

NOTES

THE SLOW-DOWN, AN UNPROTECTED CONCERTED ACTIVITY—A PYRRHIC VICTORY FOR MANAGEMENT*

FEDERAL labor legislation aims to reduce industrial strife, promote productive efficiency, and equalize bargaining power between employers and employees.¹ To attain these interrelated objectives, the Taft-Hartley Act, like the Wagner Act, gives employees the right to engage in various forms of concerted activity free from management interference.² Thus employees are free to join unions, to strike, to picket, and to bargain collectively.³

Not all concerted activities are protected, however.⁴ The Taft-Hartley Act expressly prohibits certain secondary boycotts, jurisdictional strikes, and strikes for recognition in defiance of a certified union.⁵ Even before the passage of that Act, courts had held that strikes in breach of a collective bargaining agreement⁶ and strikes to force an employer to violate a federal

* Elk Lumber Co., 91 N.L.R.B. No.60 (Sept. 23, 1950).

1. Those purposes are expressed in the preamble of the National Labor Relations Act, 49 STAT. 449 (1935), 29 U.S.C. § 151 (1946), as amended, Labor-Management Relations Act, 61 STAT. 136 (1947), 29 U.S.C. §§ 141, 151 (Supp. 1950). For a survey of federal policy toward labor-management relations during the past 50 years, see Feinsinger & Witte, *Labor, Legislation, and the Role of Government*, 71 MONTHLY LAB. REV. 48 (July 1950). See, generally, METZ, LABOR POLICY OF THE FEDERAL GOVERNMENT c. 1, 3, 9-11 (1945); BOWMAN, PUBLIC CONTROL OF LABOR RELATIONS c. 1-2 (1942).

2. Section 7 of the Wagner Act established the right of employees to engage in concerted activities "for the purpose of collective bargaining or other mutual aid or protection." 49 STAT. 452 (1935), 29 U.S.C. § 157 (1946), unchanged as amended, 61 STAT. 140 (1947), 29 U.S.C. § 157 (Supp. 1950). Section 8 (a)(1) makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." 49 STAT. 452 (1935), 29 U.S.C. § 158(1) (1946), unchanged as amended, 61 STAT. 140 (1947), 29 U.S.C. § 158 (a)(1) (Supp. 1950). Specifically, it is an unfair labor practice for an employer to discharge employees in order to discourage membership in a labor organization. 49 STAT. 452 (1935), 29 U.S.C. § 158(3) (1946), limited in part by the Taft-Hartley amendment, 61 STAT. 140 (1947), 29 U.S.C. § 158(a)(3) (Supp. 1950). The right to strike is expressly guaranteed. 49 STAT. 457 (1935), 29 U.S.C. § 163 (1946), as amended with certain limitations, 61 STAT. 151 (1947), 29 U.S.C. § 163 (Supp. 1950).

3. For a discussion of these concerted activities, see MOORE, INDUSTRIAL RELATIONS AND THE SOCIAL ORDER 425-51 (1946); Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 HARV. L. REV. 1, 3 (1947). See also Cox & Seidman, *Federalism and Labor Relations*, 64 HARV. L. REV. 211, 231-41 (1950).

4. For a discussion of unlawful concerted activities, see Note, *Availability of NLRA Remedies to "Unlawful" Strikers*, 59 HARV. L. REV. 747 (1946).

5. 61 STAT. 141 (1947), 29 U.S.C. § 8(b)(4)(A),(C),(D) (Supp. 1950). For a discussion of cases under this section, see Walsh, *Union Unfair Labor Practices*, 1 CCH LAB. LAW J. 1095, 1100-2 (Nov. 1950).

