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Article 16

Labor Law--Review of Findings of N.L.R.B.--Unfair Labor Practices--Employer's Right to Hire and Fire--Freedom of Speech (N.L.R.B. v. Union Pacific Stages, 99 F.2d 153 (9th Cir. 1938))

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was not in issue since they were entered into while the proceedings were progressing before the Board, and the amended complaint failed to assail the contracts. The court, however, chose to proceed in its opinion, in a discussion of affirmative powers of the Board. Thus it is not entirely clear on what ground the court bases its decision. It may be said with some degree of certainty, however, that the holding would have been the same way, had the court found proper notice *was* given to the Brotherhood and that the validity of the contracts *was* in issue.

P. M. L.

LABOR LAW—REVIEW OF FINDINGS OF N. L. R. B.—UNFAIR LABOR PRACTICES—EMPLOYER'S RIGHT TO HIRE AND FIRE—FREEDOM OF SPEECH.—Respondent, a bus company, had a one-year open shop contract with the union. During this time, officials of respondent made anti-union statements.[1] After its expiration and during negotiations prior to a second agreement, two employees were discharged. The N. L. R. B. found they were discharged for their union activity, while respondent contended that the true reason was their repeated and flagrant violations of proper rules and regulations. The Board found respondent guilty of numerous other unfair labor practices.[2] On petition by N. L. R. B. to enforce a "cease and desist order" and an order of reinstatement, *held,* petition denied.[3] (1) The

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employer but only to those instances when an employer has created and dominated a company union. N. L. R. B. v. Pennsylvania Greyhound Lines, Inc., 303 U. S. 261, 58 Sup. Ct. 571 (1938), cited *supra* note 11.

[1] One official informed employees that the union had nothing to do with the act of the company in raising wages above those agreed upon in the contract, adding that employees did not have to join union or "pay tribute" to safeguard their rights. Another said that if he had a son he would not let him join the union.

[2] See *infra* note 4. THE NATIONAL LABOR RELATIONS ACT, 49 STAT. 452, 29 U. S. C. A. § 158 (Supp. 1935), provides: "It shall be an unfair labor practice for an employer:

"1. To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title (*i.e.*, the right to self-organization and collective bargaining).

"3. By discrimination in regard to hire or tenure of employment, or any term or condition of employment, to encourage or discourage membership in any labor organization * * *.

"5. To refuse to bargain collectively with the representatives of the employees * * *."

[3] Order of Board that company cease anti-union acts of certain superintendents upheld, even though respondent disclaimed all knowledge of, or responsibility for them. N. L. R. B. v. A. S. Abell Co., 97 F. (2d) 951 (C. C. A. 4th, 1938); *cf.* Peninsular & Occidental S. S. Co. v N. L. R. B., 98 F. (2d) 411 (C. C. A. 5th, 1938); Ballston-Stillwater K. Co. v. N. L. R. B., 98 F. (2d) 758 (C. C. A. 2d, 1938).

findings of the Board are not supported by substantial evidence. (2) The employer still has the right to hire and discharge for any reason whatsoever except union activities. (3) To deny employer the right to voice his opinion on labor problems would be a denial of freedom of speech. *N. L. R. B.* v. *Union Pacific Stages,* 99 F. (2d) 153 (C. C. A. 9th, 1938).

In its findings, the Board relied a great deal on what it called "background evidence", whereby it considers not only the particular acts involved, but the whole general situation, so that acts, innocent or meaningless when considered alone, gain great significance when viewed with a proper perspective.[4] Section 10(e) of the Act provides that the findings of the Board are conclusive on the courts if supported by substantial evidence.[5] Such evidence is that which affords a reasonable basis for the findings, being more than a mere scintilla or suspicion, and yet less than a fair preponderance;[6] it lies indefinitely between these definite bounds.[7] Section 10(b) provides that in proceedings before the Board, the common law rules of evidence do not control.[8] The courts, however, are still bound by the technical rules of evidence; consequently, the court cannot give efficacy to a ruling of the Board which has been based solely on hearsay, non-expert opinion, and other incompetent evidence, or competent evidence which does not amount to substantial evidence.[9] Moreover, al-

