges, but ordered reinstatement of eleven guilty of misdemeanors and given sentences varying from one month to three months in jail. Of the latter, five had conspired to destroy property, and six were guilty of assault and battery.

34. Republic Steel Corp., 9 N.L.R.B. No. 33 (April 8, 1938).

35. Ibid. The Board also ordered the reinstatement of a number of strikers who had pleaded guilty to misdemeanor charges. See, also, T. W. Hepler, 7 N.L.R.B. 255, 263 (1938) (clashes between pickets and non-strikers occurred); C. A. Lund Co., 6 N.L.R.B. 423 (1938) (involving similar acts of violence); Stackpole Carbon Co., 6 N.L.R.B. 171 (1938) (involving personal injuries, disorderly conduct and one act of dynamiting).

36. Douglas Aircraft Co., Inc., 10 N.L.R.B. No. 18 (1938).

37. See Republic Steel Corp., 9 N.L.R.B. No. 33 (1938); N.L.R.B. v. Remington Rand, Inc., 94 F. (2d) 862 (C.C.A. 2d, 1938); Nevins, Grover Cleveland (1932) 622; Brooks, When Labor Organizes (1937) 133.

38. Remington Rand, Inc., 2 N.L.R.B. 626 (1937); Oregon Worsted Co., 3 N.L.R.B. 36 (1937).

39. It must be remembered, however, that there was more than mere occupation of the employer's buildings although the Court did brand the sit-down as "high handed" and "without shadow of legal right." Cf. Douglas Aircraft Co., 10 N.L.R.B. No. 18 (1938), where, subsequent to the decision of the Circuit Court of Appeals in the *Fansteel* case, the Board ordered reinstatement of sitdowners where no violence or substantial damage to property had

Power of Board to Order Reinstatement of "Employees"

Additional, and even greater concern, may be felt by labor over the Court's refusal to uphold the Board's order of reinstatement in the case of fourteen employees, who, because they aided and abetted the sitdowners from the outside, were not included in the employer's express discharge notified to the men occupying the buildings. The Court did not deem an actual discharge necessary or important because, in its view, the Board is granted authority to order only such affirmative action as is necessary to effectuate the policies of the Act. Since this group of employees aided and abetted the others in their unlawful seizure of the buildings, they were equally responsible therefore, and, for reasons already considered, ordering their reinstatement could not be defended as within the authority conferred.

It was with this position that Mr. Justice Stone felt constrained to disagree. Briefly stated, his position was that, in the absence of a discharge, the employer-employee status was preserved under section 2 (3) of the Act and that consequently the Court had no control over the Board's exercise of discretion: "Whether that power should be exercised was a matter committed to the Board's discretion, not ours."

In the light of the analysis underlying the view that the Act does not deprive the employer of the power of discharge for improper conduct although arising in connection with a labor dispute, this position seems difficult to defend. That is, the power of discharge is saved because section 2 (3) was not designed to protect the status where the employee engages in conduct dissociated with a cessation of work and of an unlawful character. And the reason for this is that a contrary view would run counter to the constitutional basis of the legislation. This being true, the absence of a necessity for effectuating the policies of the Act would result in an absence of justification for the Board's order.

It can hardly be believed that Mr. Justice Stone intended to suggest that the Board has no discretionary power to determine whether a discharge is effective or ineffective. Surely, if the Board should find, with conclusive evidential support, that a discharge by the employer was intended solely to discourage union

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occurred; Electric Boat Co., 7 N.L.R.B. 572 (1938), also involving occupation of employer's property without violence or sabotage.

The Board's practice of disregarding misdemeanor convictions and requiring conviction of a felony in upholding a refusal to reinstate is objectionable as being mechanical. This indicates, however, the natural tendency to weigh the character of the conduct involved in determining motive.

membership or activity, the Act would stand in the way of a court reversal of the order, because the Board is vested with power to order affirmative action necessary to carry out the statutory policy. Therefore, whether there has or has not been a discharge, the problem still to be considered is whether the Board's order can be justified under the authority granted—a matter of Board discretion with which the court must deal in either case. Of course, it is well settled that the court has power to determine whether an order of the Board is calculated to effectuate the policies of the Act.[40]

The concurring opinion does emphasize, however, that Mr. Justice Stone's chief concern was the constitutional validity of a legislative interference with the power of discharge where conduct of the kind involved in the case occurs. Underlying his objection can be discerned the thought that, if the Board in its discretion ordered the reinstatement of an undischarged striker engaging in such conduct, no violation of the employers constitutional liberty of contract would be committed.[41] Practically, however, if the Board should order reinstatement of employees engaging in unlawful conduct where no discharge had occurred, what would stand in the way of an immediate discharge by the employer upon reinstating the employee in compliance with the Board's order? The case indicates that such power would be recognized.