6. NLRB v. Sands Mfg. Co., 306 U.S. 332, 344 (1939) (activities by employees in repudiation of a collective agreement contravene the purpose of the Act; thus the employees are not protected from discharge); Joseph Dyson & Sons Inc., 72 N.L.R.B. 445,

law⁷ were outside the protective ambit of the Wagner Act. Strikes have also been denied protection if they contravene a federal statute, such as that forbidding mutiny,⁸ or if they violate state laws prohibiting the seizure of property or acts of violence.⁹

But until recently, the National Labor Relations Board has never put partial strikes—refusals, short of a complete stoppage, to carry out reasonable orders of the employer—into this category of unprotected concerted activities.¹⁰ If an employer discharged employees for engaging in a partial strike, he committed an unfair labor practice.¹¹ He could insist that the partial strikers do his bidding or leave the plant, and if they refused, he could replace them in order to carry on his business. But if the employees applied for reinstatement on the employer's terms before their positions had been filled, he was compelled to take them back.¹²

447 (1947) (strike during life of contract containing no-strike clause); Scullin Steel Co., 65 N.L.R.B. 1294 (1946) (strike for wage increase during life of contract), *enforced as modified on other grounds*, 161 F.2d 143 (8th Cir. 1947).

7. American News Co., 55 N.L.R.B. 1302, 1312 (1944) (strike to compel an employer to violate Wage Stabilization Act of 1942).

8. Southern Steamship Co. v. NLRB, 316 U.S. 31, 40 (1942) (seamen on strike away from home port).

9. NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240, 253, 254, 258 (1939) ("sit-down" strike found to be a seizure of property in violation of local statutes and common law); Allen-Bradley Local No. 1111 v. Wisconsin Employment Relations Board, 315 U.S. 740 (1942) (mass picketing, threats, and violence in violation of Wisconsin Employment Peace Act of 1939).

10. Massey Gin and Machine Works Inc., 78 N.L.R.B. 189, 202 (1948) (refusal to work on a new schedule), *enforcement denied per curiam*, 173 F.2d 758 (5th Cir. 1949); Montgomery Ward & Co., 64 N.L.R.B. 432, 444-6 (1945) (refusal to process orders from a struck plant), *enforcement denied*, 157 F.2d 486, 496 (8th Cir. 1946); Mount Clemens Pottery Co., 46 N.L.R.B. 714, 716 (1943) (leaving jobs before close of working day), *enforced as modified on these grounds*, 147 F.2d 262, 267 (6th Cir. 1945); Cudahy Packing Co., 29 N.L.R.B. 837, 863 (1941) (intermittent stoppages); Armour & Co., 25 N.L.R.B. 989, 996 (1940) (instruction by union to "slaughter gang" to schedule only 185 cattle in spite of company order for 190); Condenser Corp. of America, 22 N.L.R.B. 347, 431 (1940) (temporary halt in work pending settlement of a grievance), *enforced as modified on these grounds*, 128 F.2d 67, 77 (3d Cir. 1942); Good Coal Co., 12 N.L.R.B. 136, 146 (1939) (refusal to work on Labor Day in spite of notice to work in accordance with company rule that absence without permission is cause for discharge), *enforcement granted*, 110 F.2d 501 (6th Cir. 1940), *cert. denied*, 310 U.S. 630 (1940); C.G. Conn, Ltd., 10 N.L.R.B. 498, 514 (1938) (refusal to work overtime), *enforcement denied*, 108 F.2d 390 (7th Cir. 1939); Harnischfeger Corp., 9 N.L.R.B. 676, 685 (1938) (refusal to work overtime). Cf. U.A.W.A., A.F. of L., Local 232 v. Wisconsin Employment Relations Board, 336 U.S. 245 (1949) (prohibition by a state labor board of intermittent stoppages held not in conflict with Taft-Hartley Act).

11. In that event the employer was ordered to reinstate the employees in their former positions, with back pay. See Montgomery Ward & Co., 64 N.L.R.B. 432 (1945) and C.G. Conn, Ltd., 10 N.L.R.B. 498 (1938).

12. NLRB v. MacKay Radio and Telegraph Co., 304 U.S. 333 (1938); Gardner-Denver Co., 58 N.L.R.B. 81, 82 (1944); Pinaud, Inc., 51 N.L.R.B. 235 (1943); and see Montgomery Ward & Co., 64 N.L.R.B. 432, 444-6 (1945) (intermediate report); C.G. Conn, Ltd. v. NLRB, 108 F.2d 390, 401 (7th Cir. 1939) (dissenting opinion).