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[4] See § 8 of the Act, *supra* note 2. The Board found that the following facts amounted to a series of unfair labor practices: In 1934, respondent refused to bargain with union until it proved its right to represent employees. The union having been elected sole bargaining agent, negotiations were begun, but three days elapsed before the contract was executed; the Board found this an undue delay. Respondent had recently inaugurated a policy of hiring all new employees at Omaha, whereas previously they had been picked from the locality in which they were to work; the Board found that the purpose was to supplant union men with non-union men. Again respondent personally adjusted a wage grievance with an individual employee. The Board found that the company seized upon a dispute over seniority rights to delay the second agreement. See *infra* note 12.

[5] 49 STAT. 453, 29 U. S. C. A. 160(e) (Supp. 1935); N. L. R. B. v. Jones & Laughlin Steel Corp., 301 U. S. 1, 57 Sup. Ct. 615 (1937).

[6] Appalachian Electric Power Co. v. N. L. R. B., 93 F. (2d) 985 (C. C. A. 4th, 1938).

[7] Compare N. L. R. B. v. A. S. Abell Co., 97 F. (2d) 951, 958 (C. C. A. 4th, 1938) ("the rule as to substantiality is not different, we think, from that to be applied in reviewing the refusal to direct a verdict at law where the lack of substantial evidence is the test of the right to a directed verdict"), with N. L. R. B. v. Bell Oil & Gas Co., 98 F. (2d) 406, 410 (C. C. A. 5th, 1938) ("a good rule is to compare it with the evidence necessary to sustain the verdict of a jury upon a similar issue").

[8] 49 STAT. 453, 29 U. S. C. A. § 160(b) (Supp. 1935).

[9] The mere admission of matter which would be deemed incompetent in judicial proceedings, would not invalidate the administrative order. But this assurance of a desirable flexibility in administrative procedure does not go so far as to justify orders without a basis in evidence having rational probative force. Mere uncorroborated hearsay and rumor does not constitute substantial evidence. Consolidated Edison Co. v. N. L. R. B., — U. S. —, 59 Sup. Ct. 206

though the inferences to be drawn from the evidence belong solely to the Board, they must be reasonable,[10] and the Board must decide on *all* the relevant uncontradicted evidence of probative force, and not just that evidence which bears out its findings.[11] "Background evidence", therefore, may be used as a basis for the Board's findings if it, in turn, is supported by substantial evidence, and presents a fair picture of the whole situation.[12] Generally, the courts will approve the order of the Board unless clearly improper or unsupported by substantial evidence.[13]

The employer still has his common law right to hire and discharge at will, for any reason whatever, just or unjust, with but one important exception: he may not use that right as a weapon to intimidate or coerce his employees with respect to their self-organization or representation;[14] if he does, the Board has the power to reinstate them.[15] If the discharge which had a basis in just cause, was also

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(1938); (1939) 13 ST. JOHN'S L. REV. 387; N. L. R. B. v. Bell Oil & Gas Co., 98 F. (2d) 406, 409 (C. C. A. 5th, 1938).

[10] N. L. R. B. v. Lion Shoe Co., 97 F. (2d) 448 (C. C. A. 1st, 1938).

[11] Peninsular & Occidental S. S. Co. v. N. L. R. B., 98 F. (2d) 411 (C. C. A. 5th, 1938).

[12] In this case, however, the court declares that the background as found by the Board, in *supra* note 4, "presents a somewhat distorted picture of the activities of respondent". The court delved deeply into the evidence showing how the slight testimony for the union is summarized most favorably by the Board, while uncontradicted evidence for the respondent is dismissed with a sentence.

[13] Washington, V. & M. Coach Co. v. N. L. R. B., 301 U. S. 142, 57 Sup. Ct. 648 (1937). Even while setting aside an order of the Board, the courts render lip service to this doctrine. N. L. R. B. v. Thompson Products, Inc., 97 F. (2d) 13 (C. C. A. 6th, 1938).

