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The Effect of a Strike on the Right of Workers to Vote in a Bargaining Representation Election

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THE EFFECT OF A STRIKE ON THE RIGHT OF WORKERS TO VOTE IN
A BARGAINING REPRESENTATION ELECTION

by

Henry Anthony Budzinski

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and Industrial Relations of Loyola University
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LIFE

Henry Anthony Budzinski was born in Chicago, Illinois, November 5, 1923.

He was graduated from Weber High School, Chicago, Illinois, June 1941, and from Loyola University of Chicago, June 1948, with the degree of Bachelor of Philosophy. On June 14, 1950 he was conferred with the degree of Juris Doctor by the School of Law of Loyola University of Chicago.

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CHAPTER I

INTRODUCTION

Under Section 9 of the National Labor Relations Act, as amended by Title I of the Labor-Management Relations Act of 1947, representation proceedings are conducted for "the unit appropriate for the purposes of collective bargaining." In order to certify a labor organization as the exclusive bargaining representative of the employees in such a unit, the National Labor Relations Board must ascertain that the organization has been selected or designated for the purposes of collective bargaining by a majority vote of the employees in the unit. The eligibility of a person to vote in a collective bargaining election will depend, therefore, not only upon his employee status, but also upon his inclusion in the appropriate bargaining unit for which the election is being conducted.

The mere fact that an election is called during a strike generally means that prior to the strike no union had been certified as the collective bargaining agent for the unit. The National Labor Relations Act, as amended by the Taft-Hartley Act, provides that no more than one election may be held in any twelve-month period.¹ Though no time limit was set in the Wagner Act,

¹ Labor-Management Relations Act, Section 9 (c) (3), 61 Stat. 143, (1947), 29 USCA Section 159 (Supp. 1947).

the Board held the certification good for a reasonable time, usually a year.² With certification the pre-strike status quo is preserved during the strike insofar as the collective bargaining obligation is concerned.³

The important question of the eligibility of workers out on strike to vote in a collective bargaining election will be discussed herein. The answer will depend on whether or not a worker on strike retains his employee status. Is a person out on strike an employee? How does he retain such status? How is it lost? Does the type of strike affect that status? And under the amendatory provisions of the Labor-Management Relations Act, is he entitled to reinstatement?

2 In re Kimberly-Clark Corporation, 61 NLRB 20 (1945).

3 "Right to Vote During an Economic Strike," University of Chicago Law Review, XVI, 1948-1949, 537.

CHAPTER II

ELIGIBILITY TO VOTE

The earliest leading decision regarding the eligibility of strikers to vote in a collective bargaining election was rendered by the National Labor Relations Board in In re Sartorius and Company and UMW (1938), 9 NLRB 19 and in a supplemental decision in In re Sartorius and Company and UMW (1938), 10 NLRB 493. The facts underlying the two cases and the rulings of the National Labor Relations Board are as follows:

Sartorius and Company was engaged in the manufacture and preparation for sale of cosmetics, such as nail polish and its accessories. United Mine Workers of America, District 50, Local 12090, was a labor organization affiliated with the Committee for Industrial Organization, admitting to membership all persons, except supervisory and clerical employees employed in New York City in the manufacture and preparation for sale of cosmetics.

On June 27, 1938, and on at least two occasions thereafter conferences took place between the Union and the Company. The Union stated that it represented a majority of the employees and demanded exclusive representation rights over the Company's employees, but the Company refused to grant such recognition. It was agreed that the National Labor Relations Board should determine if the Union represented a majority of the employees.

There was read into the record at the hearing a list of employees as of June 24, 1938. Of the thirty-five employees on the list, thirty were in the appropriate unit. Nineteen membership application cards were introduced in evidence. On July 18, 1938, a strike of the employees was called by the Union. It was still continuing at the time of the hearing. All except five employees, including one union member, went out on strike. In the next five days after the commencement of the strike, some of the striking employees returned to work and the Company also employed six new employees, so that on July 21, 1938, there were seventeen employees in the appropriate unit who were actually working.

The Board in its original decision (9 NLRB 19) held that the employees who went out on strike were eligible to participate in the selection of the bargaining representative of the employees because their status as employees for the purposes of the Act is expressly preserved by Section 2 (3) which provides that the term "employee" shall include any individual whose work has ceased "as a consequence of, or in connection with any current labor dispute." But it also held that the new workers hired during the strike are employees within the unit. The number of employees eligible to vote then is determined by adding the number of replacements to the number who were in the unit prior to the strike.

However, the supplemental decision in 10 NLRB 493 held the prior decision erroneous. The Board said that if the workers who have during the currency of the strike replaced the strikers are permitted to vote and if the strikers are also permitted to vote, then possibly twice as many as can be

employees may participate in the election. This was not the intent of Congress. Yet the intent that strikers should remain employees for the purposes of the Act is clear (Section 2 (3)).

By preserving to employees who go out on strike their status as employees and the rights guaranteed by the National Labor Relations Act, the Act contemplates that during the currency of a strike, the employer and the striking employees may settle the strike, with the striking employees returning to their former jobs, displacing individuals hired to fill those jobs during the strike. Strikes are commonly settled in this manner. The hold of individuals who, during the currency of the strike, occupy positions vacated by striking employees is notably tenuous. NLRB v. Remington Rand, 94 F. 2d 962.