Courts of Appeals, however, in a series of reversals of Board orders, have held that partial strikes are not protected by the Act.¹³ The courts declare that employees have no right to defy any reasonable order of an employer unless they stop work completely.¹⁴ Apparently these decisions are based on the desirability of limiting the extent to which the Act restricts management's traditional authority to discipline disobedient workers. Accordingly, employees have been denied protection from discharge if they defy orders to work customary overtime,¹⁵ to process orders from a struck plant,¹⁶ to end a temporary work stoppage,¹⁷ or to work on a new hourly schedule.¹⁸

The Board has now reversed its attitude toward partial strikes by following these decisions. In *Elk Lumber Co.*¹⁹ it unanimously found one type of partial strike, the slow down, to be "so indefensible as to warrant the employer in discharging the participating employees."²⁰ An employer, introducing a new method of carloading, changed the system of pay from a piece rate wage averaging \$2.70 an hour in earnings to a flat hourly wage of \$1.50. Immediately following these changes, output per carloading crew dropped to an average of 1 carload a day from the prior average of 1½ carloads. The employees asserted that the new rate of output was equal to the quota in other plants in the area, and was a good day's work at the new wage. The employer expressed his dissatisfaction with the slow down and invited suggestions for increasing productivity. The employees maintained that greater productivity would result only from an increase in the hourly wage

13. *Massey Gin and Machine Works Inc.*, 78 N.L.R.B. 189 (1948), *enforcement denied per curiam*, 173 F.2d 758 (5th Cir. 1949); *NLRB v. Montgomery Ward & Co.*, 157 F.2d 486 (8th Cir. 1946); *NLRB v. Condenser Corp. of America*, 128 F.2d 67 (3d Cir. 1942); *C.G. Conn, Ltd. v. NLRB*, 108 F.2d 390 (7th Cir. 1939).

14. See *NLRB v. Montgomery Ward & Co.*, 157 F.2d 486, 496 (8th Cir. 1946). The court stressed that it is implied in the contract of hiring that employees shall comply with all reasonable orders of the employer so long as they are not arbitrary or capricious. See also *C.G. Conn, Ltd. v. NLRB*, 108 F.2d 390, 397 (7th Cir. 1939).

15. *C.G. Conn, Ltd. v. NLRB*, 108 F.2d 390, 400 (7th Cir. 1939).

16. *NLRB v. Montgomery Ward & Co.*, 157 F.2d 486, 496 (8th Cir. 1946). This would be an unprotected activity under the Taft-Hartley Act in any event, because it would constitute a secondary boycott. 61 STAT. 141 (1947), 29 U.S.C. § 8(b) (4)(A) (Supp. 1950).

17. *NLRB v. Condenser Corp. of America*, 128 F.2d 67, 77 (3d Cir. 1942).

18. *Massey Gin and Machine Works Inc.*, 78 N.L.R.B. 189 (1948), *enforcement denied per curiam*, 173 F.2d 758 (5th Cir. 1949).

19. 91 N.L.R.B. No. 60 (Sept. 23, 1950).

20. *Id.* at 9. The Board relied on the test of indefensibility which it announced in *Harnischfeger Corp.*, 9 N.L.R.B. 676, 686 (1938): "We do not interpret this [Section 7 of the Wagner Act] to mean that it is unlawful for an employer to discharge an employee for any activity sanctioned by a union or otherwise in the nature of a collective activity. The question before us is, we think, whether this particular activity was so indefensible, under the circumstances, as to warrant the respondent, under the Act, in discharging the Stewards for this type of Union activity. We do not think it was." The trial examiner in the *Elk* case had held that the men were not discharged for engaging in a concerted activity, but that they were discharged for a concerted refusal to obey their employer. *Elk Lumber Co.*, *supra* at 6, n. 5 [Report of Proceedings p. 102].

or a return to a piece rate wage. The employer promised to report back to the carloaders after investigating practices in another mill. This report was never made. The employer never advised the employees of an output he considered satisfactory. Without warning, he discharged the protesting employees. The employees were not members of a union recognized by the employer, nor was there a collective bargaining agreement.²¹

The Board upheld the action of the employer on the ground that this case was analogous to the *Conn* and *Montgomery Ward* cases,²² in which the seventh and eighth circuits held that the Wagner Act did not protect partial strikes. The Board defined "slow down" as a conscious adoption by employees of a rate of production unsatisfactory to the employer and lower than the employees could have adopted, or would have adopted for more money.²³ It found that such an activity constitutes a refusal to accept reasonable terms of employment without engaging in a complete stoppage and therefore justifies discharge.²⁴ The implication is that all slow downs are unprotected.

