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SOME EFFECTS OF THE NATIONAL LABOR RELATIONS ACT ON THE LAW OF CONTRACTS OF EMPLOYMENT

In this article the writer proposes to discuss the effect, if any, that the National Labor Relations Act [1] has on the three elementary rules of the Law of Contracts, namely:

1. A contract of employment, like any other, must be freely entered into without compulsion of any kind or from any source.[2]
2. Where the employee is hired at so much per day, week or month, no time for the duration being mentioned, the employer may discharge him at any time for any or no reason.[3]
3. Where the employee wilfully absents himself from the employment and refuses to work, the employer is legally justified in discharging him.[4]

To what extent, if any, has the National Labor Relations Act changed these fundamental rules of the common law of contracts of employment?

The vast majority of workers are hired at so much a day or week, no time for the duration being specified. In many states, including New York, this is a contract terminable at the will of the employer.[5] A man has to be exceptionally good in his line of work before his employer will hire him on a time contract. Probably 95 per cent of the workers in private industry are employed under contracts terminable at the will of the employer. Why? Because the average

[1] 49 STAT. 449–457 (1935), 29 U. S. C. A. §§ 151–165 (1942).
[2] Vitty v. Eley, 51 App. Div. 44, 66 N. Y. Supp. 397 (1900).
[3] Watson v. Gugino, 204 N. Y. 535, 98 N. E. 18 (1912); Martin v. N. Y. Life, 148 N. Y. 117, 42 N. E. 416 (1895).
[4] Farmer v. First Trust Co., 246 Fed. 671 (C. C. A. 1917); Jerome v. Queen City Cycle Co., 163 N. Y. 351, 57 N. E. 485 (1900).
[5] See note 3 *supra*.

worker, individually, does not stand on an equality in bargaining power with the employer. In ordinary times the demand for jobs exceeds the supply and where that is the case the bargaining power lies with the employer. Hence the employer can dictate the terms of the employment, and so make it a contract terminable at his will. It was and still is the purpose of a labor union to restore bargaining power to the employees by means of collective bargaining and the strike weapon.

For the most part the efforts of trade unions have been directed towards obtaining higher wages and shorter hours, through contracts made between the union and the employer. Little or no attempt has been made to obtain time contracts for union members in place of the usual contract terminable at will. Labor unions apparently have been satisfied with the agreement of employers to employ only union men, thus assuring a continuous employment of union members in general, although the employment contract of each individual union member may still be terminable at will.[6]

From a purely legal standpoint, the rule that where the contract fixes no time of duration it is terminable at the will of the employer, is a sound one, because such a contract is too indefinite to be enforceable in its executory state. If the employer discharges the workman under such a contract, and the workman were to sue for wrongful dismissal, he is claiming as damages the wages he would have earned had he been permitted to continue working. But there is no way of telling how long he was entitled to go on working had he not been discharged, and therefore, no way of ascertaining his damages. Furthermore, since the employer had not promised to keep him for any period of time, there is not even a technical breach by the employer in discharging him at any time for any or no reason at all. All that is sound from a purely legal point of view.

But from a social and economic standpoint, the rule that where no duration is mentioned the employer can discharge at will, is an undesirable one. The workman cannot feel secure in his job. Any day he may be told that he is dismissed and he has no redress. The possibility of a purely whimsical and capricious discharge constantly hangs over his head. He can never know how long his job will last. It won't do to say it was his own fault in not insisting on a time contract when he was hired, because the bargaining power did not lie with him, but with his employer. He had to take a contract terminable at will if he wanted a job. It goes without saying that a man can do better work and is a more contented member of society

[6] The fact that an employer enters into a contract with a labor union recognized by the National Labor Relations Board, as the exclusive bargaining agent for the employees respecting wages, hours and general working conditions, does not bind the individual employees in the union to serve for any definite time, nor deprive the employer of the right to discharge employees for any reasons, except for union activity. *See* Amelotte v. Jacob Dold Packing Co., 173 Misc. 477, 17 N. Y. S. (2d) 929 (1940).

if he feels secure in his job; that is, if he realizes that he will not lose his position except through his own misconduct or misbehaviour. Those who hold government jobs in the civil service have that assurance and security. They have a tenure of office, but workmen in private industry do not.

