Michigan Law Review

Volume 37 | Issue 5

1939

LABOR LAW - RIGHT OF EMPLOYER GUILTY OF UNFAIR LABOR PRACTICES TO DISCHARGE FOR ILLEGAL ACTS

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LABOR LAW — RIGHT OF EMPLOYER GUILTY OF UNFAIR LABOR PRACTICES TO DISCHARGE FOR ILLEGAL ACTS — During a membership drive in the Fansteel Metallurgical plants, the petitioner corporation was guilty of an unfair labor practice in that it hired espionage agents to spy upon the union. Lodge 66 attempted to bargain collectively with the petitioner and on its rejection of their offer, the union seized the key plants, effectively stopping production. The petitioner, on the union's refusal to vacate, made a blanket discharge of everyone within the plant, and secured an injunction against the union's possession. Compliance with the order was not obtained, and a writ of attachment for contempt was issued. On the second attempt to serve the writ, the sheriff was successful. The petitioner's damages by reason of the sit-down strike were approximately $50,000. Thirty-seven of the men were fined and imprisoned by reason of their contempt. The petitioner on reopening re-employed many who had been affiliated with the union and some who had participated in the strike. None of those sentenced for contempt were re-employed. On a complaint issued, the board ordered the company (1) to desist from interfering with the rights of its employees under section 7 of the NLRA; (2) to withdraw recognition from the "company" union; (3) to bargain collectively with Lodge 66; (4) to reinstate all men who were employees on the day the sit-down strike began. The court below set the entire order aside. *Held*, Justices Reed and Black dissenting, and Justice Frankfurter taking no part, the judgment of the circuit court of appeals should be affirmed in respect to setting aside that part of the board's order directing the employer to bargain collectively and reinstate former employees, but should be reversed as to setting aside the directions to cease interfering with employees' rights under section 7 and to withdraw recognition from the "company" union. *National Labor Relations Board v. Fansteel Metallurgical Corp.*, (U. S. 1939) 6 U. S. Law Week 896, reviewing (C. C. A. 7th, 1938) 98 F. (2d) 375.

The *Jones & Laughlin*[1] case declared "The Act[2] does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them." [3] However, "normal exercise" is a nebulous phrase. Certain it is that the employer's right to terminate the employer-employee relation is something less than it was at common law.[4] He is prohibited from discriminatory discharge.[5] The right to strike is expressly recognized.[6] The board is given the remedial power to order reinstatement of employees, and "employee" is defined as including anyone whose work has ceased as a consequence of or in connection with "any current labor dispute or because of any unfair labor practice." [7] The order of reinstatement in the principal case narrows the issue to whether or not, as a matter of law, the men ordered to be reinstated remained employees,[8] with the added question, if the main issue is decided affirmatively, of whether or not the board has acted arbitrarily, i.e., has exceeded its jurisdiction. The board contended that as the petitioner was guilty of an unfair labor practice,[9] it was solely within the discretion of the board to order reinstatement as

[1] National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1 at 45, 57 S. Ct. 615 (1937).

[2] National Labor Relations Act, 49 Stat. L. 449 (1935), 29 U. S. C. (Supp. 1938), § 151 ff.

[3] In Associated Press v. National Labor Relations Board, 301 U. S. 103 at 132, 58 S. Ct. 650 (1937), the Court in even stronger language stated that discharge is permitted for any reason other than union activity.

[4] At common law the right of discharge was absolute. Coppage v. Kansas, 236 U. S. 1, 35 S. Ct. 240 (1915).

[5] N. L. R. A., § 8 (3).

[6] N. L. R. A., § 13; National Labor Relations Board v. Remington Rand, Inc., (C. C. A. 2d, 1938) 94 F. (2d) 862.

[7] N. L. R. A., § 2 (3). This is merely a matter of terminology. The striking employee is merely an employee as a matter of law, and employee is merely a convenient term to apply to a certain status under a certain set of facts included within the situation which the act is attempting to alleviate.