The Board should not have regarded the *Conn* and *Montgomery Ward* decisions as controlling. For one thing, the Taft-Hartley Act, unlike the Wagner Act, specifically defines a "strike" so as to include slow downs.²⁵ For another, the *Elk* case, unlike the *Conn* and *Montgomery Ward* cases, did not involve the defiance of a specific order.²⁶ The employees, in the

21. *Id.* at 4-6. The Elk Lumber Company was charged with engaging in unfair labor practices within the meaning of Sections 7 and 8(a)(1) and (3) of the Taft-Hartley Act. See note 3 *supra*. The protection of the Act extends to non-union employees engaged in concerted activities. *NLRB v. Phoenix Mutual Life Insurance Co.*, 167 F.2d 983 (7th Cir. 1948), *cert. denied*, 335 U.S. 845 (1948); Note, 49 COL. L. REV. 277 (1949).

22. See note 10 *supra*.

23. *Elk Lumber Co.*, 91 N.L.R.B. No. 60, p. 10 (Sept. 23, 1950).

24. *Id.* at 8.

25. The term "strike" is defined by the Taft-Hartley Act to include "any concerted slowdown or other concerted interruption of operations by employees." 61 STAT. 161 (1947), 29 U.S.C. § 142(2) (Supp. 1950). Nothing in the Act, except as specifically provided, is to "interfere with or impede or diminish in any way the right to strike. . . ." 61 STAT. 151 (1947), 29 U.S.C. § 163 (Supp. 1950). For a comment on the application of this definition of strike, see U.A.W.A., A. F. of L., *Local 232 v. Wisconsin Employment Relations Board*, 336 U.S. 245, 268 n.3 (1949) (dissenting opinion of Justice Douglas). The Board in the *Elk* case made no mention of the Act's definition of strike.

It is arguable that any form of partial strike is a "concerted interruption of operations by employees," and therefore a protected activity under the Taft-Hartley Act. It is significant to note that the court in the *Conn* case, 108 F.2d 390 (7th cir. 1939), selected a definition of strike which excluded the partial strike: "The term 'strike' is applied commonly to a combined effort on the part of a body of workmen employed by the same master to enforce a demand for higher wages, shorter hours, or some other concession by stopping work in a body at a prearranged time, and refusing to resume work until the demanded concession shall have been granted." *Id.* at 397.

26. The principal argument of the General Counsel in the *Elk* case was that "at the time of the discharge there still had been no failure to comply with any command of management. If such activity [a slow down] is to be condemned by the Board, it should only be

absence of a guide to production, had no alternative but to determine their own rate of output and to that extent work on their own terms.²⁷

If the Board insists on regarding all slow downs as unprotected, then its definition of "slow down" is too broad.²⁸ The crucial consideration should be what constitutes normal output under the circumstances, not what output the employees *could* have adopted.²⁹ If it can be shown that an alleged slow down has resulted in less than normal production, then it might constitute a refusal to accept reasonable terms of employment. The determination of a norm is difficult.³⁰ It would mean deciding how much slowness constitutes a slow down. The Board might arrive at a norm by considering evidence of output in other plants in the area, working under similar conditions. In the absence of a change in working conditions, the norm might be determined by past performance. Whatever the method of determination, dissatisfaction on the part of the employer is no criterion of normal production.

In the *Elk* case the limitation of production may have reduced output below normal; but in fact the Board had no evidence upon which to determine a norm. It compared rates of output under essentially different circumstances. The employer's unilateral introduction of new methods of

done after there has been a deliberate refusal to do the Employer's bidding. Without a demand there cannot be a refusal." Brief of Counsel for the General Counsel, p. 4, *Elk Lumber Co.*, 91 N.L.R.B. No. 60 (Sept. 23, 1950).