To accord such individuals (the replacement workers) while the strike is still current, a voice in the selection of the bargaining representative of the employees in the appropriate unit would be contrary to the purpose of the Act as set forth in Section 2 (3) and the ends contemplated by it, since it might effectively foreclose the possibility of the settlement of the labor dispute, either by the return of the striking employees to their jobs or by some other settlement agreement.

The possibility of the settlement of the strike should not be foreclosed during the currency of the strike. Accordingly, the Board held that such individuals replacing the employees during the currency of the strike are not eligible to participate in the election. The workers out on strike are employees and are entitled to vote in the selection of the bargaining repre-

sentative of the employees.⁴

The Board emphasized in the Sartorius case that strikers remain employees during the currency of the strike and are eligible to vote. However, if at the time the election is directed, the strike is no longer current and the strikers have been replaced by new workers, then the striking workers are not any longer employees within the meaning of Section 2 (3) as was the case in In re Standard Lime and Stone Company (1939), 17 NLRB 7. The employees went out on strike prior to the enactment of the National Labor Relations Act. The strike was still current on September 19, 1935. By the end of July 1936 the company had replaced the striking employees. Except for sporadic activity for several months after September 15, 1936 the record is barren of any strike activity for a period of four years.

The Board made a finding that the strike which was commenced on April 24, 1935 was no longer current at the time of the proceeding. The doctrine of the Sartorius case is, therefore, inapplicable. Inasmuch as the strike was not caused by an unfair labor practice and is no longer current, the former employees who went out on strike and who have not since returned to work for the company are not employees within the meaning of Section 2 (3) and accordingly are excluded from participation in the selection of a bargaining representative.

One of the primary concerns of the Act is the peaceful settlement of a labor dispute. The employer and the union in settling a labor dispute may

⁴ See also In re Easton Publishing Company, 19 NLRB 43; In re Eastern Box Co., 30 NLRB 194; and in In re Klanber Wangeheim Co., 25 NLRB 28.

agree that the employees on strike will not displace the new workers hired during the strike, but will be placed on a preferential hiring list for re-employment when work becomes available. Does this agreement result in a forfeiture of the right of the strikers to vote in a representative election proceeding?

In the case of In re Tennessee Copper Company, 25 NLRB 22 such an agreement was executed between the parties. The striking employees relinquished the possibility of securing their jobs by the displacement of the persons hired during the strike. The Board ruled that the consideration which would warrant denial to the replacement workers of the right to participate in the selection of a bargaining representative does not exist. The persons hired during the currency of the strike to the positions of the striking employees are eligible to vote. Such persons are employees and are not subject to displacement by the strikers.

However, the execution of the agreement did not forfeit the right of the striking employees also to participate in the selection of the bargaining representative. The settlement was in accordance with the declared policy of the Act to obviate industrial strife and the resultant burdens upon commerce through resort to the collective bargaining procedure. The effectuation of the purpose of the Act requires recognition of this preferential status acquired through collective bargaining. That status gives the persons possessing it an interest in the employment and conditions of employment which entitle them to vote.

The striking employees on the preferential hiring list and the re-

placement workers are both eligible to vote.

The Board did not specifically state in the Tennessee Copper case that the strikers on the preferential hiring list remained employees within the meaning of Section 2 (3) of the Act. However, for such strikers to be eligible to vote in the election, it is necessary that they be employees. In re Sartorius and Company and UMW (1938), 10 NLRB 493 and In re Eastern Box Co., 30 NLRB 104. The strikers are not employed or entitled to immediate employment. The Act in Section 2 (3) states that "the term 'employee' shall include any employee. . . and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute. . . ." The Board by its ruling has interpreted the phrase ". . . ceased as a consequence of, or in connection with, any current dispute. . . ." to encompass those strikers who are not entitled to reinstatement to their former positions, but are placed on a preferential hiring list by reason of a settlement agreement.

A striker who fails to return to work after the conclusion of the strike and whose name was dropped from the payroll when he failed to report to work after two notifications from the employer is no longer an employee of the employer. Therefore, he is not eligible to vote in a bargaining election.

In re Jones and Laughlin Steel Corp., 27 NLRB 47.

CHAPTER III

IN RE RUDOLPH WURLITZER COMPANY

In 1941 the National Labor Relations Board departed from its prior ruling in the Sartorius case and held that the persons eligible to vote in the selection of a bargaining representative shall be all employees, both the strikers and those who have been hired to replace them. In re Rudolph Wurlitzer Company (1941), 32 NLRB 163.

The Board by this ruling followed the decision rendered in the first Sartorius case in 9 NLRB 19 which was subsequently overruled by a supplemental decision which set forth the Sartorius doctrine in 10 NLRB 493.

The Rudolph Wurlitzer Company operated a plant at DeKalb, Illinois, where it was engaged in the manufacture of pianos and accordions. The Company employed approximately six hundred employees at this plant.

Piano, Organ and Musical Instrument Workers' Union, Local 1190, chartered by the United Brotherhood of Carpenters and Joiners of America, was a labor organization affiliated with the American Federation of Labor. It admitted to membership employees at the DeKalb plant of the Company.

On February 20, 1941, 1941, Local 1190 requested the Company to recognize it as exclusive representative of the employees at this plant. On March 7, 1941, the Company denied this request stating that it would not recognize Local 1190 until it was certified by the Board.

A strike of the employees was called by the Local. Thereafter, the Local filed a petition for investigation and certification as the bargaining representative of the employees of the Company. Twenty-three of the striking employees had not returned to work at the time of the hearing on this petition. All of the parties stipulated that the dispute was current at the time of the hearing. A question arose as to the right of the strikers and their replacements to vote in the election. As regards the twenty-three striking workers, it was held that as the strike was still current, they were employees and therefore were entitled to vote. The principle question arose as to the right of the replacements to vote.

