LABOR LAW

Reinstatement and Back Pay under the National Labor Relations Act

The Lumber and Sawmill Workers' Union, having been designated as the bargaining agent by the National Labor Relations Board, and being unable to reach an agreement with the Carlisle Lumber Co., called a strike. The company then formally discharged all workers and shut down. A few months later, preparing to resume operations, they required all applicants to be non-union men. The N.L.R.B. found the company guilty of unfair labor practices and ordered the reinstatement of the striking employees, except those who had received regular and substantially equivalent employment elsewhere; it also awarded back pay, less any amounts earned, to all strikers from the time of the unfair labor practice. The court, through Judge Haney, upheld the Board's order as being constitutional; refused to require the Board to take further evidence; and refused to deny the Board's order because of violence by the Union. *N.L.R.B.* v. *Carlisle Lumber Co.*, 94 F (2d) 138 (C.C.A. 9th, 1938).

In *Mooresville Cotton Mills* v. *N.L.R.B.*, 94 F (2d) 61 (C.C.A. 4th, 1938), the United Textile Workers of America called a strike. The mills continued operating and hiring men. The N.L.R.B. found that the company had discriminated against eight men by refusing to reinstate them, and ordered reinstatement of all eight with back pay. Judge Soper, speaking for the court, affirmed the order as to four men and found that the remaining four had received substantially equivalent employment elsewhere and were not entitled to reinstatement, but were entitled to back pay for the period between refusal of reinstatment and obtainment of other employment.

Another case just decided by the N.L.R.B. is also worthy of note. The Board found that the employer being guilty of violence, did not come before the Board with clean hands in asking it to refuse reinstatement to employees also guilty of violence, but otherwise entitled to it. Evidence of violence by the strikers was held to be relevant in deterbining whether it is equitable for the Board to order reinsatement, but the Board took into consideration evidence only of convictions and pleas of guilty by individual strikers. Strikers convicted of felonies were denied reinstatement, but others, convicted of misdemeanors, were ordered reinstated, the employer being found to have been responsible for more serious acts of violence than those to which the strikers pleaded guilty.

In Re Republic Steel Corp. and *Steel Workers' Organizing Committee*, 2 L.R.R. 224 (Apr. 18, 1938).

Of the several points raised by these three opinions this note will confine itself to: (1) Reinstatement with back pay of discharged employees; (2) Reinstatement and right to back pay for striking employees; (3) Substantially equivalent employment elsewhere as a bar to reinstatement; (4) Violence by strikers as a bar to relief; (5) Admission of new evidence.

In regard to the first point the National Labor Relations Board has repeatedly ordered reinstatement with back pay of men discriminately discharged. *In Re Ford Motor Co.* and *Int'l Union, United Auto Workers of America*, 1 L.R.R. 449 (Dec. 1937); *In Re Montgomery Ward & Co. Inc.* and *United Mail Order and Retail Workers of America*, 1 L.R.R. 627 (Jan. 1938); *In Re Cardinale Trucking Corp.* and *Int'l Ass'n of Machinists*, 1 L.R.R. 688 (Feb. 1938); and others. In fact this power is expressly conferred in the Act. 29 U.S.C. 160(c). The courts have upheld this power and its constitutionality. *Appalachian Electric Power Co.* v. *N.L.R.B.*, 93F(2d) 985 (C.C.A. 4th, 1938); *N.L.R.B.* v. *Remington Rand Inc.*, 94F(2d) 862 (C.C.A. 2d, 1938); *N.L.R.B.* v. *Jones & Laughlin Steel Corp*, 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893, 108 A.L.R. 1352 (1937); *N.L.R.B.* v *Pacific Greyhound Lines Inc.*, 91F(2d) 458 (C.C.A. 9th, 1937); *Agwilines Inc.* v. *N.L.R.B.*, 87F(2d) 146 (C.C.A. 5th, 1936). In ordering the payment of back wages the Board has often determined the amount of back pay. *In Re Wald Transfer & Storage Co. Inc.* and *Int'l Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America*, 1 L.R.R. 206 (Sept. 1937); *In Re Cardinale Trucking Corp., supra; In Re Montgomery Ward & Co. Inc., supra.* This power also was sustained in *N.L.R.B.* v. *Pacific Greyhound Lines Inc., supra*, as well as in *N.L.R.B.* v. *Carlisle Lumber Co., supra.*

