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Lindsay P. Walden

FORFEITURE OF REINSTATEMENT RIGHTS BY MISCONDUCT UNDER TAFT-HARTLEY

LINDSAY P. WALDEN

of the Denver Bar, General Counsel for Oil Workers International Union, CIO

This discussion is prepared with primary emphasis upon what happens at operating level with respect to the question of forfeiting rights to reinstatement because of *misconduct* on the picket line and what constitutes misconduct. The attitude of the General Counsel of the National Labor Relations Board, when complaints are sought in discharge cases and the judgment of the Labor Board when such complaints come up for hearing have become of great practical importance. From the operating level point of view, the Board's decisional policies are secondary if the views of the Board's General Counsel are contrary to those of the Board, because under the Taft-Hartley Act[1] the General Counsel has final authority to determine which complaints shall be heard by the Board by merely refusing to issue the complaint. Under the Wagner Act this conflict did not exist, as the charging party had the right to appeal to the Board itself should the Board's attorney refuse to issue the complaint.

The question of forfeiting rights to reinstatement because of misconduct on the picket line arises, under the present status of the law, because of the proviso in Section 10(c) of the Act, which reads as follows:

> No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged *for cause.* (Italics added).

This section 10(c) proviso was not in the Wagner Act, but the Board and the courts in administering that Act did deny relief to strikers and pickets who were found guilty of misconduct under certain circumstances. However, those decisions are not here emphasized as this discussion is directed toward present status of the law governing picketing. Actually, the misconduct here discussed is not limited to picketing, as all misconduct activities in connection with a strike fall within the same legal principles whether it be related to picketing or other associated strike activities.

Section 7 of the Act gives the employees the right to engage in picketing activities, and Sections (8)a (1) and 8(a) (3) of the Act attempt to protect the employees in the exercise of picketing activities, but the protection is forfeited by the proviso of Section 10(c) if the employee is suspended or discharged for cause. The problem then arises as to what misconduct on the part of the em-

[1] Labor-Management Relations Act, 1947, Act of June 23, 1947, c. 120, 61 Stat. 136.

ployee forfeits this protection for cause if the employer elects to suspend or discharge the employee.

In the *Standard Oil Company of California* case,[2] decided October 13, 1950, the Board held, as a matter of law, that *if, in fact, the employees were not guilty of the forbidden picketing conduct* then the employer has no valid defense for refusing to reinstate them to their former jobs, even though the employer in good faith believed they were guilty of misconduct. This same rule of law was announced by the Board in *Mid-Continent Petroleum Corp.* case[3] which grew out of the alleged seizure via a sit-down strike of the company's refinery by the strikers. This doctrine was also applied by the Board in the *Perfect Circle* case[4] to a situation in which the employer urged that its plant manager reasonably believed that striking employees as pickets barred his entry to the plant under threat of violence. The United States Court of Appeals for the Fourth Circuit, in *NLRB v. Clinchfield Coal Corp.*[5] sustained the Board in holding, upon conflicting evidence, that three strikers, whom the employer believed engaged in misconduct, did not, as a matter of fact, engage in such conduct, and, consequently, that the employer did not have good cause for discharging the strikers.

SUMMARY OF PRESENT STATUS OF LAW

Possibly, the best summary of the present status of the law on this subject is stated by the Board in the*Standard Oil of California* case[6], wherein it held:

> The function of determining whether the striker's conduct is lawful or unlawful has been entrusted by the Congress to the Board, subject to judicial review, and not to any private agency. Thus *an employer, who discharges a striker on the ground that he has engaged in unlaw strike activities, does so at the peril of deciding wrongly.* (Italics added).

In the above case, the employer filed a motion asking the Board to take judicial notice of certain proceedings on the ground that a California state court had found 24 of the discharged employees guilty of violating an injunction restraining mass picketing and acts of violence in connection with the strike. With respect to this motion, the Board stated:

> This Board is not bound by determinations of a State Court in a proceeding to which the Board is not a party; and, so far as appears, the California Court did not make specific findings of fact as to the alleged misconduct of the strikers. Under these circumstances, we must rest our findings upon the evidence in the record before us.