The Board hearing the case was a re-constituted one, consisting of Chairman Millis and Members Leiserson and Smith. The Board discussed the respective rights of the striker and the replacement to vote in a bargaining representation election. In support of the Sartorius doctrine it has been contended that to permit both strikers and replacements to vote would mean that the number of voters would be in excess of the number of jobs for employees. This is true, but the Board frequently rules that more employees are eligible to vote than there are jobs. Employees who are ill, or on vacation, or temporarily laid-off, or called for military service and those who fill their positions are permitted to vote. Employees placed on a preferential hiring list are permitted to vote because of the expectancy of employment in future.⁵

⁵ See In re Tennessee Copper Company, 25 NLRB 22; Matter of The Johnston Glass Company, Inc., 30 NLRB 629; Matter of American Cyanamid Company, 19 NLRB 1026.

But suppose practically all employees go on strike and the employer fills their jobs with replacements. If both are allowed to vote, there would be twice as many votes as jobs. But if the so-called strike-breakers were made ineligible to vote, it would mean the scale would be turned against the employer who is not charged with any unfair labor practice. The controlling principle, according to Chairman Millis, was that "in purely economic strikes, the employer and striking employees should have equal rights; the Board should be neutral."

Under the Act strikers are employees as long as the dispute is current. The Board and the courts have consistently ruled that men hired as permanent replacements during an economic strike are employees whom the employer may not be required to discharge in order that the strikers may be reinstated to their jobs. NLRB v. Mackay Radio and Telegraph Company (1938), 304 U.S. 333, 58 S. Ct. 504. The strikers and the permanent replacements should have lawful claims to their jobs. Both should have the same rights to vote in a representative election proceeding.⁶

Board Member Smith, in a dissenting opinion, relies on the Sartorius doctrine and points out that the facts in the Wurlitzer case are the same as those in the Sartorius case. There is no reason for applying a different rule. The Sartorius doctrine conforms with the realities of labor relations. To the contention made that "the Board frequently rules that more employees are eligible to vote than there are jobs," Member Smith states that none of the

⁶ See In re Ideal Seating Company, 16 NLRB 166; In re J. L. Bronders and Sons, 50 NLRB 325; In re Gross Galesburg Co., 56 NLRB 198, In re Lloyd Holleston, Inc., 68 NLRB 99.

cases are comparable to the one in question, for in none of those cases is there the conflict in interest between the two persons who vote by virtue of the same job as there is in the Sartorius case. It is this conflict in interest between the two persons having a single job which makes the election an ineffectual instrument for settling the labor dispute, particularly when all employees go on strike and the employer fills their places.

The reasoning of Chairman Millis in the Wurlitzer case is substantially the same as that of Member Leiserson in his dissents in earlier cases⁷ and since Smith is no longer a member of the Board (replaced by Gerald Reilly in 1942), the Sartorius doctrine is of no further effect and the majority opinion in the Wurlitzer case will govern future decisions.⁸

The rule set forth in the Wurlitzer case that both strikers and replacements are entitled to vote in cases involving a current economic strike is not applicable to a situation where there is pending before the National Labor Relations Board a charge that the strike was caused by unfair labor practices and that the employer refused to reinstate strikers.

In the case of In re Kellburn Mfg. Co. Inc. (1942), 45 NLRB 322, the union began an organization campaign of the employees of the Kellburn Company. Eight employees who were active in the campaign were discharged.

7 Matter of Horace G. Prettyman, 12 NLRB 640; In re Eastern Publishing Company, 19 NLRB 389.

8 Samuel Salny, "Rights of Strikers and Strike Breakers to Vote in N.L.R.B. Elections," Law Society Journal, No. 2, May, 1942, 1936-140.

Eighty employees went on strike, not authorized by the union. The company hired replacement workers. Eight days later the employees made an unconditional offer to return. The employer refused to rehire them. The union filed an unfair labor practice charge against the employer.

As to the thirteen employees whose discharges are alleged to be discriminatory, if the company is found to have engaged in an unfair labor practice, the Board will order reinstatement and their continuing employee status will have been established. The thirteen employees are permitted to vote. However, their votes are impounded until the unfair labor charges have been resolved. With respect to the eligibility of the strikers, it is clear that they ceased their work as a result of a current labor dispute and that they did not quit their employment.

This case is distinguished from the Wurlitzer case. Here the strike is not an economic one, but a strike caused by an unfair labor practice. If such is substantiated, the Board will order the company to offer reinstatement upon application by such employees. They are entitled to vote but the validity of the voter will not be passed upon until after the unfair labor practice charge is resolved.

The replacement employees are in the same position as discharged employees. Their status remains to be determined. Upon making an unconditional offer to return to work, the striking employees acquired a right to available jobs, which, for the purposes of determining eligibility to vote, is superior to the right of employees hired after the unconditional offer.⁹

⁹ See In re Dossin's Food Products (1944), 56 NLRB 739; also

If the Board finds that the company has committed an unfair labor practice, then the thirteen employees will be entitled to reinstatement, and the company must discharge, if necessary, the replacement workers.

If such is the case, the votes cast by the thirteen employees will be counted in determining the selection of the bargaining representative, but those of the replacement workers will not.