According to the majority opinion, if employees engage in conduct affording independent and adequate grounds for dismissal, they not only expose themselves to effective discharge by the employer, but also put themselves in a position where a Board order of reinstatement, in the absence of a dismissal, could not be justified. This should serve as a very definite check on questionable union activity. To the employee, such conduct may mean the loss of his job. To the union, it may mean loss of control.

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40. See, Consolidated Edison Co. v. N.L.R.B., 59 S.Ct. 206 (1938); N.L.R.B. v. Columbian Enamelling & Stamping Co., 59 S.Ct. 501 (1939); N.L.R.B. v. The Sands Mfg. Co., 59 S.Ct. 508 (1939).

41. If the employment relationship is effectively destroyed by a discharge then the order of the Board would amount to forcing the employer to contract with a stranger, a power which would raise grave constitutional doubts. N.L.R.B. v. Mackay Radio & Telegraph Co., 92 F. (2d) 761 (C.C.A. 9th, 1937). The judges of the Circuit Court of Appeals deciding the *Fansteel* case were in agreement that the Board has power to order the reinstatement of "employees" only. Fansteel Metallurgical Corp. v. N.L.R.B., 98 F. (2d) 375 (1938). This view is also supported by N.L.R.B. v. Carlisle Lumber Co., 99 F. (2d)

Normal Exercise of Right to Select

Not only did the Court give some indication of the meaning of the normal exercise of the right to discharge, but it also made an important commitment concerning the "normal right to select" employees. In reopening its plant the company offered re-employment to a number of the sitdowners which action, the company stated, was based on the "belief that a large number of men who had taken part in the seizure of the plant were compelled to do so through coercion and intimidation." The arguments based on this conduct by the employer and urged by the Board for consideration with reference to his attitude generally, and toward the employees who had seized his buildings, in particular, were not stated or considered in detail by the Court. Its position, which it stated in a few words, was that while the employer was absolved of any duty of re-employment by the unlawful conduct he might offer re-employment if he chose so to do. When this course was pursued by the Fansteel Corporation it "was simply exercising its normal right to select its employees."

What the opinion did not deal with sufficiently was the possibility that the employer, by rehiring some of the employees who had participated in the sit-down strike, but not all, was effectively discouraging self-organization or representation and thereby committing an unfair labor practice. The Court had previously pointed out that the employer might not, under cover of the normal right to select, "intimidate or coerce its employees with respect to their self-organization and representation."[42] In the recent case of *N. L. R. B. v. Mackay Radio & Telegraph Co.*,[43] it was held that although when employees strike for reasons other than the commission of an unfair labor practice, the employer having filled their places might not be compelled to rehire them, yet, if in rehiring, some are excluded under circumstances which indicate that union activity was the basis of the exclusion,

533 (1938). The sections interpreted are 2 (3) and 10 (c) of the N.L.R.A.

The Supreme Court, instead of adopting the view of the Circuit judges, took the broad position that the Board's order of reinstatement of strikers effectively discharged would not serve to effectuate the policies of the act. While the Court did not hold that the undischarged aiders and abettors remained "employees" by virtue of the Act, it is doubtful under the broad terms of section 2 (3) that unlawful conduct alone would be considered sufficient to sever the employment status. Cf., however, Truax v. Corrigan, 257 U.S. 312, 42 S.Ct. 124, 66 L.Ed. 254 (1921).

42. N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 57 S.Ct. 615, 628, 81 L.Ed. 893 (1937).

43. N.L.R.B. v. Mackay Radio & Telegraph Co., 304 U.S. 333, 58 S.Ct. 904, 82 L.Ed. 1381 (1938).

an unfair labor practice is thereby committed. An order to rehire with back pay from the time of the discrimination would then be proper. The possibility suggested by the principal case is that, where employees engage in unlawful conduct, the circumstances of their participation therein may be taken into consideration by the employer in rehiring without his running the risk of committing an unfair labor practice. Clearly enough, the leaders would always be excluded in such a case, and the true basis of choice would be the character or extent of union activity.[44] This is a choice that the Act is definitely designed to forbid.