The same treatment has been accorded striking employees as discharged ones. *In Re Lenox Shoe Co., Inc.* and *United Shoe Workers of America*, 1 L.R.R. 401 (Dec., 1937); *In Re Wald Transfer and Storage Co., supra; In Re American Mfg. Co.* and *Textile Workers' Organizing Committee C.I.O.*, 1 L.R.R. 720 (Feb., 1938). But there has been controversy on this point among the courts. Under the Act an employee who strikes is still considered an employee. 29 U.S.C.A. Sec. 152(3). The court in the *Carlisle* case, *supra*, citing *Jeffrey-DeWitt Insulator Co.* v. *N.L.R.B.*, 91F(2d) 134 (C.C.A. 1937), stated that the relationship of employer and employee is not completely terminated by a strike, but that a new status arises—that of a

"striking employee." The court stated that it had not held to the contrary in *N.L.R.B.* v. *Mackay Radio & Tel. Co.*, 87F (2d) 611, Rehearing 92F (2d) 761 (C.C.A. 9th, 1937). In that case Judge Wilbur had held that reinstatement can be required only when an employee ceased work because of an unfair labor practice, and when work ceased before that time, to require reinstatement is to force the employer to make a new contract, violative of the 5th Amendment. Judge Garrecht, dissenting, pointed out that the Act clearly states that the employment relation does not cease when there is a strike, and that the Act applies when the men cease work in consequence of a labor dispute even before an unfair labor practice. The court in the *Carlisle* case, *supra*, evidently felt that the situation was different, as the strike there occurred at the time of the unfair labor practice. It is significant to note that on Feb. 28, 1938, the United States Supreme Court granted a writ of certiorari in the *Mackay* case.* Other courts have sustained the constitutionality of this section of the Act as to due process. *N.L.R.B.* v. *Remington Rand Inc.*, *supra*, where the *Carlisle* case was cited as overruling the *Mackay* case; *N.L.R.B.* v. *Pacific Greyhound Lines Inc.*, *supra*; *Black Diamond Steamship Corp.* v. *N.L.R.B.*, 94F(2d) 875 (C.C.A. 2d, 1938); *N.L.R.B.* v. *Jones & Laughlin Steel Corp.*, *supra*.

On the issue of back pay the Board has not distinguished men who have struck from men who were discharged, and has awarded back pay from the date of refusal to reinstate until the actual reinstatement. *In Re Boss Mfg. Co.* and *Int'l Glove Workers of America*, 1 L.R.R. 80 (Aug., 1937); *In Re Wald Transfer & Storage Co.*, *supra*; *In Re American Mfg. Co.*, *supra*. The courts in general uphold the exercise of this power. *N.L.R.B.* v. *Black Diamond Steamship Corp.*, *supra*, and *N.L.R.B.* v. *Carlisle Lumber Co.*, *supra*, accepting this case as overruling *N.L.R.B.* v. *Mackay Radio & Tel. Co.*, *supra*.

The fact that an employee has at the time of the Board's decision, substantially equivalent employment elsewhere, has been regarded by the Board as a bar to reinstatement. *In Re Hopwood Retinning Co. Inc.* and *Metal Polishers, Buffers, Platers and Helpers Int'l Union*, 1 L.R.R. 561 (Jan. 15, 1938). The Board in one case held that employees who had obtained substantially equivalent employment elsewhere, had their choice as to reinstatement. *In Re Highway Trailer Co.* and *U.A.W. of America*, 1 L.R.R. 232 (Sept., 1937). The courts generally have upheld the former type of decision. *N.L.R.B.* v. *Carlisle Lumber Co.*, *supra*; *N.L.R.B.* v. *Remington Rand Inc.*, *supra*. But in the *Mooresville* case, *supra*, the court held that the time to determine the right to reinstatement is at the date of the court decision. The

court in that case rejected the Board's contention that Sec. 10(c), [29 U.S.C. 160(c)], is broad enough to give the Board power to require reinstatement whether other employment has been obtained or not. The court said that Sec. 10(c) did not give such broad powers, but that Congress only wished to indicate that the employer-employee relationship is not terminated by a strike.