Participation of employees in an illegal strike does not per se deprive them of employee status. Such strikers are eligible to vote as long as the employer does not take affirmative steps to discharge such employees prior to the election. In re Worcester Woolen Mills Corp., 69 NLRB 51.

The National Labor Relations Board in 1945 reiterated its policy rendered in prior decisions that economic strikers although replaced are employees and are eligible to vote where the strike is still current. In re Columbia Pictures Corp., 64 NLRB 490. The replacement of the strikers does not deprive them of their employment status since the strike is current at the time of balloting.

The language and legislative history of the Act impels the conclusion that employees who have ceased work as a consequence or in connection with any current labor dispute shall be permitted to participate in the choice of a bargaining representative.¹⁰

Matter of Johnson-Carper Furniture Company, Inc., 14 NLRB 1030; In re Klauber Wangeheim Company, 25 NLRB 245; In re Eastern Box Company, 30 NLRB 673; In re Harlich Manufacturing Company, 31 NLRB 223.

¹⁰ In re Sartorius and Co. and UMW, 10 NLRB 493; In re Rudolph Wurlitzer Co., 32 NLRB 163; In re New England Collapsible Tube Co., 37 NLRB 568.

The striking employees' expectancy of future employment is not so remote or minute as to warrant withholding from them a voice in the selection of a representative. It is impossible to determine, despite what any employer may predict, whether or not the employees will return to their jobs, even if the strikers have been replaced. It is common knowledge that strikes have been frequently concluded by settlements pursuant to which the strikers have been reinstated. In re Remington Rand Company, 94 F. 2nd 862. Were the Board to hold that strikers are ineligible to vote because they have no expectancy of returning to work, the holding would be tantamount to a determination that the struggle had been lost by the strikers. Though economic strikers have no absolute right to their jobs,¹¹ they should be permitted, while the strike is still current, to select representatives to bargain with the employer on the question of their possible reinstatement.

The success or failure of such bargaining is not the concern of the Board, but it is its concern to make certain that the bargaining is not made abortive by denying to the strikers the opportunity to select a spokesman. Any other policy would leave them no alternative but continued use of a naked economic power and would deny recourse to the peaceful election machinery of the Board at the very moment when it is acutely needed.

¹¹ NLRB v. Mackay Radio and Telegraph Company (1938), 304 U.S. 333, 58 S. Ct. 904.

CHAPTER IV

TAFT-HARTLEY AMENDMENT: SECTION 9 (c) (3)

In enacting the amendatory provisions to the National Labor Relations Act, members of the Eightieth Congress apparently agreed with the Board's decision in the Matter of Columbia Pictures Corporation, 64 NLRB 490, wherein the Board stated that if the strikers were ineligible to vote because of no expectancy of returning to work, then such a ruling "would be tantamount to a determination that the struggle had been lost by the strikers." But the affirmative policy of the Columbia Picture Corporation case was turned into a negative one by the enacting members of Congress when Section 9 (c) (3) was written into law. It reads as follows: "Employees on strike who are not entitled to reinstatement shall not be eligible to vote." An attempt is made to deny to the strikers the peaceful election machinery of the Board "at the very moment when it is acutely needed."

The Senate in its report¹² stated that when elections are conducted during a strike, situations frequently arise wherein the employer has continued to operate his business with replacement workers. If such a strike is an economic one and not caused by unfair labor practices of the employer, strikers permanently replaced have no right to reinstatement. According to the Senate

¹² Senate Report 105, Eightieth Congress, 25.

report, it appears clear that a striker having no right to reinstatement should not have a vote in the selection of a bargaining representative. The committee bill so provided.

The leading decision interpreting Section 9 (c) (3) is In re Pipe Machinery Company, 76 NLRB 247 (1948). The Pipe Machinery Company was engaged in the manufacture of pipe threading machinery, small tools and dies in Cleveland, Ohio.

The petitioner, Pipe Machinery Company Independent Union, was a labor organization claiming to represent employees of the Company. International Association of Machinists, District 54, herein called the Intervenor, was a labor organization claiming to represent employees of the Company.

The Company refused to recognize the Petitioner as the exclusive bargaining representative of its employees until the Petitioner had been certified by the Board in an appropriate unit.

A strike was in effect since February 1947. The Company replaced some of the strikers and continued operation of the plant. All parties requested an immediate election despite the currency of the strike.

Although the Act clearly indicates that only those employees who are entitled to reinstatement shall be eligible to vote, it is apparent that it cannot be accurately determined at this stage of the proceeding which of the striking employees have been validly replaced and which individuals are still entitled to reinstatement. To do so will require ascertaining the facts as of the date selected to test voting eligibility.

Board experiences have demonstrated the advisability in such circum-

stances of proceeding with an election forthwith, of using a current payroll, and of permitting affected individuals, strikers and replacements, to cast ballots under challenge with the proviso that their ballots shall not be counted unless the results of the election make it necessary to do so. By permitting the strikers and their replacements to cast ballots, it is not to be taken as a reiteration of the doctrine set forth in In re Rudolph Wurlitzer Company, 32 NLRB 163 upon which Section 9 (c) (3) of the amended Act has had considerable impact. The Board indicated that it was merely using this technique to lay the basis for ascertaining the active employment status of the strikers and their replacements.¹³

The Board further stated that nothing in its direction of election should be construed as indicating that it has prejudged in any respect any of the questions which may be drawn into issue by a challenge to the eligibility of voters, such as whether a new employee is a permanent replacement, a striker has been validly replaced or whether an employee's position no longer exists by reason of its permanent discontinuance for economic reasons.