27. Even if one accepts the view that the dissatisfaction of the employer was the equivalent of an order to increase production, it was still left to the employees to determine their own work pace. Workers, whether aware of it or not, form themselves into groups with customs, duties, and even rituals. The working group determines the output of individual members. Even with an assembly line method of production in which management may control the speed of the line, the amount of output may be determined by the informal organization. MOORE, *op. cit. supra* note 3, at 313-35; MAYO, *THE SOCIAL PROBLEMS OF AN INDUSTRIAL CIVILIZATION* 79-82 (1945).

28. See text at note 23 *supra*.

29. In an earlier decision involving not a concerted slow down, but a slow down by a single employee, the Board arrived at its decision after considering evidence to determine normal output. The evidence indicated that the production record of the disciplined employee was the lowest among workers doing a similar job in the plant and below time-study estimates of the time required for the operation. The Board concluded that "a slowdown in a plant working on a high priority war contract is not a type of conduct which should be protected against reasonable disciplinary action. . . ." *Underwood Machinery Co.*, 74 N.L.R.B. 641, 645, 646 (1947).

A recent state case in which normal output was not accepted as a criterion is *Stolper Steel Products Corp.*, 24 BNA Lab. Rel. Ref. Man. 1185 (1949). During wage negotiations on a new contract the union decided to produce at slightly above normal output (100%). There followed a reduction in output from 127% to between 100 and 105%. The Board ordered the union to cease and desist in the slow down. The dissent stressed the point that men should not be penalized for not producing at their maximum so long as they are not producing below normal.

30. There are numerous sources of error in trying to determine normal output. See Carroll, Jr., *What is the Measure of a Fair Day's Work?* 7 *ADVANCED MANAGEMENT* 152 (Oct.-Dec. 1942). For management's recognition of the difficulties, see c. VI, *How Fast is*

operation and his unilateral termination of an incentive system were significant factors affecting worker response. Limitations in output³¹ are inevitable among workers denied a voice in making decisions affecting their every-day work.³² Furthermore, an incentive wage,³³ if the incentive has been effective, results in output substantially above what is achieved under a flat hourly system.³⁴ The Board made the mistake of treating an ad-

Fast? in CHEYFITZ, *CONSTRUCTIVE COLLECTIVE BARGAINING* 55-68 (1947). For the trade union view and a discussion of the wide variation in the concept of normal as an objective measurement, see GOMBERG, *A TRADE UNION ANALYSIS OF TIME STUDY* 73, 147, 131-46, 165 (1948).

Of course the collective agreement may itself specify what the norm is to be. Time study results at best provide a guidepost to the bargainers and keep bargaining within rational bounds. CHEYFITZ, *supra* at 57-9, 62-3, 87; GOMBERG, *supra* at 171-88; SLICHTER, *UNION POLICIES AND INDUSTRIAL MANAGEMENT* 344, 436 (1941).

31. Methods of limiting output range from slowing down to planned waste of time by meticulous elaboration of work. In addition, output is often limited by employees hiding their discoveries of new and better ways of doing a job. These conclusions result from a study based on interviews with 350 workers and 65 executives in 105 establishments in 47 localities. Some 223 incidents were found in which restriction was evident. See MATHEWSON, *RESTRICTION OF OUTPUT AMONG UNORGANIZED WORKERS* 7, 15-126 (1931).

