

Labor Law--Sit-Down Strike--Right of N.L.R.B. to Order Reinstatement (N.L.R.B. v. Fansteel Metalurgical Corp., 59 S. Ct. 490 (1939))

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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 re-employed 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 strikes³ are a fairly recent development in labor relations. The earliest known case occurred in 1885,⁴ but they did not

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.

gain prominence until 1933.⁵ The basis of any attempt to justify a sit-down strike is the theory that the workers have a property right in their jobs, and in order to protect that right, they may occupy the employer's plant which is so essentially bound up with their jobs.⁶ The courts have refused to accept this theory.⁷ Although sit-down strikes have been repeatedly declared illegal by state courts which have granted injunctions against them,⁸ this is the first time a sit-down strike has been involved in a controversy before the United States Supreme Court.⁹

The Board, in this action, did not contend that the sit-down strike was legal; it claimed that since the unfair labor practices of the employer caused the strike, the Board had power to order reinstatement. But the Act giving the Board power to remedy unfair labor practices does not authorize the reinstatement of strikers who participate in illegal acts.¹⁰ They do not make the employer an outlaw or deprive him of his legal rights to the possession and protection of his property.¹¹ To justify a sit-down strike because of the existence of a labor dispute or of an unfair labor practice would have the effect of putting a "premium on resort to force instead of legal remedies and to subvert the principles of law and order which lie at the foundations of society."¹² At common law the employer had an absolute right to discharge for any or no reason an employee hired under a contract fixing no definite period of employment.¹³ Under the N. L. R. A., this right is qualified insofar as he may not wield it as a weapon to intimidate and coerce the employees in respect to their self-organization and collective bargaining.¹⁴ Ordinarily, where the employer has

Patch, *Control of the Sit-Down Strike* (March 26 1937) EDITORIAL RESEARCH REPORTS, Vol. I, No. 12. However, real sit-down strikes, or "stay-ins" began in 1906 when workers succeeded in shutting down the General Electric Light Plant in Schenectady.

⁵ Sit-down strike in the Firestone Rubber Plant in Akron, Ohio, in July, 1933. See Note (1937) 23 VA. L. REV. 799.

⁶ Note (1937) 35 MICH. L. REV. 1330, 1335-1336.

⁷ Note (1938) 23 IOWA L. REV. 149.

⁸ Equity grants an injunction because of the inadequacy of damages at law. *Fansteel M. Corp. v. Lodge* 66, 14 N. E. (2d) 991 (Ill. App. 1938); *General Motors v. International Union U. A. W. A.*, Mich. C. C. (1937) 4 U. S. L. Week 678; *Chrysler Corp. v. International Union U. A. W. A.*, Mich. C. C. (1937) 4 U. S. L. Week 858. But see Note (1938) 23 IOWA L. REV. 149, which submits that the "clean hands" doctrine of equity should apply, and the injunction should be refused if the employer has been guilty of an unfair labor practice; likewise, the injunction should be refused where it is improbable that it will be enforced.

⁹ Instant case.

¹⁰ 49 STAT. 449, 29 U. S. C. A. § 151 *et seq.* (Supp. 1935).

¹¹ *Ibid.*

¹² Instant case.

¹³ 39 C. J. § 1454; *N. L. R. B. v. Thompson Products, Inc.*, 97 F. (2d) 13 (C. C. A. 6th, 1938).

¹⁴ Section 8(3) of the National Labor Relations Act, 49 STAT. 453, 29 U. S. C. A. § 158(3) (Supp. 1935), *N. L. R. B. v. Jones and Laughlin Steel Corp.*,

been guilty of unfair labor practices, the Act, in effect, deprives him of his right to discharge subsequently striking employees.¹⁵ Where the employees are guilty of criminal acts, the employer retains the absolute right to discharge them for that reason.¹⁶ Consequently, since there was no excuse for the sit-down strike, the employer had the right to exercise his common law power to discharge.¹⁷

Section 2(3) of the Act¹⁸ defines "employees" as including "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 * * *." Section 10(c)¹⁹ grants the Board power to force the employer "to take such affirmative action, including reinstatement of employees * * *, as will effectuate the policies" of the Act. The Board contended, therefore, that since the strikers remained employees the Board had power to order their reinstatement; and further, even if they lost their status as employees, under its general power to order "affirmative action as will effectuate the policies" of the Act, the Board could order their reemployment. Once the strikers were discharged, they did not remain employees, because their work did *not* cease as a consequence of an unfair labor practice, but merely as a result of their own illegal actions.²⁰ The authority to command an affirmative action is "remedial, not punitive";²¹ it is broad but not unlimited. "It has the essential limitations which inhere in the very policies of the Act which the Board invokes."²² The dominant purpose of the National Labor Relations Act is to encourage *peaceful* settlements of labor disputes.²³ The answering of the question as to whether the policies of the Act would be effectuated is solely for the Board, subject

301 U. S. 1, 57 Sup. Ct. 615 (1937); *N. L. R. B. v. Remington Rand*, 94 F. (2d) 862 (C. C. A. 2d, 1938).

¹⁵ 49 STAT. 449, 29 U. S. C. A. § 151 *et seq.* (Supp. 1935); *Associated Press v. N. L. R. B.*, 301 U. S. 103, 57 Sup. Ct. 650 (1937); *N. L. R. B. v. Remington-Rand*, 94 F. (2d) 862 (C. C. A. 2d, 1938).

