Buffalo Law Review

Volume 6 | Number 3 Article 11

4-1-1957

Labor Law: Unfair Labor Practice Strikes During Taft-Hartley Act "Cooling-Off" Period

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RECENT DECISIONS

Labor Law: Unfair Labor Practice Strikes During Taft-Hartley Act "Cooling-Off" Period

Employees were discharged after engaging in a strike directed solely against employer unfair labor practices. Employer refused reinstatement on the grounds: (1) that the strike was in violation of a no-strike clause in the collective bargaining agreement; and, (2) that the strikers lost their employee status under section 8(d) of the Taft-Hartley Act, 61 STAT. 142 (1947), 29 U. S. C. §158(d) (1952), because the strike occurred during the sixty-day "cooling off" period required by that section. In a proceeding for enforcement of a NLRB order directing reinstatement of these employees, held (6-3): neither the no-strike clause of the agreement nor the loss of status provision of the statute is applicable to strikes solely against employer unfair labor practices, and the NLRB had power to order reinstatement. *Mastro Plastics Corp. v. NLRB,* 350 U. S. 270 (1956).

The Court was unanimous in construing the no-strike clause as applicable only to economic strikes, since the agreement, taken as a whole, dealt solely with the economic relationship between employer and employee. They refused to find that the employees had given up their most effective weapon against employer interference with their rights, without clear and compelling language in the agreement to support such an interpretation.

Even if a breach of contract had been found, a like result could have been reached by application of the principle that a strike in breach of contract is not grounds for employer's refusal to reinstate where the employer's actions causing the strike were inconsistent with the purpose of the contract. *United Biscuit Co.,* 38 N. L. R. B. 778 (1942), *enforcement granted,* 128 F. 2d 771 (7th Cir. 1942). However, the Court's view appears preferable as precedent for interpretation of such strike waiver agreements. While no-strike agreements covering economic conditions are valuable implements of peaceful labor settlements, unions can hardly be expected to give up the strike weapon as a counter-measure to employer unfair practices, without exacting comparable employer concessions. Hence, a strict interpretation of such agreements will encourage their continued use. The view adopted by the Court supports current NLRB policy.

Although the legal right to strike is traced back to the early case of *Commonwealth v. Hunt,* 4 Met. 111 (Mass. 1842), the concomitant right of employees to waive their strike right by proper bargaining agreements has never been questioned. This is so because of the public policy favoring peaceful settlement of labor disputes. In furtherance of this policy, the NLRB formulated the doctrine that strikes in breach of such agreements are not protected activity under the NLRA. *Joseph Dyson & Sons Inc.,* 72 N. L. R. B. 445 (1947); *Scullin*

Steel Co., 65 N. L. R. B. 1294 (1946). These two cases involved economic strikes and contained dicta to the effect that the doctrine was not applicable to unfair labor practice strikes. *Joseph Dyson & Sons Inc., supra* at 447; *Scullin Steel Co., supra* at 1318. However, the Board subsequently applied the same rule to an unfair labor practice strike. *National Electric Products Corp.*, 80 N. L. R. B. 995 (1948). At the Board's hearing of the instant case, the *National Electric Products Corp.* case was distinguished on its facts. *Mastro Plastics Corp.*, 103 N. L. R. B. 511, 514 (1951). Hence, this ruling of the Board represents a retreat from its previous holding, by a refusal to apply a strike waiver agreement to unfair labor practice strikes where such strikes are not clearly included in the agreement. A similar result was reached in *Wagner Iron Works*, 104 N. L. R. B. 445 (1953), *enforcement granted*, 220 F. 2d 126 (7th Cir. 1955).

Section 8(d) of the NLRA, as amended, defines the duty to bargain collectively, which is imposed upon both the employer and employee by section 8(a) and (b). The section requires that a party desiring termination or modification of an existing agreement must serve written notice upon the other party sixty days prior to the expiration of the agreement. During this sixty-day period, all terms and conditions of the existing agreement must be continued in full force and effect without resort to strike or lockout, and any employee who engages in a strike within the specified period loses his employee status under the act.

The majority of the Court took the view that section 8(d) was designed primarily to prevent economic warfare during the renegogiation period; hence, the loss of status provision was construed as not applicable to strikes against employer unfair labor practices because such strikes are not directed toward termination or modification of the contract. The dissent argued that the loss of status provision would have no effect unless applied to strikes against employer unfair practices.

Apart from this section, the courts, in assessing the rights of strikers to reinstatement, have clearly distinguished between economic strikers and unfair labor practice strikers. Although economic strikers are not entitled to reinstatement where permanent replacements for them have been secured, *NLRB v. Mackay Radio & Telegraph Co.*, 304 U. S. 333 (1938), unfair labor practice strikers have an absolute right to reinstatement upon their unconditional application, despite replacement. *NLRB v. Kobritz*, 193 F. 2d 8 (1st Cir. 1951). Even where the strike was economic in its inception, but was converted to an unfair practice strike by employer's conduct during the strike, employees replaced after the employer's wrongful conduct are entitled to reinstatement. *NLRB v. Remington Rand*, 130 F. 2d 919 (2d Cir. 1942). Where unfair labor practice strikers have been guilty of wrongful conduct during the strike, it is within the

NLRB's discretion to order reinstatement. *NLRB v. Elkland Leather Co.*, 114 F. 2d 221 (3d Cir. 1940). Hence, the majority is not without precedent in distinguishing between the two types of strikers.