[8] It was argued by the board and suggested by the dissent that there was no discharge as a matter of fact. 5 N. L. R. B. 930 (1938); (C. C. A. 7th, 1938) 98 F. (2d) 375 at 384 (dissenting opinion.) On the other hand, it might be argued that no factual discharge is necessary, that the illegal acts put the employees wholly beyond the protection of the statute. The Chief Justice affirms this proposition, saying that even assuming the men remained employees by virtue of § 2 (3) the board was limited in its discretion to remedial action which would effectuate the policy of the act, and that an order of reinstatement of those engaged in the sit-down strike, or those who had aided and abetted them, would certainly not promote peaceable settlement of labor disputes. Justice Stone, in his concurring opinion, contended that as there had been no discharge, in fact, of those who merely aided the workers engaged in the sit-down, they were still employees within the protection of the act, and could be reinstated within the discretion of the board. The dissent took the further step, saying that all discharges were inoperative, and that the problem was solely one of the board's discretion.

[9] He had hired espionage agents to spy upon union activities and therefore violated N. L. R. A., § 8 (1).

long as its order effectuated the purposes of the act.[10] Admittedly, once the employer is guilty of an unfair labor practice his power over the hire and tenure of his employees is vulnerable,[11] but to carry the board's contention to its logical conclusion would be to deny the employer's right to discharge, no matter for what cause, once he is guilty of an unfair labor practice (subject to the qualification that the board could not act arbitrarily). To go to this extreme is a far cry from denying him the right to discharge for union activities and would very likely violate the Fifth Amendment.[12] But even if such an interpretation survives the constitutional argument, the question still remains whether it would be the correct result as a matter of statutory construction. From the statute's preservation of the right to strike, it may be inferred that discharge for that cause alone is prohibited.[13] Here more was involved. However, the board's order could have been upheld as a matter of literal construction of section 2 (3) of the National Labor Relations Act. The men were striking "in connection with a current labor dispute." This argument is bolstered by the fact that the act does not purport to regulate employee action.[14] Again, the board might contend that discretion over reinstatement is given to it, not to the employer.[15] In spite of these arguments for strict construction, one must inevitably return to the tempered construction given to the act in the *Jones & Laughlin* case.[16] Was there a mere

[10] If the board was correct in contending that the men were employees as a matter of law, it was correct in this assertion of power under § 10 (c). As to the assertion, see United States Stamping Co., 5 N. L. R. B. 172 (1938); Kentucky Firebrick Co., 3 N. L. R. B. 455 (1937), affd. National Labor Relations Board v. Kentucky Firebrick Co., (C. C. A. 6th, 1938) 99 F. (2d) 89; Standard Lime & Stone Co., 5 N. L. R. B. 106 (1938), reversed Standard Lime & Stone Co. v. National Labor Relations Board, (C. C. A. 4th, 1938) 97 F. (2d) 531. Before the Supreme Court the board further contended that it had, in the exercise of its discretion, authority to order re-employment as distinguished from reinstatement.

[11] Black Diamond Steamship Corp. v. National Labor Relations Board, (C. C. A. 2d, 1938) 94 F. (2d) 875 at 879, cert. denied 304 U. S. 579, 58 S. Ct. 1044 (1938). There were no unfair labor practices here until after the strike had begun.

[12] This is indicated in Justice Stone's concurring opinion.

[13] National Labor Relations Board v. Remington Rand, Inc., (C. C. A. 2d, 1938) 94 F. (2d) 862, cert. denied, 304 U. S. 576, 58 S. Ct. 1046 (1938). It may be contended that the term "strike" includes sit-down strikes, and that therefore the sit-down strike is condoned. See note 8, supra. This is denied by Judge Sparks and arguably affirmed by Judge Lindley in the circuit court of appeals, (C. C. A. 7th, 1938) 98 F. (2d) 375. In the principal case, Chief Justice Hughes declared that § 13 condones only legal strikes and holds that sit-down strikes are not within the intent of this section.

[14] National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1 at 46, 57 S. Ct. 615 (1937). The basis for this argument would be that the act deals only with the action of the employer and that with regard to employees' unlawful acts the employer must rely on the efficacy of local law enforcement. But query whether such a remedy is adequate in view of the prevalence of sit-down strikes and whether such an interpretation is effectuating the ends of the statute.