32. This conclusion is supported by studies of group behavior among industrial workers. In a controlled experiment at Western Electric's Hawthorne Plant, the Bank Wiremen group, who were denied a voice in making decisions concerning their work, limited output. The Test Room Girls, on the other hand, who were consulted with respect to the proposed changes at every point of the experiment, continually raised output. Even when conditions of work were made more difficult, these girls apparently had no thought of engaging in restrictive practices. MAYO, *THE SOCIAL PROBLEMS OF AN INDUSTRIAL CIVILIZATION* 70-3, 82 (1945). A similar conclusion was reached in a survey of uncontrolled work situations. MATHEWSON, *op. cit. supra* note 31, at 146-59. The experience of many union leaders substantiates the findings of the Hawthorne experiments. See Golden & Ruttenberg, *Union Participation: Key to Greater Productivity*, 7 *ADVANCED MANAGEMENT* 54-60 (April-June 1942). Many business leaders and industrial consultants attribute limitations in output, at least in part, to failure to keep employees informed of important plans and to invite suggestions on matters which are of vital concern on the job. See, e.g., Henry Ford II, *The Challenge of Human Engineering*, 11 *ADVANCED MANAGEMENT* 48-51 (June 1946); McMurry, *Management Mentalities and Worker Relations*, 7 *ADVANCED MANAGEMENT* 165 (Oct.-Dec. 1942).

33. Incentive schemes involve wage rates which vary according to the output of individuals, groups, or departments. Profit sharing and co-partnership plans also may be classified as incentive schemes. CHEYFITZ, *CONSTRUCTIVE COLLECTIVE BARGAINING* (1947).

34. Productivity under incentive schemes is generally higher than productivity under hourly wage systems. Reports by management to the War Labor Board on the operation of new wage incentive plans indicated that an increase in production of 40 per cent per man-hour occurred during the first ninety days of incentive production. These reports covered one million workers. An American Management Association survey corroborated the W.L.B. reports. Wherever an incentive wage replaced hourly payments output per man-hour increased 20 to 50 per cent. CHEYFITZ, *CONSTRUCTIVE COLLECTIVE BARGAINING* 70 (1947). See also MILLIS & MONTGOMERY, *ORGANIZED LABOR* 396 (1945).

Financial incentives, however, do not automatically cause increases in output. Cooperation among members of the group and confidence in management must exist before the offer of increased income operates as an incentive. In the Hawthorne experiment, workers

mission that more could have been produced as an admission that less than a reasonable amount was actually being produced.

All these considerations should be irrelevant, however, because a slow down should be treated just like a complete stoppage. If an employer wishes to guard against a slow down, he can do so in the same manner as against a total stoppage—by seeking to insert in the collective agreement a provision prohibiting it.³⁵ And in any event he can lock out the partial strikers and seek to replace them unless they agree to work on his terms.³⁶

Moreover, the implication of the Board's decision that all slow downs are unprotected undermines the basic objectives of the Act. It invites industrial strife by forcing employees to resort to a strike in the form of a complete stoppage when a less drastic economic weapon might be used.³⁷ It also aggravates existing inequalities of bargaining power. Many unorganized workers and workers in financially weak or poorly organized unions are so insecure that they may be unable to risk a strike in the form of a complete stoppage.³⁸ By depriving these workers of what may be their only effective

in the Bank Wiring room were paid on a group incentive. "Work done was in accord with the group's conception of a day's work; this was exceeded by only one individual who was cordially disliked." MAYO, *THE SOCIAL PROBLEMS OF AN INDUSTRIAL CIVILIZATION* 42, 111 (1945). Another factor limiting the effectiveness of incentive schemes is the tendency of workers to believe that under a piece-rate system, output above a certain level results in a reduction of the piece rate. For example, a group of foundrymen held their pay to \$5 per day for a year though they could easily have earned \$10 a day. After the superintendent convinced them that the rate would not be cut, they stepped up production. McMurry, *Management Mentalities and Worker Reaction*, 7 *ADVANCED MANAGEMENT* 164, 170 (Oct.-Dec. 1942). See also MATHEWSON, *op. cit. supra* note 31, at 15-84; WARNER & LOW, *THE SOCIAL SYSTEM OF THE MODERN FACTORY* 104 (1947); and Drake, *When Wage Incentives Fail*, 7 *ADVANCED MANAGEMENT* 42 (Jan.-Mar. 1942). This is by no means a peculiarly American phenomenon. The coal shortage behind the iron curtain was aggravated recently by a slow down among Czech miners, weary of speed-ups through incentives. *N.Y. Times*, Nov. 20, 1950, p. 1, col. 6.