In the same case, the Board further held that, "misconduct

[2] 91 N.L.R.B. 87 (1950).
[3] 54 N.L.R.B. 912 (1944).
[4] 70 N.L.R.B. 526 (1946); reversed on other grounds in 162 F. 2d 566 (1947).
[5] 145 F. 2d 66 (1944).
[6] Note 2, *supra.*

is an affirmative defense" and that the burden of proof is upon the employer who alleges that the discharge was made because of the striker's alleged misconduct, and that the discharge of strikers or pickets, "may be viewed . . . as having been made because of lawful strike activity, unless the employer affirmatively proves employee misconduct."

The academic law, at the present, concerning the effect which unlawful picketing or strike activities have upon rights of employees under the Taft-Hartley Act appears to be: *First,* Strikers and pickets are presumed to have engaged in lawful and protected conduct and are entitled to reinstatement upon abandonment of the strike. *Second,* The burden of proof is upon the employer to establish by a preponderance of the evidence that each discharged or disciplined employee engaged in unprotected misconduct. *Third,* The National Labor Relations Board, subject to judicial review, is the sole judge as to whether strikes or pickets engaged in unlawful conduct and as to what activities constitute misconduct.

In determining misconduct, the Board will not accept the employer's conclusion, which was based upon hearsay or rumor, consisting of written and unwritten statements received by the employer from non-strikers and supervisors who failed to testify directly in the proceedings before the Board.[7]

Undoubtedly, there are many more activities and circumstances constituting misconduct which lawfully justfy loss of employee status than have been determined to date. Space will not permit a complete discussion of all prior decisions on this subject.

ACTIVITIES CONSTITUTING MISCONDUCT

Some of the activties found by either the Board or the courts to constitute misconduct are: physically blocking the entrance and preventing operation of a mine;[8] striking employees physically attacking another employee who had returned to work while strike continued;[9] employees striking to compel an employer to violate a law (Federal Stabilization Act of 1942);[10] participating in strike in violation of no-strike clause of valid contract;[11] pickets preventing plant manager from entering property by use of words and acts which justified manager in believing that he could not get possession except through a fight and bloodshed;[12] participating in a strike to require an employer to recognize one union when another union has been certified by the board;[13] picket threatening other employees with physical violence and participating in mass picketing of plant entrance, spitting on the general manager, and openly advocating use of force and violence as an instrument of collective

[7] Ohio Associated Telephone Company, 91 N.L.R.B. 162 (1950).
[8] N.L.R.B. v. Clinchfield Coal Corp., 145 F. 2d 66 (1944).
[9] Decatur Newspapers, Inc., 16 N.L.R.B. 489 (1939).
[10] American News Co., Inc., 55 N.L.R.B. 1302 (1944).
[11] Copperweld Steel Co., 75 N.L.R.B. 18 (1947).
[12] N.L.R.B. v. Perfect Circle Co., 162 F. 2d 556 (1947).
[13] Thompson Products, Inc., 72 N.L.R.B. 886 (1947).

bargaining and as a strike weapon.[14] In the latter case, the Board stated that the picketing by from 75 to 100 strikers at the plant entrance "had the effect of barring supervisory and other employees from the plant," and that the picket whose reinstatement was in question "personally participated in such mass picketing." Similarly, in the *Roanoke Public Warehouse* case,[15] an employee-picket was barred from reinstatement after wielding a heavy belt on the picket line which resulted in his conviction of six separate charges of assault, three of which were against fellow non-striking employees.

MASS DEMONSTRATIONS HELD MISCONDUCT

Participating in the seizure and retention of the employer's plant by means of a sit-down strike is misconduct under the *Fansteel* decision of the Supreme Court,[16] and this is true despite the union's contention that employees seized control in order to shut down dangerous operations safely when the strike was called.[17] Likewise, participating during a strike in a mass demonstration which amounted to a forcible debarment of persons lawfully entitled to enter a plant has been held to be misconduct forfeiting reinstatement rights.[18] However, in the *Standard Oil Co. of California* case,[19] the Board denied the company's contention that it had "a right to discharge all those identified in the mob" which gathered at the entrance because, in the language of the Board:

> Unlike the situation in *Socony Vacuum* the strikers here did not gather at the gates pursuant to any plan to obstruct entry to or from the refinery, or any other illegal plan; and the record dicloses . . . that many of these strikers . . . were merely observers who stood apart from those who gathered directly in front of the Respondent's gates.