During the election held at the Pipe Machinery Company, seventy-four ballots were challenged. Forty-three were those of pre-strike employees who had returned to work. They were challenged on the ground that they were temporary employees. Ballots of certain replacements and pre-strike employees

¹³ See also In re H. O. Canfield Company, 76 NLRB 92; In re Colonial Hardwood Flooring Company, 76 NLRB 150; In re Braz Mills Inc., 78 NLRB 153; In re Rowe-Jordan Furniture Company, 81 NLRB 28.

were challenged on the ground that these workers would be replaced by strikers having greater seniority.

At the hearing, reported in 79 NLRB 1322, the Company testified that it had advised the strikers that if they did not return to work new workers would be hired to fill the jobs available. The applicants were told that they would be hired as permanent and not as temporary employees. The men hired testified that they had accepted permanent employment and planned to continue working for the Company. In almost all instances these employees had, in their previous employment, engaged in the same or similar work as that for which they were hired and were recruited from the geographical area in which the plant is located.

There was no showing that any of the individuals on strike ever made an unconditional application for reinstatement. The Board held that the replacement workers were hired as permanent employees, that they are eligible to vote, that the strikers are not entitled to reinstatement, and therefore, are not eligible to vote. The contention that certain strikers are entitled to vote because they have greater seniority than either the replacements or employees who abandoned the strike and returned to work is without merit. Seniority is irrelevant in the determination of which employees are entitled to vote.

In its decision the Board stated

Section 9 (c) (3) places no limitation on the right to strike although it may indeed discourage its exercise in some situations by denying the franchise to those strikers who lose their rights to reinstatement. The intervenor asserts that this places such hazards upon the exercise of the right to strike as to make the guarantee of that right in Section 13 of the Act a nullity. This contention, being directed to the desirability of the amendment contained in Section 9 (c) (3), should be directed to

the Congress and not to this Board.

It is the duty of the Board to administer the law as written, not to pass upon the wisdom of its provisions. Matter of National Maritime Union of America, 78 NLRB 971.

For the purpose of determining eligibility to vote in National Labor Relations Board elections, a strike is assumed to be an economic one where no unfair labor practice case involving the parties is before the National Labor Relations Board.

The ruling in the Pipe Machinery case, 76 NLRB 37, is controlling even though the strike occurred after the Board directed an election and established an eligibility date. In re Rowe-Jordan Furniture Corporation, 81 NLRB 28.

Eligibility of strikers to vote in a representation election under the amended Act does not depend only upon whether they are employees within the meaning of the Act, but rather upon whether they are entitled to reinstatement. Thus the rules which govern the eligibility of employees for reinstatement govern the eligibility of employees to vote. In re Belmont Radio Corp., 83 NLRB 5.

CHAPTER V

ELIGIBILITY NOW DETERMINED BY REINSTATEMENT

The Supreme Court of the United States passed on the question of the reinstatement of employees in NLRB v. Mackay Radio and Telegraph Company (1938), 304 U.S. 333, 58 S. Ct. 904. A union of telegraphers seeking recognition as collective bargaining representatives called a strike in San Francisco. The Company replaced the strikers with men from other cities to whom it offered permanent jobs. There was no evidence of an unfair labor practice before the strike. After the strike failed, the Company offered jobs back to all but five of the strikers. The Board found that by refusing to reinstate the five men in question, thereby discharging the said employees, the employer committed an unfair labor practice. The Board ordered reinstatement.

The Supreme Court in its decision held that under the findings the strike was a consequence of, or in connection with, a current labor dispute as defined in Section 2 (9) of the Act. The strikers remained employees under Section 2 (3) of the Act which defines an employee as one "whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice. . . ." As employees they were protected under the Act against unfair labor practices.

It was not an unfair labor practice for the Company to replace the striking employees with others in an effort to carry on the business. Although

Section 13 provides that "Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike," the Supreme Court stated it does not follow that the employer, guilty of no act denounced by the statute, has lost the right to protect and continue his business by filling places left vacant by the strikers.

The employer is not bound to displace men hired to take the strikers' places in order to provide positions for economic strikers. It is not an unfair labor practice to reinstate only so many of the strikers as there are places remaining to be filled. But the contention is that the employer discriminated in reinstating striking employees by refusing to rehire certain men for the reason that they had been active in the union. Section 8 of the Act holds that it is an unfair labor practice for the employer to interfere with, restrain or coerce employees exercising their right to form, join or assist labor organizations, to engage in concerted activities for the purposes of collective bargaining or for an employer to discriminate in regard to hire or tenure of employment by discouraging membership in any labor organization.

There was evidence that several of the five men in question were told their union activities made them undesirable to their employer. The Board found that the Company discriminated against the five on account of their union activity. This is an unfair labor practice. The Company might have refused reinstatement on the ground of skill or ability. It did not. The five members are entitled to reinstatement with back pay.¹⁴

¹⁴ See also NLRB v. Lettie Lee, Inc., 140 F. 2nd 243 (C.C.A. 7, 1943).