35. See, e.g., *AGREEMENT BETWEEN UAW-CIO AND THE FORD MOTOR CO.*, art. 5 § 3 (Sept. 28, 1949): "The Union will not cause or permit its members to cause, nor will any member of the Union take part in, any sit-down, stay-in, or slow-down in any plant of the Company or any curtailment of work or restriction of production or interference with the operations of the company." If a union breaches an agreement of this sort, then its activity is not protected under the rationale of the *Sands* case. See note 6 *supra*.

36. See note 12 *supra*.

37. The Board has recognized this argument in a recent case. See *Morand Brothers Beverage Co.*, 91 N.L.R.B. No. 58, at 4 (Sept. 25, 1950) (strike against only one member company of a trade association during negotiations with the association, rather than against all member companies, held to be protected under the Act). See also *Harnischfeger Corp.*, 9 N.L.R.B. 676 (1938), in which the Board found that the day shift's refusal to work overtime and the early arrival of the night shift were protected activities. Though these actions caused the employer considerable difficulty, "calling a strike would have occasioned much more serious difficulty, and it cannot be contended that employees may properly be discharged for calling a strike." *Id.* at 686.

38. Only 14 to 16 million workers in the United States are members of labor unions. Approximately 75% of the total labor force is unorganized. *Size of Labor Unions in the United States*, 71 *MONTHLY LABOR REVIEW* 113 (July 1950). In addition to unorganized

method of concerted action, the decision hinders the growth of labor organization and withdraws protection from those least able to protect themselves from arbitrary actions of the employer.³⁹

Perhaps most important of all, the *Elk* decision impedes the development of labor-management cooperation essential to productive efficiency. It encourages an employer to make unilateral changes in working conditions because he knows that he can discharge those employees who engage in a slow down as a result of such changes. In turn, unilateral action by an employer tends to create a work climate in which employees limit output, either deliberately or instinctively.⁴⁰ Participation by employees in the determination of wages, methods of production, and production quotas promotes a spirit of confidence essential to the gradual elimination of restrictive practices.⁴¹ In the final analysis, managerial authority depends

workers, workers in poorly organized as well as financially weak unions have limited ability to resort to a complete work stoppage. Unless the union is well organized and equipped with sufficient reserve funds, a shut down may not constitute an effective weapon. See MOORE, *INDUSTRIAL RELATIONS AND THE SOCIAL ORDER* 428 (1946).

39. For a discussion of management practices in unorganized plants and the influence of the threat of unionization on these practices, see SHISTER, *ECONOMICS OF THE LABOR MARKET* 257-76 (1949).

40. Such behavior gives rise to labor fears of the speed-up and wage cuts, a major obstacle to the successful introduction of incentive schemes by management. See SLICHTER, *op. cit. supra* note 30, at 312; CHEYFITZ, *op. cit. supra* note 30, at 73-5; and Drake, *When Wage Incentives Fail*, 7 *ADVANCED MANAGEMENT* 42, 43 (Jan.-Mar. 1942).

The instinctive nature of the slow down was revealed in a case study where members of a work team did not understand clearly the method of payment, which, though favorable to the employees, had been unilaterally introduced. "On first observation there was a tendency to ascribe this to an alleged habit of 'restricting output'; it was speedily found that this phrase expresses a gross simplification which is essentially untrue. Apparently it is not enough to have an enlightened company policy, a carefully devised (and blue-printed) plan of manufacture. To stop at this point, and merely administer such plan, however logical, to workers with a take-it-on-leave-it attitude has much the same effect as administering medicine to a recalcitrant patient. It may be good for him but he is not persuaded. . . . [W]ith all the will in the world to cooperate he finds it difficult to persist in an action for an end he cannot dimly see." MAYO, *THE HUMAN PROBLEMS OF AN INDUSTRIAL CIVILIZATION* 119-121 (2d ed. 1946). See also, GOMBERG, *A TRADE UNION ANALYSIS OF TIME STUDY* 95-106 (1948).

41. The sharing by labor and management of decisions of practical concern to both remains one of the central problems of industrial relations. See Cox & Dunlop, *Regulation of Collective Bargaining by the National Labor Relations Board*, 63 *HARV. L. REV.* 389, 401-405 (1950).