We have already seen that it is a rule of the law of contracts that if the employee willfully absents himself from the employment against his employer's wishes, the employer is legally justified in discharging him,[7] and is under no legal duty to take him back in the employment when the period of absence is over. When a workman, a member of a labor union, goes out on a strike with his fellow union laborers, he is willfully absenting himself from the employment against his employer's wishes. Under the law of contracts, the employer is justified in discharging him, and is under no legal duty to take him back when the strike is over. That rule of law threw a monkey-wrench into the use of the strike as a weapon to obtain better terms of employment, since striking employees could lawfully be discharged because of willful absence from work, and the employer was under no legal duty to reinstate them.

Likewise it is a fundamental rule of the law of contracts that the employer is free to select his own workmen, and may not have thrust upon him a workman not of his own choice.[8] However, such freedom of contract is not impaired by an agreement between an employer and a union to employ only union men, based on the consideration that the union will not call strikes and will permit the employer to use the union label.[9] The employer is getting a benefit there. There is the element of bargain, of free give and take.

But when a statute, such as the National Labor Relations Act, compels the employer to reinstate employees whom he had discharged for willful absence on strike activity hampering the operation and output of the plant,[10] very little, if anything, is left of the doctrine of freedom of contract, or of the rule that contract is an agreement, freely and voluntarily entered into. The striking employee's right to employment no longer rests on contract, but upon a statute. The employment becomes a statutory right rather than a contract right.

When a statute, such as the National Labor Relations Act, declares that it shall be an unfair labor practice for an employer to discharge an employee for union activities,[11] it materially changes the rule of law that when the employment is by the day or week, the employee may lawfully be discharged at any time for any reason or for no reason.

When a statute, such as the National Labor Relations Act, declares that it shall be an unfair labor practice for an employer to

[7] See note 4 *supra.*
[8] Boston Ice Co. v. Potter, 123 Mass. 28, 25 Am. Rep. 9 (1877).
[9] Gulla v. Barton, 164 App. Div. 293, 149 N. Y. Supp. 952 (1914).
[10] 49 STAT. 452 (1935), 29 U. S. C. A. § 158 (1942).
[11] N.L.R.B. v. Fansteel Metallurgical Corp., 306 U. S. 240 (1939).

discharge an employee because of his absence from work while out on a strike,[12] it abrogates the common law rule that an employer is legally justified in discharging an employee because of his willful absence from work against the employer's wishes.

In these and in other respects which I shall presently point out, the National Labor Relations Act, materially changes the existing common law of contracts of employment.

The National Labor Relations Act (popularly known as the Wagner Act) was enacted by the Congress of the United States in 1935.[13]

Congress has only such powers as are expressly given to it by the United States Constitution. Therefore, in order for any legislation passed by Congress to be valid, its purpose would have to be to effect some power expressly granted to Congress by the Constitution. The only way Congress could validly legislate in regard to labor was to bring it within the power given to Congress to regulate interstate commerce. Hence, in the first section of the National Labor Relations Act, Congress declared that the purpose of the Act was to prevent the disturbance to interstate commerce arising from strikes and labor disputes, induced or likely to be induced because of unfair labor practices resulting in the cessation of the movement of manufactured products in interstate commerce. Industrial strife slows up and impedes interstate commerce. In short the purpose of the Act is to safeguard the flow of interstate commerce by eliminating certain causes of industrial strife.

Industrial peace is promoted by giving equivalence in bargaining power to employees. This the Act attempts to accomplish by securing to employees the right to organize, to form, join or assist labor organizations, in order to bargain collectively through representatives of their own choosing. The Statute declares that union activity on the part of employees or agitation for collective bargaining is lawful.[14] Moreover, the Act expressly preserves to employees the right to strike,[15] and that includes a strike for refusing to negotiate as well as for any other cause.[16] The Act excludes the influence of employers in the selection of the bargaining agent by designating such action as an "unfair labor practice".[17] It is also an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees.[18] It is also an unfair labor practice for an employer to discharge or otherwise discriminate against an employee because of his union activities.[19]

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[12] See note 10 *supra.*

[13] 49 STAT. 449–457 (1935), 29 U. S. C. A. §§ 151–165 (1942).