[14] See § 8(3) of the Act, *supra* note 2. A great majority of the cases that have come down under the Act have involved the situation, just as in this case, where the Board has ordered reinstatement of employees allegedly discharged for union activities, despite the contention of the employer that they were discharged for just cause. This raises a question of fact as to the employer's intent. Associated Press v. N. L. R. B., 301 U. S. 103, 57 Sup. Ct. 650 (1937); Washington, V. & M. Coach Co. v. N. L. R. B., 301 U. S. 142, 57 Sup. Ct. 648 (1937); N. L. R. B. v. Mackay Radio & Tel. Co., 304 U. S. 333, 58 Sup. Ct. 904 (1938) (discrimination in rehiring strikers after an unsuccessful strike); Agwilines, Inc. v. N. L. R. B., 87 F. (2d) 146 (C. C. A. 5th, 1936); Clover Fork Coal Co. v. N. L. R. B., 97 F. (2d) 331 (C. C. A. 6th, 1938) (employer contended he was forced to discharge union employees because non-union employees threatened to quit work if he did not do so; this was true, but the Board found that the company was responsible for this attitude by inspiring and encouraging it); N. L. R. B. v. Star Pub. Co., 97 F. (2d) 465 (C. C. A. 9th, 1938) (in order to save its business from ruin, the company was forced to discriminate against one union during a jurisdictional dispute between the A. F. of L. and C. I. O.; nevertheless, reinstatement order was upheld); N. L. R. B. v. Willard, 98 F. (2d) 244 (App. D. C. 1938); N. L. R. B. v. Am. Potash & Chem. Corp., 98 F. (2d) 488 (C. C. A. 9th, 1938).

[15] Section 10(c) of the Act, 49 STAT. 453, 29 U. S. C. A. § 160(c) (Supp. 1935), gives power to the Board to issue "an order requiring such person * * * to take such affirmative action, including reinstatement of employees * * * as will effectuate the policies of this chapter." The Board, however, is not entitled to use this authority as a pretext to interfere with employer's right of discharge when that right is exercised for other reasons than intimidation or coercion.

tinged with an anti-union color, a reinstatement order may be enforced by the courts.[16] However, such an order is unenforceable where the employee was discharged for an illegal act, or a threat of an illegal act,[17] such as a sit-down strike,[18] sabotage,[19] assault on non-union workers,[20] and destruction of, or conspiracy to destroy, employer's property during a strike.[21] Once an unfair labor practice has been established, this right of the employer is subject to very close scrutiny,[22] and it requires only slight evidence to sustain a finding that an employee was discharged for union activity.[23] In this respect, the whole case may turn upon "background evidence".[24]

The Board has issued many orders restraining anti-union statements by employers,[25] and this is the first one that has been overruled as violative of freedom of speech.[26] Freedom of speech is not an absolute but a qualified right, subject to the preeminent rights of society. Generally, however, the only speech which may be enjoined or punished, in law or equity, is that which is designed to, or does injure another's personal, economic, or property right.[27] That element of injury must be present. Therefore, theoretically at least, the employer has the right to speak his mind freely on labor problems, in an attempt to influence his employees, as long as his words do not, intentionally or unintentionally, intimidate them in their pursuit of collective bargaining. Here again, "background evidence" plays an

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N. L. R. B. v. Jones & Laughlin Steel Corp., 301 U. S. 1, 57 Sup. Ct. 615 (1937).

[16] N. L. R. B. v. Oregon Worsted Co., 96 F. (2d) 193 (C. C. A. 9th, 1938). Not every discharge which was actuated to some degree by anti-union feelings will be declared a violation by the Board. A question of extent is involved. See Note (1938) 32 ILL. L. REV. 568, 578.

[17] Peninsular & Occidental S. S. Co. v. N. L. R. B., 98 F. (2d) 411 (C. C. A. 5th, 1938).

[18] N. L. R. B. v. Fansteel Metallurgical Corp., 59 Sup. Ct. 490 (1939), (1939) 13 ST. JOHN'S L. REV. 395.

[19] Peninsular & Occidental S. S. Co. v. N. L. R. B., 98 F. (2d) 411, 415 (C. C. A. 5th, 1938).