Although they do not all agree on details, industrialists, labor leaders and students of labor relations are convinced that some participation by workers in decisions affecting their everyday work lives is essential to the efficient operation of organizations. "[T]he only successful organized human effort depends upon willing—even more, the enthusiastic—collaboration of all members of an organization. . . . To be enthusiastic in their collaboration, men must understand and agree upon the objectives toward which their efforts are directed. . . . They must share not only in the material rewards of accomplishment, but in the psychological rewards which come from being a hard hitting, self-governed and self disciplined team. Above all they must have confidence in their leaders, and they must know that their leaders

upon the spirit of cooperation among those upon whom demands are made.⁴² Thus the *Elk* decision is at best a Pyrrhic victory for management.

SECTION 1404(a) AND TRANSFERS OF SUBSTANTIVE LAW*

Section 1404(a) of the Judicial Code authorizes a federal district court to transfer a civil action to any other district where it might have been brought.¹ To transfer, a court must find that such a move serves "the convenience of parties and witnesses," and is "in the interest of justice." But a transfer for convenience in a diversity case may also raise the question of which of two state laws applies to the action.² For if substantive law varies from state to state, it must, by the rule of *Erie Railroad Co. v. Tomp-*

have confidence in them." McGregor, *The Untapped Potential in Labor-Management Relations*, N.Y. Herald Tribune, Oct. 29, 1950, § 10, p. 21, col. 1. See, generally, Barkin, *Labor Views the Working Day*, 7 *ADVANCED MANAGEMENT* 32, 36 (Jan.-Mar. 1942); Golden & Ruttenberg, *Union Participation: Key to Greater Productivity*, 7 *ADVANCED MANAGEMENT* 54, 58 (April-June 1942); Ramond, *Does Labor Want Maximum Production?* 7 *ADVANCED MANAGEMENT* 157 (Oct.-Dec. 1942); Shield, *Release the Brakes on Output*, N.Y. Herald Tribune, Oct. 29, 1950, § 10, p. 12, col. 1; Tead, *Comment*, 11 *ADVANCED MANAGEMENT* 1, 20, 33, 125, 141 (March-Dec. 1946); CHEYFITZ, *CONSTRUCTIVE COLLECTIVE BARGAINING* 1-88, 111-55 (1947); MAYO, *THE HUMAN PROBLEMS OF AN INDUSTRIAL CIVILIZATION* (2d ed. 1946); MAYO, *THE SOCIAL PROBLEMS OF AN INDUSTRIAL CIVILIZATION* 34-86 (1945).

42. For a discussion of the problem of authority and decision making, see BARNARD, *THE FUNCTIONS OF THE EXECUTIVE* 170-6 (1938); SIMON, *ADMINISTRATIVE BEHAVIOR* 123-53 (1948).

* *Headrick v. Atchison, T. & S. F. Ry. Co.*, 182 F.2d 305 (10th Cir. 1950).

1. 28 U.S.C. § 1404(a) (1948).

2. In theory, there should be no difference in the law applied to a cause of action, regardless of where the case is tried. This is true because all American jurisdictions recognize the conflict of laws principle that the governing "substantive" law is the law of the place where the cause of action arose. GOODRICH, *CONFLICT OF LAWS* §§ 4, 80 (1949). But the uniformity of result which adherence to that principle should produce often breaks down in practice. For example, in the case of statutes of limitation, in states not having a "borrowing" statute, the law of the forum trying the action governs, because a statute of limitations has been classified as a "procedural" matter. *Id.* § 85. Other matters which will vary from state to state because they are considered "procedural" include burden of proof, statute of frauds, and measure of damages. *Id.* §§ 84, 88, 91. Statutes providing security for costs in stockholders' derivative suits have not yet been classified for conflicts purposes, but are presumably "procedural." 16 *U. CHI. L. REV.* 738, 739 (1949).

Also, some states will refuse to recognize the law of the state where the cause of action arose because that law is contrary to the public policy of the forum. This too will create a difference in result depending on where plaintiff sues. *E.g.*, *Griffin v. McCoach*, 313 U.S. 498 (1941), 9 *U. CHI. L. REV.* 141 (1941). See COOK, *LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* 133 (1942).