With reference to pickets' hurling of obnoxious and offensive epithets at non-strikers, such as "scabs" and "suckers", the Board in the *Wytheville Knitting Mills* case[20] said:

> Although we have not previously condoned the use of abusive and intemperate language in the conduct of industrial relations, reality requires us to recognize that industrial disputes are not always conducted in the dispassionate atmosphere best calculated to result in their amicable settlement. Viewed in this light, the language of (the pickets) . . . must be regarded as an integral and inseparable part of their concerted activity for which the Act affords them protection.

Apparently the Third Circuit Court of Appeals does not agree with the Board as the case was reversed. The Court of Appeals stated:

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[14] Dearborn Glass Co., 78 N.L.R.B. 891 (1948).
[15] 72 N.L.R.B. 1281 (1947).
[16] N.L.R.B. v. Fansteel Metallurgical Corp., 306 U.S. 240 (1939).
[17] Mid-Continent Petroleum Corp., 54 N.L.R.B. 912 (1944)
[18] Socony-Vacuum Oil Co., 78 N.L.R.B. 1185 (1948).
[19] 91 N.L.R.B. 87 (1950).
[20] N.L.R.B. v. Wytheville Knitting Mills, 175 F. 2d 238 (1949).

> We do not regard the conduct . . . as a legitimate, concerted activity entitled to the protection of the Act. When as a result of it, each of them became persona non grata to their fellow workers to such an extent that the latter absolutely declined to work with them . . . *the respondent was not required . . . to reinstate them at the risk of throwing the seaming department into confusion.* (Italics added).

It is not clear whether the use of the words "scab" and "suckers" standing alone would justify the discharges if fellow employees did not refuse to work with the pickets who used the words.

However, on October 12, 1950, a trial examiner in *Tidewater Associated Oil Company*[21] held that a statement by a picket "that anyone that went through a picket line was a dirty rotten scab" merely followed a custom that has existed for many years in labor disputes, and recommended that the discharged employee be reinstated. Therefore, it appears somewhat doubtful whether pickets may use the word "scab" toward non-strikers and still receive protection of the Act. The answer to this question must necessarily depend upon subsequent decisions.

Five employees who engaged in a concerted slow-down following a wage reduction were held guilty of misconduct sufficient to warrant their discharge in the *Elk Lumber Co.* case.[22] Cutting off the power from the boiler stoker preparatory to going on strike was deemed misconduct in the *River Falls Co-operative Creamery* case,[23] especially since this was neither the normal act of a fireman about to leave his post nor a necessary concomitant of his going on strike.

Union Officer Held Responsible

In another *Tidewater Associated Oil Co.* case,[24] the trial examiner held that a union officer who was present and witnessed the assault and manhandling of non-strikers "without making an effort to halt the attack" was guilty of misconduct. It is interesting to note here, however, with respect to another discharge, that the trial examiner held:

> Assuming, arguendo, that Fonseca had in fact thrown the pebbles or gravel or small rocks testified to by McLaughlin and Jessee as having occurred on September 29, such conduct could not warrant his exclusion from an order of reinstatement.

In support of the above finding, the trial examiner cited *NLRB v. Elkland Leather Co.*[25] wherein the U. S. Court of Appeals, Third Circuit, had sustained the Board in its findings that the offenses charged were not "of sufficient gravity to warrant exclusion from the order of reinstatement." Certiorari was denied by the U. S. Supreme Court. With respect to the trial examiner's ruling, it is well to point out that the circuit court decision relied upon arose

[21] N.L.R.B. Case No. 20-CA-170 (1950).
[22] 91 N.L.R.B. 60 (1950).
[23] 90 N.L.R.B. 56 (1950).
[24] N.L.R.B. Case No. 21-CA-170 (1950).
[25] 114 F. 2d 221 (CA 3) (1940).

under the Wagner Act rather than under the Taft-Hartley Act, and consequently, may not be conclusive.