A distinction is made between economic strikers and unfair labor practice strikers. The latter are employees engaged in a strike caused or prolonged by an unfair labor practice of the employer. Economic strikers have no right to reinstatement if the employer has hired replacements before the strikers unconditionally apply for reinstatement. If the employer has not hired replacements before such time, he is under no unconditional obligation to reinstate them. He may refuse to reinstate, just as he may refuse to re-hire or reinstate other workers, so long as the refusal is not based on anti-union discrimination or to discourage employee participation in strikes. The employer may refuse to reinstate an economic striker if his job no longer exists as a result of technological advances or economic conditions. But the refusal may not be based on union activity. The right of an economic striker is like that of other employees; the right not to be discriminated against because of union activity or participation in lawful concerted activity. In re National Grinding Wheel Company, 75 NLRB 905; In re Old Life Line Insurance Company, 96 NLRB 494 and In re Colonial Shirt Company, 96 NLRB 711.

Refusal to reemploy striking employees who strike because of an unfair labor practice, or whose strike was prolonged by an unfair labor practice, and who have not been guilty of illegal acts such as violence, has generally been held to violate the Act where positions are available or could be made available by the discharge of strike replacements. Refusal to reinstate because of the strikers' participation in the strike has been held to be discriminatory. NLRB v. Greater New York Broadcasting Corporation, 147 F. 2d 337 (C.C.A. 2, 1945).

Employees guilty of unlawful conduct during a strike, even where the strike is occasioned by the employer's unfair labor practices, forfeit the protection afforded strikers by the Act. Thus, where employees take and refuse to relinquish possession of the plant, the employer is justified in discharging them. Denial of the Board order of reinstatement was proper. NLRB v. Fansteel Metallurgical Corporation (1939), 306 U.S. 240.

An employer may refuse reinstatement to economic strikers who participate in mass picketing (provided he has formally discharged them). The National Labor Relations Board so ruled in the case of In re International Nickel Company, 77 NLRB No. 39. The facts were that strikers assembled between fifty-one and one hundred pickets near each of the two plants' entrances. When supervisors reported for duty, they were advised that no one was permitted to enter the plant except the general manager and the production manager. Supervisors who were on duty when the strike started were told that they would not be able to get back into the plant, if they went out.

It was held that the supervisors were actually barred by an implied threat of violence. They were faced with a clear and present danger of bodily harm if they elected to enter the plant. The conduct went beyond peaceful persuasion and constituted concerted activity not protected by the Act. In re International Nickel Company, 77 NLRB no. 39.

Employees on strike to force an employer to pay higher wages or otherwise change working conditions are generally entitled to reinstatement upon application unless they have been replaced by new employees during the strike. In re Electric Auto-Lite Company, 80 NLRB 1601. However, if they go

out on strike in violation of their union contract, they are not entitled to reinstatement and the employer can refuse to reinstate them as long as the employer did not breach the contract, or did not commit an unfair labor practice, and the discharge is based on the illegal strike and not because of their union activity. In re Joseph Dyson and Sons, Inc., 72 NLRB 445.

Participation in a strike conducted in an unlawful manner does not work an automatic termination of employment. The employer must take the positive step of discharging or refusing to reinstate such strikers. Stewart Die Casting Corp. v. NLRB, 114 F. 2d 849 (C.C.A. 7, 1940). Moreover, strikers who do not participate in or abet the unlawful conduct do not forfeit their rights under the Act.

The relative rights of a striker are dependent upon whether the strike is one caused by economic conditions or by an unfair labor practice of the employer. The Board has held that strikes must be presumed to be economic as distinguished from unfair labor practice strikes unless they are found by the Board to have been caused by the unfair labor practices of the employer in question. An initial finding that a strike was caused by an unfair labor practice may be made only in unfair labor practice proceedings. The Board may not review the General Counsel's administrative dismissals of unfair labor practice charges, regardless of the grounds for his action. The Board has no choice then, but to find that the strike was an economic one. In re Times Square Stores, 79 NLRB 361. Though a strike initially may be caused by a dispute over economic conditions, action of the employer may convert it into an unfair labor practice strike and the strikers will have greater protection,

especially regarding reinstatement, under the terms of the Act. An economic strike is converted into an unfair labor practice strike by the commission of an unfair labor practice which prolongs or aggravates the strike. If this occurs, reinstatement of strikers replaced by new workers will depend upon whether the conversion is held to the commission of the operative unfair labor practice.¹⁵

The Court of Appeals for the Seventh Circuit¹⁶ has held that the employer is not bound to discharge replacements permanently hired before the commission of the unfair labor practice. The court relied on the language in the Mackay case¹⁷ wherein it is stated that it is not an unfair labor practice for the employer to hire replacements in an effort to carry on his business. The employer is not bound to discharge the newly hired in order to create places for economic strikers upon their election to resume their employment. The Circuit Court's decision is of doubtful value since the Court failed to make the distinction that in the Mackay case the employer offered to reinstate all but five of the strikers, and in addition the Board found that the refusal to reinstate was based on the union activity of the five who, therefore, were entitled to reinstatement. There was no question in the Mackay case as to the retroactive conversion of the strike nor any question as to the discharge of replacements in order to make room for economic strikers which was the con-

15 "Reinstatement Rights--Conversion of an Economic Strike into an Unfair Labor Practice Strike," Columbia Law Review, 51, 7, 856.

16 NLRB v. Lightner Publishing Corp., 114 F. 2d 621 (C.A.A. 7, 1940).

17 NLRB v. Mackay Radio and Telegraph Company, 304 U.S. 333.

trolling issue before the Circuit Court.

The NLRB¹⁸ and the Circuit Courts of Appeal for the Second¹⁹ and the Fifth Circuits²⁰ have held that if an employer commits an unfair labor practice which prolongs or aggravates an economic strike, he is in the same position he would have been if the unfair labor practice caused the strike in the first place. He must reinstate all the strikers upon their application even if re-instatement requires the discharge of the replacement workers.