[14] See notes 10, 12 *supra.*

[15] N.L.R.B. v. Remington Rand Co., 94 F. (2d) 862 (C. C. A. 1938) *cert. denied,* 304 U. S. 585 (1938).

[16] *Ibid.*

[17] 49 STAT. 452, 453 (1935), 29 U. S. C. A. §§ 157, 158 (1942).

[18] See note 10 *supra,* subd. 5.

[19] *Id.* subd. 4.

The object of the Statute in providing for collective bargaining is the making of contracts between employers and their employees as a group. Does the Act compel the employer to make a contract? Does it destroy his freedom of contract, his voluntary agreement? The courts have unanimously held that the Statute does not require an employer to reach an agreement with his employees,[20] but it does require that he negotiate with them in good faith with the view to reaching an agreement if possible,[21] on the theory that free opportunity for negotiation is likely to produce industrial peace. Mere discussion with the employees' representative with the fixed resolve on the part of the employer not to enter into an agreement with them does not satisfy the Act which requires sincere negotiations with the employees' representative.[22] An employer may refuse to agree to a collective contract urged by the employees if he honestly thinks it would be detrimental to his business.[23]

The Statute does not empower the National Labor Relations Board to regulate the employer's control of his own business, nor to substitute its judgment for his in the employment, promotion or discharge of his employees. It does not deprive the employer of the right to select or dismiss his employees for any cause, so long as the employer does not attempt thereby to interfere with the rights of self-organization of the employees, or to intimidate or coerce them by actually discriminating against an employee because of his union activities or affiliations.[24] The Act does not prevent the employer hiring an individual employee on whatever terms he may by unilateral action with him determine, provided that in doing so, he does not breach a collective bargaining contract already made with the union.[25] The Statute does not compel the employer to hire union men rather than non-union men, unless he had already contracted with a union to do so.[26] Under the Act, employees have the right of freedom to contract and to join or not the ranks of organized labor.[27] Nor

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[20] N.L.R.B. v. Sunshine Mining Co., 110 F. (2d) 780 (C. C. A. 1940); N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U. S. 1 (1937).

[21] It has been held that an employer is under the duty to bargain collectively with the union as soon as the union representative presents convincing evidence of majority support for the union. *See* N.L.R.B. v. Dahlstrom Metallic Door Co., 112 F. (2d) 756 (C. C. A. 1940).

[22] N.L.R.B. v. Highland Park Mfg. Co., 110 F. (2d) 632 (C. C. A. 1940).

[23] N.L.R.B. v. Jones Laughlin Steel Corp., 301 U. S. 1 (1937), cited *supra* note 20. The employer is entitled to demand a contract with the union that would permit him to do business at a profit. *See* N.L.R.B. v. Lion Shoe Co., 305 U. S. 315 (1938).

[24] N.L.R.B. v. Union Pacific Stages, 99 F. (2d) 153 (C. C. A. 1938); Appalachian Electric Power Co. v. N.L.R.B., 93 F. (2d) 985 (C. C. A. 1938).

[25] N.L.R.B. v. National Casket Co., 107 F. (2d) 992 (C. C. A. 1939); Globe Cotton Mills v. N.L.R.B., 103 F. (2d) 91 (C. C. A. 1939); N.L.R.B. v. Sands Mfg. Co., 96 F. (2d) 721 (C. C. A. 1938), *aff'd*, 306 U. S. 332 (1939).

[26] N.L.R.B. v. National Casket Co., 107 F. (2d) 992 (C. C. A. 1939), cited *supra* note 25.

[27] Tri-Plex Shoe Co. v. Cantor, 25 F. Supp. 996 (D. C. Pa. 1939).

does the Act interfere with the normal right of the employer to discharge his employees. The employer may still discharge them for good cause or where the employment is at will, for no cause at all, except that the Statute declares it "unfair labor practice" to discharge an employee for union activities or union affiliations.[28] It has been held that if employees violate their contract of employment they may be discharged for that reason, and such a discharge is not unfair labor practice, even though the discharged employee was a member of a labor union.[29] The Statute does not give a blanket immunity to employees from the consequences of their illegal acts and breaches of contract, just because they are members of a labor union.[30] The determination of the question whether an employee had been improperly discharged for union activity is a matter exclusively within the jurisdiction of the National Labor Relations Board.[31]