[15] Against this it can be said that the employer is not usurping any of the board's discretion but is merely exercising his normal right of discharge.

[16] National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 57 S. Ct. 615 (1937).

normal exercise of the power of discharge here,[17] or stated differently, were the men ordered to be reinstated within the protection of the act? Nowhere in the act is a comparable discharge expressly prohibited. Certainly, Congress did not intend the act to be a cloak for any and all illegal conduct.[18] On the other hand, should the employer be allowed to discharge for all illegal acts no matter how insignificant? [19] In the light of the purpose of the statute, minimization of labor conflicts, it would seem that the view of the majority is the more cogent result. To force an employer to reinstate employees guilty of such unlawful acts as occurred in the principal case would settle nothing. Rather it would emphasize the struggle. Moreover, to deny the possibility of reinstatement will tend to force the employee to seek his remedies under the act rather than to resort to force and violence. Labor's fear of discharge for minor infractions of the law may be set at rest with the reminder that it is still within the power of the board to find that any given discharge is in reality for union activity, and therefore discriminatory. Under such a finding, supported by substantial evidence, an order of reinstatement is permissible.[20] It is possible, but doubtful, that the principal case will become the basis for holding that minor employee irregularities, in and of themselves, with no bona fide discharge, preclude recourse to the remedies of the act. All this tends to discredit the literal interpretation of section 2 (3) of the minority and leaves us with the proposition that the protection afforded by the act has limits, one of them being serious mis-

[17] It is pointed out even by the board in United Fruit Co., 2 N. L. R. B. 896 (1937), that in a discharge for cause the justifiable motive must merely be the principal, not the sole, motive.

[18] But the conclusion reached by the dissent does not necessarily make the act a cloak. For one thing, the board still has discretion. Then, too, merely because Congress does not attempt to regulate the employee does not mean that it condones his action. Also, the act does not abrogate local law enforcement against the employees' illegal acts. On the other hand, a Senate Committee Report, S. REP. 573, 74th Cong., 1st sess. (1935), indicates that the act should be read in the negative, viz., that workers should not be outside the remedial power of the board *merely* because they had ceased work in connection with a current labor dispute. As the Chief Justice puts it in the principal case, it would be anomalous to say that the employer could invoke relief in the state courts and still not be permitted to discharge the men. See on this point, Appalachian Elec. Power Co. v. National Labor Relations Board, (C. C. A. 4th, 1938) 93 F. (2d) 985.

[19] Query, what would the result be if an employer discharged because the employee violated an ordinance prohibiting the distribution of leaflets? In the principal case, although there were acts of violence in the picture the Court denied reliance on them and in strong language said, "We may put on one side the contested questions as to the circumstances and extent of injury to the plant. . . . The seizure and holding of the buildings was itself a wrong apart from any acts of sabotage." 6 U. S. LAW WEEK 896 at 898, col. 1.

[20] N. L. R. A., § 8 (3). This would doubtless be the finding if a member of the union were fired, for instance, for violating a parking ordinance. This is, of course, a difficult question of intent, a factor arguing against this construction. See discussion of circuit court decision in the principal case, 33 ILL. L. REV. 187 (1938); National Labor Relations Board v. Kentucky Firebrick Co., (C. C. A. 6th, 1938) 99 F. (2d) 89.

conduct in the employee leading to an exercise of the "normal" right of discharge.[21] However, while this protection is denied to the individual employee, the fact that the Supreme Court sustained the board's order to withdraw recognition from the company union, the Rare Metal Workers of America, No. 1, indicates that the striking union itself is still entitled to benefits under the act.

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[21] This statement assumes that the discharge is not in reality discriminatory. As to discharge for cause and the normal right of election, see Peninsular & Occidental S. S. Co. v. National Labor Relations Board, (C. C. A. 5th, 1938) 98 F. (2d) 411; National Labor Relations Board v. Mackay Radio & Tel. Co., 304 U. S. 333, 58 S. Ct. 904 (1938) (no unfair labor practice); National Labor Relations Board v. Sands Mfg. Co., (C. C. A. 6th, 1938) 96 F. (2d) 721, affd. (U. S. 1939) 6 U. S. L. WEEK 887.