This view that the conversion is operative from the very inception of the strike seems to be in accord with the policy of the Act to eliminate obstructions to the flow of commerce, to encourage the practice and procedure of collective bargaining and to protect the concerted activity of the workers. Men on strike remain employees under Section 2 (3) of the Act. They are protected in concerted activity by Section 13 which provides that nothing in the Act, except as specifically provided therein, shall be construed so as "to interfere with or impede or diminish in any way the right to strike." On the other hand, the Act affirmatively denounces unfair labor practices. Labor and management disputes should be settled without the use of unfair labor practices.

18 In re Cathey Lumber Company, 86 NLRB 157.

19 NLRB v. Remington Rand Inc., 130 F. 2d 919 (C.C.A. 2, 1942).

20 NLRB v. Crosby Chemicals Inc., 188 F. 2d 91 (C.C.A. 5, 1951).

CHAPTER VI

PROPOSALS FOR REVISION BEFORE THE EIGHTY-THIRD CONGRESS

The provision that economic strikers who are replaced will not be entitled to vote can be a real blow to the union. It is designed to weaken substantially the practical value of the strike, and it would seem to place a real premium on obstinate conduct by the employer, especially when considered with other amendments in the Act. When the union demands that it be treated as the bargaining representative of the employees, the employer could provoke a strike by unreasonable conduct and refuse to bargain with the union. Strike-replacements would be hired by the employer; this has been made easier by Section 8 (b) (1) of the Act which prohibits coercion of employees by the union. The employer could then petition for an election in accordance with the right granted to him by Section 9 (c) (1) (B). Assuming that non-strikers would vote against the union, the employer need hire only a sufficient number of replacements to give him a total of fifty-one percent of the vote. The almost certain result in such a situation would be the failure of the union to obtain a majority vote. The Board would be powerless under Section 9 (c) (3) of the Act to direct another election in the same unit for a year, even if during that period the union actually becomes the majority representative of the workers.²¹

²¹ Charles Gregory and Harold Kats, Labor Law: Cases, Materials and Comments, Virginia, 1948, 910.

Moreover, by Section 8 (b) (4) (B) it would be an unfair labor practice for any other labor organization to assist the union in its attempt to secure recognition in absence of certification of the latter union by the Board. This operates in effect to penalize the union for not having safeguarded itself with certification prior to the strike. Proper strategy, however, may call for a strike rather than the long drawn out procedure before the Board.²² The same strategy on the part of the employer could result in the loss of bargaining representative status for the union in the event of a strike over contract terms, providing an election was not held within the preceding twelve-month period.

To give to the employer the means whereby he may disrupt the union's majority representation is to give him powerful inducement not to settle the strike, but rather to prolong it. The Senate in its minority report on the Taft-Hartley Amendments, stressed this when discussing the provision regarding eligibility to vote:²³

We deem it highly undesirable, because it enables an employer to secure the rejection of an established bargaining agent at the very time that the public interest makes it practically urgent that collective bargaining continue. . . . Anti-union employers are thus encouraged to refuse settlement of disputes in order to bring about strikes and thereby secure the defeat of the collective bargaining representative. We can think of few provisions in this bill better calculated to produce and prolong strife and to defeat collective bargaining.

Representative Madden of Indiana speaking before the House of Representatives of the United States stated that Section 9 (c) (3) is particularly

²² "Right to Vote During an Economic Strike," University of Chicago Law Review, XVI, 1948-49, 537-544.

²³ Senate Minority Report Number 105, Part 2 on Senate Bill 1126, Eightieth Congress, First Session, 1947.

vicious since an employer may file a petition for an election or have one filed by one or more employees in order to obtain the rejection of the bargaining agent "at the very time that the public interest makes it particularly urgent that collective bargaining continue."²⁴

Senator Robert A. Taft, principal author of the Taft-Hartley, recognizing the inequities and danger in the reinstatement provision, introduced during the early days of the Eighty-Third Congress, an amendment deleting that part of Section 9 (c) (3) relating to the eligibility of strikers to vote. He gave as his reason for the proposed amendment the fact that it may be used as a weapon against unions.²⁵ During periods of full employment it probably is not so effective, but if there was very considerable unemployment, it might be harmful. A similar bill was introduced by Senator Taft in 1949, but it never was enacted into law.

This action was endorsed by President Eisenhower. At the convention of the American Federation of Labor in September, 1952, he stated that the law "might be used to break unions. That must be changed. America wants no law licensing union-busting. Neither do I." To this, Walter P. Reuther, President of the Congress of Industrial Organizations, stated that the CIO says "Amen."²⁶

Considerable testimony was given before the Senate Committee on Labor

²⁴ Congressional Record, House, 93 Congressional Record 6537, June 4, 1947.

²⁵ Hearings Before the Committee on Labor and Public Welfare, United States Senate, Eighty-Third Congress, First Session on Proposed Revisions of the Labor Management Relations Act of 1947, 43.

²⁶ Ibid., 370.

and Public Welfare during the hearings on the proposed amendments to the Labor Management Relations Act. Much was said about the eligibility of strikers to vote.