As already mentioned, the Act does not require the employer to agree with his employees, but if he does so, the courts have held that it is an unfair labor practice amounting to a refusal to bargain collectively, if he refuses to embody the terms agreed upon in a writing.[32]

Under the Statute, the National Labor Relations Board is given power not merely to prevent unfair labor practices by an employer, such as a discharge from employment for union activities, but the Board is also given power by affirmative action to give relief to the discharged employee, by ordering the employer to reinstate him in the employment and to pay him his wages for the period he was put out of the employment by reason of the discharge.[33] Since it is an unfair labor practice for the employer to discharge an employee for union activity, it is unlawful for him to do so even if the contract of employment was terminable at the will of the employer. Hence the discharge being illegal, the employee is considered under

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[28] N.L.R.B. v. Waterman S.S. Corp., 309 U. S. 206 (1940); Fort Wayne Corrugated Paper Co. v. N.L.R.B., 111 F. (2d) 869 (C. C. A. 1940); N.L.R.B. v. Lane Cotton Mills Co., 111 F. (2d) 814 (C. C. A. 1940); Link-Belt Co. v. N.L.R.B., 110 F. (2d) 506 (C. C. A. 1940); N.L.R.B. v. Boss Mfg. Co., 107 F. (2d) 574 (C. C. A. 1939); Jefferson Electric Co. v. N.L.R.B., 102 F. (2d) 949 (C. C. A. 1939).

[29] N.L.R.B. v. Empire Furniture Corp., 107 F. (2d) 92 (C. C. A. 1939); N.L.R.B. v. Sands Mfg. Co., 96 F. (2d) 721 (C. C. A. 1938), cited *supra* note 25.

[30] Barfield v. Standard Oil Co., 172 Misc. 95, 14 N. Y. Supp. 627 (1939).

[31] Coldiron v. Good Coal Co., 276 Ky. 833, 125 S. W. 757 (1939).

[32] H. J. Heinz Co. v. N.L.R.B., 110 F. (2d) 843 (C. C. A. 1940), *aff'd*, 310 U. S. 621 (1940); N.L.R.B. v. Highland Park Mfg. Co, 110 F. (2d) 632 (C. C. A. 1940).

[33] It has been held that an order of the National Labor Relations Board, requiring the employer to reinstate employees discharged because of union activities is authorized by the Statute. *See* N.L.R.B. v. Jones Laughlin Steel Corp., 301 U. S. 1 (1937), cited *supra* notes 20, 23.

the Statute as not discharged at all, but still continues an employee.[34] So under the Act, if employees strike in connection with a labor dispute, it is not a renunciation of the employment relation, and they remain "employees" for the remedial purposes of the Act.[35] However, reinstatement may not be ordered unless the employer has been guilty of an unfair labor practice.

As a general rule affirmative relief of any sort is equitable in its nature, and the maxim applies that one who seeks it must have clean hands. However, the courts have held that the "unclean hands" doctrine does not apply to striking employees seeking affirmative relief of reinstatement, even though they had engaged in a boycott and acts of violence, since that doctrine is not applicable to a proceeding in which a governmental agency is seeking enforcement of its order in the public interest.[36]

The affirmative action of the National Labor Relations Board, requiring the employer to reinstate may include an order compelling the employer to pay striking employees their wages while out on strike. But suppose between date of the discharge of the employee for strike activities and the date of the order for his reinstatement, the employee earned something in a similar employment, must that be deducted from the back pay? One case held that the National Labor Relations Board is not required to apply the doctrine of mitigation of damages.[37] However, the affirmative relief of reinstatement was not intended by Congress to be punitive or disciplinary, as it would be if we deprived the employer of the doctrine of mitigation of damages, but is purely remedial in its nature. Hence, according to the weight of authority, the order for reinstatement must deduct any wages earned by the employee at another similar job in the meanwhile.[38]

Suppose that after the employer had discharged his striking

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[34] N.L.R.B. v. Fansteel Corp., 306 U. S. 240 (1939). Indeed, Section 152 of the Act defines the word "employee" to include "any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute, or because of any unfair labor practice."

[35] 49 STAT. 450, 29 U. S. C. A. § 152 (1942).

[36] Republic Steel Corp. v. N.L.R.B., 107 F. (2d) 472 (C. C. A. 1939), *cert. denied*, 309 U. S. 684 (1940); N.L.R.B. v. Hearst, 102 F. (2d) 658 (C. C. A. 1939).