[20] Standard Stone & Lime Co. v. N. L. R. B., 97 F. (2d) 531 (C. C. A. 4th, 1938).

[21] *Ibid.*

[22] Black Diamond S. S. Corp. v. N. L. R. B., 94 F. (2d) 875 (C. C. A. 2d, 1938).

[23] Thus it was in this case that the Board, having found so many unfair labor practices, also found, on such flimsy evidence, that the two employees were discharged for their union activities. The burden of proving unfair labor practices is on the complainant. But see Note (1938) 32 ILL. L. REV. 568, 578, which suggests that where previous anti-union bias has been shown, the burden of going forward with the evidence shifts to the employer, citing N. L. R. B. v. Jones & Laughlin Steel Corp., 301 U. S. 1, 57 Sup. Ct. 615 (1937).

[24] See *supra* notes 4 and 12.

[25] Associated Press v. N. L. R. B., 301 U. S. 103, 57 Sup. Ct. 650 (1937); N. L. R. B. v. Pennsylvania Grey. Lines, Inc., 303 U. S. 261, 58 Sup. Ct. 571 (1938), (1938) 13 ST. JOHN'S L. REV. 178; N. L. R. B. v. Remington Rand, 94 F. (2d) 862 (C. C. A. 2d, 1938).

[26] U. S. CONST. Amend. I.

[27] 2 WILLOUGHBY, CONSTITUTION OF THE UNITED STATES (2d ed. 1929) 1200.

important part, for the effect of a statement depends on the atmosphere and circumstances at the time it was uttered.[28] However, since the employer has such a great economic advantage over the employees,[29] it is difficult to see how that element of coercion can be removed completely from the employer's statements.[30]

R. B. G.

LABOR LAW—SIT-DOWN STRIKE—RIGHT OF N. L. R. B. TO ORDER REINSTATEMENT.—The union which represented a majority of defendant's employees called a sit-down strike when defendant refused to bargain collectively. The latter thereupon discharged all those employees actively participating in the strike. The employer had previously been guilty of other unfair labor practices. After they were finally evicted and business operations were resumed, defendant reemployed many of the strikers. The union again asked for recognition, and again defendant refused. The N. L. R. B. ordered the employer to reinstate the other strikers,[1] and to bargain collectively with the union.[2] On appeal from a judgment refusing to enforce the orders, *held,* affirmed. *Sit-down strikes are illegal.* Therefore, despite the prior unfair labor practices, the employer has the right to discharge employees who participate in such a strike, and the Board has no power to order their reinstatement. *N. L. R. B.* v. *Fansteel Metallurgical Corp.,* 59 Sup. Ct. 490 (1939).

Sit-down strikes[3] are a fairly recent development in labor relations. The earliest known case occurred in 1885,[4] but they did not

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[28] See *supra* notes 4 and 12.

[29] 49 STAT. 449, 29 U. S. C. A. 151 (Supp. 1935).

[30] See Note (1938) 48 YALE L. J. 54, 72, where the author gently rebukes the court, saying, "The wisdom of the court in rejecting so completely the positive findings of an expert administrative body, versed in the technique of labor tactics, is open to question."

[1] Included in this order are fourteen men who did not "sit down" but who aided and abetted the strikers by handing in food, clothing etc. As to these the court refused to enforce the order in spite of the fact that they remained "employees", and were not included in the general discharge. They were just as guilty as the actual strikers themselves. See N. L. R. B. v. Mackay Radio and Tel. Co., 304 U. S. 333, 58 Sup. Ct. 904 (1938).

[2] The court refused to enforce the order because, although before the strike the union represented a majority of the workers, the altered circumstances furnished no basis for the conclusion that the union had a majority after the strike.

[3] Sit-down strikes are either "quickies" or "stay-ins". A "quickie" is merely a ceasing of work temporarily, without a seizure of the plant, while a "stay-in" is a seizure and a setting up of a community within the plant. Porter, *The Broad Challenge of the Sit-Down* (April 4, 1937) N. Y. TIMES MAGAZINE, p. 8.

[4] A "quickie" occurred when striking workers temporarily stopped freight traffic by occupying the yards and shops on a railroad owned by Jay Gould.