Mr. Powell C. Grover, representing the United States Chamber of Commerce, stated that the proposal to strike from the Act the eligibility section rested upon inconsistency. It leaves intact the rule that the employer may hire replacements for economic strikers, but at the same time it allows the sharing of the voting rights which are inherent in the employee status with individuals whose employee status has been terminated within the terms of the governing law. If the right of the employer to replace strikers is to have any meaning, then the bargaining representative should be determined by those who are employees and not by those who were.²⁷

Employers who seek retention of the present rule proceed on the theory that replaced strikers are no longer employees. Section 2 (3) of the Act specifically states that the term "employee" shall include "any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute." Strikers are employees and are protected as such within the terms of the Act. If replaced, they then lose the right to vote for the bargaining representative, but they still are employees.

Mr. W. J. McGill, General Manager, Industrial and Public Relations, Standard Oil Company (Indiana), offered a rebuttal to the contention that the eligibility section of the Taft-Hartley Act is a union-busting provision:

The provision of the act under consideration has been referred to as a

27 Ibid., 170.

union-busting provision. Obviously, it can have no application if there is no strike. The union itself determines whether or not there is a strike. The possibility of economic strikers being replaced by other employees is a known, normal and fair risk inherent in striking. If that results in loss of majority status by the striking union, there is no escaping the fact that it is the union that busts itself by its strike. The risk of thus losing its majority status is not beyond the control of the striking union. Even the risk of replacements is not beyond the union's control. The hiring of replacements by the employer (which must be done under no more favorable conditions than have been offered to the union) should indicate the union's error in judgment in setting its demands. At such point, or at any other time, the union can immediately stop all further replacements by calling off the strike.²⁸

This approach is unrealistic and unsound. It is not the strike that results in the loss of bargaining representation. Neither is the right of the employer to hire replacements directly the cause. Rather, it is the Taft-Hartley Amendment disfranchising the striker which brings about the undesired end. It is for this principal reason that Senator Taft and President Eisenhower seek the change.

George Meany, President of the American Federation of Labor, speaking before the Senate Committee on Labor and Public Welfare during the hearings on the amendments to the Taft-Hartley Act gave a concise statement as to the proper relationship between the government and the workers in the field of industrial relations:

Labor's basic purpose in industrial relations is to make sure that men and women whose livelihood depends on wages can, through their own mutual effort, safeguard the standards of their pay, their job status and their working conditions through binding agreements with their employers. Working people look to their government to hold inviolate their rights of self-organization and collective bargaining. To give these human rights full effect and full meaning and to harmonize them with their property rights and management prerogatives of business, as well as with the welfare of the whole community, must likewise be the guiding aim of the

28 Ibid., 235.

government of a free nation.²⁹

James B. Carey, President of the International Union of Electrical, Radio and Machine Workers, CIO, presented an intelligent discussion for the repeal of the present provision. He stated that there still remain powerful employers who attempt to justify the present harsh rule, despite condemnation from responsible and authoritative sources. The employers maintain that union representatives seeking repeal are "guilty of agitation based on exaggeration and misinformation."³⁰

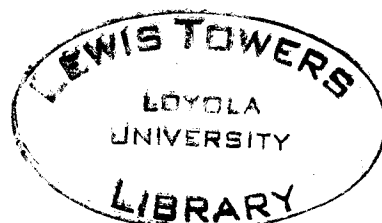
The Supreme Court in the decision of NLRB v. Mackay Radio and Telegraph Company, 304 U.S. 333, 58 S. Ct. 904, held that the employer was privileged to refuse to reinstate economic strikers to the extent that replacements had been hired during the strike. The right of the employer to replace strikers testified Mr. Carey, does not "require disfranchising them during the strike. To deny that a striker has an interest in reemployment, even though he may have been replaced by a strikebreaker, distorts the facts of industrial life. It is the presence of such an interest, rather than the availability of a specific job, which should determine whether a striker is eligible to vote."³¹ Allowing strikers and their replacements to vote does not result in inconsistency as was pointed out by the National Labor Relations Board. In re Wurlitzer Company, 32 NLRB 163.

Mr. Carey then pointed out that strikers remain employees and that

29 Ibid., 2034.

30 Ibid., 1855.

31 Ibid.



employers seek retention of the present rule so that they have an easy method of ending strikes:

Callously to deny that strikers have an interest in their jobs means a return to the outworn notion of a strike as an illegal conspiracy. Repudiation of the right of strikers to vote stems from a strikebreaking philosophy, directly contrary to that in Section 2 (3) of the act which recognizes that a striker remains an employee.

In practice, those who would deprive strikers of their status as employees intend to force settlement of all disputes on the employer's terms. They mean that strikes must result in acceptance of the employer's offer or in destruction of the strike and the union itself. They mean that strikers should be regarded as economic and social outcasts, who must endure punishment for having dared to take collective action against their employers.

We say a worker who strikes so that his family can eat and live satisfactorily must not be condemned to total loss of employee status. There can be no question about the vital and substantial character of the relationship between the striker and his employment. It is the strikebreaker whose attachment to the job is notoriously tenuous. If anyone should be ineligible to vote it should be the strikebreaker and not the striker, who by the very fact that he is striking demonstrates his tie to the enterprise where he has been working and desires to continue to work. At the very least, however, the fair and prompt settlement of industrial disputes requires rejection of the medieval notion advanced by employers who want to keep available an easy method for breaking a strike.³²

Fairness and justice require enactment of the proposal to allow economic strikers to vote in the selection of the bargaining representative. The right to strike guaranteed by the Act would have real meaning. It would also make for expeditious settlement of industrial disputes.

32 Ibid.

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