The oft-cited *Standard Oil Co. of California* case[26] is quite inclusive as to the subject of misconduct and appears to be the latest decision by the NLRB on the subject. Fifty-six employees were discharged for alleged misconduct, and the Board ordered forty-three of them reinstated. The Board found the evidence insufficient to establish that the latter had committed the alleged acts of misconduct. The specific acts of misconduct which the Board found as good cause for refusal to reinstate the thirteen pickets who were denied protection under the act were: (a) Picking up a rock for the sole purpose of throwing it at the police officers who were escorting a non-striker in a squad car and for refusal to put down the rock when ordered to do so by the police. (b) Smashing the windows of cars which were entering the refinery gate. (c) Carrying stones, together with other pickets, which prevented two non-strikers from entering a parking lot prior to going to work. (d) Struggling with police officers and interfering with police officers in their efforts to perform their duties. (e) Standing in front of cars at the entrance to the parking lot and refusing to move at the command of police, and pushing back the police officers who were trying to remove him from in front of the cars. (f) Beating up four non-strikers when attempting to enter the refinery premises. Grabbing a non-striker by the arm and pulling him off company property when walking to work. (g) Striking an employee of a construction contractor when going to work at the same refinery to perform work for his construction employer. (h) Stating to a female employee who was attempting to cross the picket line, "You dirty little bitch, you are not going to work."

Application of Legal Definition Difficult

The Board also held that the employer may not refuse reinstatement to a picket on the ground that the picket prevented the passage of a railroad train to and from the refinery where the picket's activity was that of walking back and forth across the tracks rather than parallel to the tracks when the locomotive approached the picket line. It was held that the picket did not thus physically block ingress or egress to the plant, and also that this picket's statement that "he would lie down on the tracks rather than permit passage of the train" was not sufficient attempt to block the entry to the refinery and did not bar his reinstatement. With respect to another picket, the Board held that his alleged misconduct did not justify his discharge because rocks were thrown at him by employees inside the plant, and this picket threw two

[26] 91 N.L.R.B. 87 (1950).

stones back, "each a little bigger than the size of a penny" and the small stones fell harmlessly. The Board further stated:

> In our opinion, Ottino's conduct, under the circumstances hereinabove set forth . . . was not of such a serious nature as to pass the limits of protected activity.

As can be seen by the cited authorities, the question of what constitutes misconduct is somewhat vague and is still in the stage of development. However, as a general guide, it is suggested that the definition cited by the trial examiner in the *Tidewater Associated Oil Company* case, citing *Boynton Cab Co. vs. Neubeck,* by the Supreme Court of Wisconsin,[27] may be used. This reads as follows:

> * * * The term "Misconduct" used in (the disqualification provision) is limited to conduct evincing such wilful or wanton disregard of an employer's interest as is found in deliberate violations or disregard of standards of behavior which the employer has a right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interest or of the employee's duties and obligations to his employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as a result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances or good faith errors in judgment or discretion are not to be deemed "misconduct" within the meaning of the statute.

PICKETING — FREE SPEECH?

CHARLES A. GRAHAM
of the Denver Bar

The decision of the Supreme Court of the United States in *Thornhill* v. *Alabama*[1] has given rise to extensive speculation as to the legal status of picketing.[2]

Language employed by the court has been quoted to support the contention that picketing is a form of speech on a parity with public debate for purposes of determining its constitutional immunity to regulation.[3] The consequences, of course, would be that picketing could be neither forbidden nor punished unless upon a showing of a clear and present danger of *extremely serious*[4] sub-

[27] 296 N. W. 636 (1941).

[1] 310 U.S. 88 (1949).

[2] Adequate citation to the legal journals alone would require more than the space allocated for this discussion. A few references will be provided below.

[3] One of the most specific statements of this sort, made by the late Mr. Justice Murphy, was: "In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution." (*Supra,* n. 1 at 102).

[4] "What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished." Bridges v. California, 314 U.S. 252, 263 (1941).