The Board's position on this point would seem the better. The broad policy behind the Act is to protect self-organization of employees. The right to reinstatement is a necessary incident to this policy. The ruling of the *Mooresville* case will be a powerful deterrent to a striker's search for new employment. The striker will be reluctant to take another job, if he stands to lose his former one and perhaps his seniority rights. If the employees employed elsewhere are key figures in the labor organization, this opinion will damage organizational activities as well, tending to discourage membership in labor organizations. This too would contradict this policy. Further the position taken by the court raises the question of the indicia to be employed in determining whether an employee has substantially equivalent employment elsewhere. The Board's position avoids this question, by leaving the choice to the personal preference of the employees. Their preference is better evidence than any court decision, of the inequality of the jobs.

Approximately three months after the *Mooresville* case the Board held that a higher wage is no bar to reinstatement as being substantially equivalent employment. *In Re The Kelly Springfield Tire Co.* and *United Rubber Workers of America*, 2 L.R.R. 195 (Mar., 1938).

In the few cases where violence has occurred, the Board has held it no bar to reinstatement. *In Re Biles-Coleman Lumber Co.* and *Puget Sound Dist. Council of Lumber and Sawmill Workers*, 1 L.R.R. 484 (Dec., 1937); *In Re Standard Lime and Stone Co.* and *Quarry Workers Int'l Union of N.A.*, 1 L.R.R. 654 (Feb., 1938); *In Re Inland Steel Corp.* and *S.W.O.C. & Amal. Ass'n. of Iron, Steel and Tin Workers of N.A.*, 2 L.R.R. 180 (Apr. 5, 1938); *In Re Republic Steel Corporation, supra.* But in the *Republic Steel* case, *supra*, the Board refused reinstatement to men convicted of felonies, possibly because the men were unavailable. The former cases have been upheld in *N.L.R.B.* v. *Remington Rand Inc., supra*, no reasons being given. In *N.L.R.B.* v. *Carlisle Lumber Co., supra*, the court stated that the Board was the petitioner, and not the Union, and therefore violence by union men was no bar to the Board's order.

The question of admitting new evidence was raised in *N.L.R.B.* v. *Carlisle Lumber Co., supra.* There a company union had made a con-

tract with the company covering wages, hours, etc., and asked the court to order the Board to take further evidence under 29 U.S.C. 160(e). The court held that in the absence of a showing that the evidence was as required by the statute, "material and that there were reasonable grounds for the failure to adduce such evidence in the hearing," the request should be denied. *Accord, N.L.R.B.* v. *Oregon Worsted Co.*, 2 L.R.R. 231, — Fed. 2d —, (C.C.A. 9th, Apr. 11, 1938). In the same case there was a question as to the amount of back wages, and the court had to decide whether they should direct the Board to take new evidence or whether they should wait until one of the parties applied to the court. The court decided in favor of the latter, and suggested that the employees follow the course provided in the act. In a previous case the court ordered the parties to agree as to the amount within ten days. *N.L.R.B.* v. *Pacific Greyhound Line, supra.* The court in the instant case felt the situation was different as the employees were many and the wage problem full of difficulties.

From the foregoing it will be seen that all courts are agreed as to the constitutionality of the section of the Act empowering the Board to require reinstatement of discharged employees with back pay. As to reinstatement of striking employees with back pay, the point is still one in controversy. Those courts holding reinstatement legal also uphold back pay. The requirement that employees do not have substantially equivalent employment elsewhere in order to be entitled to reinstatement is recent and still unsettled. The presence of violence by employees has never been held to be a bar to reinstatement and for back pay. Although the power to require the Board to take additional evidence on application of one of the parties is, by statute, within the discretion of the courts, they have not as a matter of practice so required. The *Carlisle* case, *supra,* is the first instance of a suggestion on the part of a court that a party apply for such an order.

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* Since the writing of this note, the United States Supreme Court has reversed the decision of the circuit court of appeals and held strikers remained employees under section 2 (3) of the Act *N.L.R.B.* v. *Mackey Radio and Tel. Co.*, 5 U.S.L.W. 1126 (May 16, 1938).