[37] N.L.R.B. v. Carlisle Lumber Co., 92 F. (2d) 513 (C. C. A. 1938), *cert. denied*, 306 U. S. 646 (1939).

[38] N.L.R.B. v. Leviton Mfg. Co., 111 F. (2d) 619 (C. C. A. 1940); N.L.R.B. v. Stackpole Carbon Co., 105 F. (2d) 167 (C. C. A. 1939), *cert. denied*, 308 U. S. 605 (1939); N.L.R.B. v. American Potash Corp., 98 F. (2d) 488 (C. C. A. 1938), *cert. denied*, 306 U. S. 643 (1939); N.L.R.B. v. Pacific Greyhound Lines, 91 F. (2d) 458 (C. C. A. 1939), *rev'd on other grounds*, 303 U. S. 272 (1938). This view seems to be supported by the language of the Statute itself in Section 152, in defining the word "employee" to include "any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute, or because of any unfair labor practice, and who has not obtained any regular and substantially equivalent employment."

employees, he engaged others on time contracts. May the Board, nevertheless, order him to fire the new employees and reinstate the old ones? On this point it has been held that from the date of an employer's first unfair labor practice his right to select employees becomes vulnerable, and so it is proper for the Board to order the employer to discharge all new employees hired in the meanwhile, so as to make room for the reinstated striking employees.[39]

The provisions of the National Labor Relations Act apply only to unfair labor practices affecting interstate commerce. Nevertheless, even though the employer's activities are local or intrastate in character, still if they affect interstate commerce, the National Labor Relations Board has jurisdiction.[40] However, whether particular action in the conduct of intrastate enterprises affects interstate commerce so closely as to be the subject of federal control, is left to be determined as individual cases may arise.[41]

In New York State we have a State Labor Relations Act, sometimes known as "The Little Wagner Act".[42] The purpose of the Act is to prevent strikes, lockouts and other forms of industrial strife and unrest, and to equalize the disparity in bargaining power between employers and employees. It follows in the main the provisions of the National Labor Relations Act.

The State Labor Relations Board is part of the State Department of Labor, and its members are appointed by the governor for a fixed term.

The State Labor Relations Act expressly excludes from its provisions, employees of the state, county or municipal government.[43] It has been held that the State Labor Relations Act applies to banks and bank employees, and to employees of insurance companies.[44]

Under the state Act the calling of a strike does not terminate the employer's obligation to bargain collectively with the employee's representative.

The State Labor Relations Act leaves an employer free to employ or to discharge with or without reason, except that he may not require an employee or one seeking employment, as a condition of employment, to join any company union, or to refrain from forming or joining or assisting a labor organization of his own choosing.

Like the national Act, the state Act lists a number of "unfair labor practices" among which is a refusal to bargain collectively with representatives of his employees, or to intimidate or coerce them.[45]

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[39] Black Diamond S.S. Corp. v. N.L.R.B., 94 F. (2d) 875 (C. C. A. 1938), *cert. denied*, 304 U. S. 579 (1938).

[40] N.L.R.B. v. Hearst, 102 F. (2d) 658 (C. C. A. 1939).

[41] Consolidated Edison Co. of N. Y. v. N.L.R.B., 305 U. S. 197 (1938).

[42] 20 N. Y. LABOR LAW §§ 700–716 (1937).

[43] *Id.* § 715.

[44] Bank of Yorktown v. Voland, 172 Misc. 85, 16 N. Y. S. (2d) 756 (1940).

[45] 20 N. Y. LABOR LAW § 704 (1937).

Under the New York Act, an employer exercising the right to discharge unsatisfactory employees, does not have the burden of justifying the discharge. The burden of proving the charge of "unfair labor practice" against the employer rests upon those making the charge. In unfair labor practice proceedings the State Labor Relations Board has the burden of proof.[46]

The state Board is given power to issue "cease and desist" orders to prevent unfair labor practices and to give affirmative relief by ordering reinstatement with or without back pay.[47]

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[46] Stork Restaurant v. Boland, 282 N. Y. 256, 26 N. E. (2d) 247 (1940).
[47] 20 N. Y. LABOR LAW § 706 (1937).