The dissent's argument proceeds on the grounds that union violations of section 8(d) are unprotected by the act even without the loss of status provision because they are union unfair practices under section 8(b); therefore, the employer could punish such activity, with impunity, except where the employer was also guilty of unfair practices which induced the strike. In the latter case, apart from the loss of status provision, the Board could order reinstatement in its discretion because the antecedent employer unfair practices gave the employees rights under section 8(a). See *NLRB v. Elkland Leather Co., supra.* But the loss of status provision would prevent the Board's exercise of its discretion in this case because the striking employees would lose their rights under section 8(a). Hence, the loss of status provision would be of no force or effect unless applied to unfair labor practice strikers.

Neither view gains any conclusive support from the legislative history. The dissent finds support in the interpretation given to the provision by the opponents of the Taft-Hartley Act who pointed out the inequity of such a result in opposing it. S. REP. NO. 105 (Minority), 80th Cong., 1st Sess. 21 (1947). Although the sponsors of the bill never squarely met the minority's objection, Senator Ball, one of the conferrees on the bill, emphasized in debate that the section prohibited "quickie strikes" intended to secure economic advantage. 93 CONG. REC. 5014 (1947). It is a general rule of statutory construction that the views of the sponsors must be looked to for the meaning of doubtful words. *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U. S. 384 (1951).

The dissent appears to place undue reliance upon the rule of construction that effect and significance must be accorded to every part of a statute. *Washington Market Co. v. Hoffman,* 101 U. S. 112 (1879). In applying the rule they argued that the loss of status provision adds nothing to the law regarding economic strikes. But since economic strikes would be the real evil as far as disrupting negotiations is concerned, it seems not unreasonable to conclude that the provision was not meant to add anything to the law. Justice Holmes long ago pointed out that there is no canon against the legislature making explicit what is already implied in a statute. *United States v. Sischo,* 262 U. S. 165, 169 (1923).

To accept the dissent's interpretation is to impose undue discrimination upon workers employed under collective bargaining agreements. Not only are they placed in a disparate position with regard to the employer, but they are in a worse position than if they had no bargaining agreement. The employer could engage in any type of unfair activity, during the "cooling off" period, subject only to a "cease and desist" order of the NLRB under the act's slow re-

medial processes; whereas, any employee who engaged in self-help against such conduct would be subject to summary dismissal irrespective of the employer's conduct. Furthermore, the employees would lose their right to strike against unfair practices during the critical contract renegotiation period when the strength of their bargaining agent is most important, even though they admittedly have such right prior to the sixty-day period, and at any time if they are not covered by a collective agreement. Thus the union, by bargaining at all, is precluded from protecting its very existence during the bargaining period.

Conceding that the Eightieth Congress had set a high value on peaceful settlement of labor disputes, it does not necessarily follow that this enactment was intended to adopt the extremes that might be enacted in furtherance of such policy. It appears to the writer that the result reached by the dissent is incongruous and unreasonable, and the majority view is to be preferred, in light of the declared legislative policy underlying the NLRA, as amended, namely:

> ". . . to eliminate the causes of certain substantial obstructions to the free flow of commerce . . . by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association . . . ." 61 STAT. 136 (1947) 29 U. S. C. §151 (1952).

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Labor Law: Federal v. State Jurisdiction To Enjoin Unfair Labor Practices

Appellant union was enjoined by the Wisconsin Employment Relations Board from committing unfair labor practices within the Wisconsin Employment Peace ACT WISCONSIN STAT. c. 111, §§111.04, 111.06, 111.07 (1953). The conduct subject to the cease and desist order consisted of mass picketing, violence and overt threats of violence and as such constituted coercion and was therefore within the jurisdiction of the National Labor Relations Board. 61 STAT. 140-143 (1947), 29 U.S.C. §§157,158 (b)(1)(A) (1952). *Held* (6-3): the state board could enjoin violent conduct as a valid exercise of its police power. *United Automobile Workers, CIO v. W.E.R.B.,* 351 U. S. 266 (1956).

While the boundary between exclusive federal jurisdiction and state jurisdiction in the field of labor relations has not been clearly delineated, it cannot be questioned that rigid restrictions have been impressed upon the jurisdiction of the states over industrial controversies. A state may not, in furtherance of its labor policy, enjoin unfair labor practices in areas where the NLRB would accept jurisdiction. *Garner v. Teamsters Union,* 346 U. S. 485 (1953). Nor may a state, in furtherance of policies not associated with labor, enjoin such conduct as, *e.g.,* a restraint of trade. *Weber v. Anheuser-Busch, Inc.,* 348 U. S. 468 (1955). Yet