¹⁶ See note 17, *infra*. But *cf.* *N. L. R. B. v. Oregon Worsted Co.*, 96 F. (2d) 193 (C. C. A. 9th, 1938).

¹⁷ *Standard Stone and Lime Co. v. N. L. R. B.*, 97 F. (2d) 531 (C. C. A. 4th, 1938) (employer had right to discharge employees for destruction of property and assault on non-union workers during a strike; employer, however, had been guilty of no previous unfair labor practices); *Peninsular and Occidental S. S. Co. v. N. L. R. B.*, 98 F. (2d) 411 (C. C. A. 5th, 1938) (discharge for sit-down strike); *Ballston-Stillwater K. Co. v. N. L. R. B.*, 98 F. (2d) 758 (C. C. A. 2d, 1938) (union struck without cause; court refused to enforce reinstatement).

¹⁸ 49 STAT. 450, 29 U. S. C. A. § 152(3) (Supp. 1935).

¹⁹ 49 STAT. 453, 29 U. S. C. A. § 160(c) (Supp. 1935).

²⁰ See § 2(3), cited *supra* note 18. *Cf.* *N. L. R. B. v. Mackay Radio and Tel. Co.*, 304 U. S. 333, 58 Sup. Ct. 904 (1938).

²¹ Instant case; *Consolidated Edison Co. v. N. L. R. B.*, 59 Sup. Ct. 206 (1938), (1939) 13 ST. JOHN'S L. REV. 387.

²² Instant case. *N. L. R. B. v. Remington Rand*, 94 F. (2d) 862 (C. C. A. 2d, 1938); *Clover Fork Coal Co. v. N. L. R. B.*, 97 F. (2d) 331 (C. C. A. 6th, 1938).

²³ 49 STAT. 449, 29 U. S. C. A. § 151 (Supp. 1935).

to the limitation, however, that it may not be arbitrary, unreasonable, or capricious.²⁴ In this case its power has clearly been transcended.

R. B. G.
S. C. S.

LABOR UNIONS—COLLECTIVE BARGAINING AGREEMENT—INJUNCTION—SECTION 876-A C. P. A.—The plaintiff-employer and defendant-union entered into a collective bargaining agreement for one year, under the terms of which it was agreed that during its existence "there should be no strike or lockout." The union called a strike in alleged violation of the agreement. The employer then brought suit for an injunction, alleging a breach of the contract; he also alleged facts sufficient to state a cause of action under Section 876-a of the New York Civil Practice Act.¹ The Appellate Division dismissed the complaint, reversing the decision of the Special Term which granted the injunction, on the ground that the contract was unenforceable in equity as it was against the legislative policy of this state.² On appeal, *held*, reversed, "The complaint contains all the allegations required by Section 876-a of the Civil Practice Act pre-

²⁴ Instant case. § 10 of the Act, 49 STAT. 453, 29 U. S. C. A. § 160 (Supp. 1935).

¹ N. Y. CIV. PRAC. ACT § 876-a: "Injunctions issued in labor disputes. 1. No court nor any judge * * * shall have jurisdiction to issue any restraining order or a temporary or permanent injunction in any case involving or growing out of a labor dispute, as hereinafter defined, except after a *hearing*, and *except after findings of all the following facts by the court* * * * : (a) That unlawful acts have, or a breach of any contract [collective bargaining] not contrary to public policy, has been threatened or committed and that such acts or *breach* will be executed or continued unless restrained; (b) That substantial and irreparable injury to complainant's property will follow unless the relief requested is granted; (c) * * * [that complainants will suffer more than the defendant by denial of the injunction]; (d) That complainant has no adequate remedy at law; (e) That the public officers charged with the duty to protect complainant's property have failed or are unable to furnish adequate protection; * * *." (Italics ours.)

Aberdeen Restaurant Corp., 158 Misc. 785, 285 N. Y. Supp. 832 (1935) (holding that "this section is constitutional since there is no deprivation of a right, but only a limitation of circumstance under which an injunction will be issued").

For a discussion of the court's construction of the term "labor dispute" as used in this section see (1938) 12 ST. JOHN'S L. REV. 358.

For a general discussion of the Norris-La Guardia Act upon which § 876-a is based, see (1938) 13 ST. JOHN'S L. REV. 171; Tapley, *The Anti-Union Contracts* (1936) 11 ST. JOHN'S L. REV. 40; for discussion of § 876-a see PRASHKER, CASES AND MATERIALS ON NEW YORK PLEADING AND PRACTICE (2d ed. 1937) 1062-64.

² *Nevins, Inc. v. Kasmach*, 252 App. Div. 890 (2d Dept. 1937).