The obvious reply to the foregoing is that in such event there would be an "independent and adequate basis" for the selection of employees and that such selection would not be aimed at interfering with the right of self-organization or representation. But such basis would necessarily involve the nature and circumstances of the wrong committed against the employer, which would, as mentioned above, lead to a consideration of the facts surrounding the individual's participation in union activity—whether actively or passively—and perhaps his motives. On the facts of the instant case, the employer discharged all of the sitdowners because they had seized his buildings and destroyed his property. Then, in effect he said to some of them: "I'm rehiring you because I know that you did not want to do those things." The difference suggested is that, whereas in discharging he can show that he is acting against the employee as an individual who has been guilty of unlawful conduct toward him, in rehiring he is necessarily considering the employee's relationship toward his union. Suppose the announced discharge of the sitdowners had been in these words: "All employees occupying my buildings are hereby discharged except those who did not freely and voluntarily, without union constraint, agree to participate in this conduct"—would the discharge discourage union activity? Would it clearly appear that the employer was motivated by reasons, independent of union activity, and adequate?

If the quality of union allegiance be treated as an "adequate basis" for selection of employees, whole-hearted participation in a union program may certainly be discouraged. But, after all, this should not discourage unrestrained participation in peaceable proceedings. Furthermore, if it would constitute an unfair labor practice, when re-employing, to take into consideration a striker's

44. Cf. Douglas Aircraft Co., 10 N.L.R.B. No. 18 (1938).

unwillingness or reluctance to engage in questionable conduct with his brothers, the employer might either be forced to rehire those men who had justifiably been discharged—an anomalous situation, or to refuse to rehire any of such participants—an undesirable one. However, in apparently recognizing that the employer may consider the attitude of his striking employees toward unlawful union conduct when considering their reinstatement, the present decision does seem to give to the employer a weapon which may be used effectively to discourage union activity—a result not in harmony with the Act.

The probable development of the doctrine announced and the amount of litigation which will be involved in drawing the strings around its content intrigue the imagination. Certain it is that there may be more things underlying its possible delineation than are dreamt of in our legal philosophy.[45] To labor it contains a definite challenge. The ropes are not down. Occupation of the Elysian Fields glimpsed through the rose-colored glasses of the N. L. R. A. must be orderly, not rife with disorder.[46] Employees may not take advantage of the existence of a labor dispute to engage in activity that cannot be justified by the necessities based on the interests at stake. Any conduct of an unlawful nature, independently of the Act, and not legalized thereby, may not be indulged in with the assurance that there will be complete immunity with respect to the normal incidents, under the Act, of the employment relationship. Nose-thumbing perhaps would not get caught, yet an accompanying smile might be good insurance.[47]

J. DENSON SMITH*

45. Inter-union conflict with its serious social waste may result in a change in public attitude to the discomfort of labor unions—a possibility that labor history discloses and supports. Furthermore a reaction to recent pressure may serve to re-emphasize the importance of liberty in the "long-established constitutional sense." Much of the agitation for amendment of the Wagner Act might thus be dispelled.

46. The decision had the immediate effect of putting an end to a sit-down strike in the South Bend, Ind., plant of the Bendix Corp., and prompted the discharge of sitdowners by the J. E. Mergott Co., Newark, N.Y. See 4 Lab. Rel. Rep. 3 (1939).

47. Cf. Oregon Worsted Co., 3 N.L.R.B. 36, 52 (1937) (pickets engaged in throwing snowballs at "loyal" workers); Douglas Aircraft Co., 10 N.L.R.B. No. 18 (1938) (a self-protective smile was not required); Titmus Optical Co., N.L.R.B. Case No. C-716 (Nov. 21, 1938), 3 Lab. Rel. Rep. 399 (1938), where the Board said, "An employer has a right to discharge an employee for using obscene language in his plant if he sees fit to do so. The act is not designed to deprive him of such rights. . . . It is our opinion, and we find, that Titmus seized this incident as a pretext for discharging Kirkland and Davis when his real purpose in making the discharges was to discourage membership in the Union."

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