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LABOR LAW - BACK PAY - REQUIREMENT OF DEDUCTION FOR REIMBURSEMENT OF GOVERNMENTAL RELIEF AGENCIES

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LABOR LAW — BACK PAY — REQUIREMENT OF DEDUCTION FOR REIMBURSEMENT OF GOVERNMENTAL RELIEF AGENCIES — Having found that the petitioner, by discharging employees for union activities, had engaged in an unfair labor practice, the National Labor Relations Board ordered the employees' reinstatement with back pay, less monies received during the period of discharge for work performed upon federal, state, county, municipal or other work-relief projects, and the payment of this amount received to the appropriate fiscal agencies of the government or governments which supplied the funds for the work-relief projects. The Circuit Court of Appeals for the Third Circuit directed enforcement of the board's order. On petition for a writ of certiorari to that court, *held* that the board's order should be enforced with the reimbursement provisions eliminated. Justices Black and Douglas dissented. *Republic Steel Corporation v. National Labor Relations Board*, (U. S. 1940) 9 U. S. LAW WEEK 4019, modifying (C. C. A. 3d, 1939) 107 F. (2d) 472.

Originally the National Labor Relations Board refused to deduct, from back

pay awards, payments received on relief, on the theory that such payments were not a part of net earnings and only net earnings could be deducted.[1] While still not considering work-relief as part of the employee's net earnings, the board in more recent cases has ordered reinstatement with wages that would have been earned, less net earnings during the period; deducting, however, from the amount otherwise due, monies received for work performed on work-relief. Such monies were ordered paid to the appropriate relief agencies which supplied the work-relief funds.[2] The board asserts the right to order reimbursement under section 10(c) of the National Labor Relations Act, which gives the board power "to take such affirmative action . . . as will effectuate the policies of this Act." [3] Broadly, the question is, "Does the order requiring reimbursement effectuate the policy of the act?" [4] From the decisions of the courts, one can assume that an affirmative order will be upheld as carrying the legislative policy

[1] No home relief money was deducted in Matter of Vegetable Oil Products Co., Inc., 1 N. L. R. B. 989 (1936) and as modified in 5 N. L. R. B. 52 (1938). The deduction of wages from a W. P. A. project in Matter of Associated Press, 1 N. L. R. B. 788 (1936), can best be explained on the ground that a $200 a month job is a good deal more than mere relief. See In the Matter of Burk Bros., 21 N. L. R. B., No. 126 (1940), for a list of sources of money which make the payments exempt from deduction. 48 YALE L. J. 1265 (1939) has a good discussion of the whole problem of back pay orders. The order for reinstatement with back pay, less amount earned, was made in the board's first case, In the Matter of Pennsylvania Greyhound Lines, 1 N. L. R. B. 1 (1935).

[2] The first such order was issued in Matter of Republic Steel Corp., 9 N. L. R. B. 219 (1938). The language used by the board in this case is typical: "make whole [the employees] for any losses of pay they have suffered by reason of the respondent's discriminatory acts, by payment to each . . . of a sum of money equal to that which each of them would normally have earned as wages during the period . . . less the amounts, if any, which each earned during said period, deducting, however, from the amount otherwise due to each of the said employees, monies received by said employees during said periods for work performed upon Federal, State, county, municipal, or other work-relief projects; and pay over the amounts, so deducted, to the appropriate fiscal agency of the Federal, State, county, municipal, or other government or governments which supplied the funds for said work-relief projects. . . ." Id., 9 N. L. R. B. 219 at 402. In all the board's orders, the phrase used to describe money due the governments is, "deducting from the amount otherwise due." The increasing popularity of the order can be illustrated by its use only once from 1936 through November, 1938, while it was given 25 times during February and March, 1939.

[3] 49 Stat. L. 454 (1935), 29 U. S. C. (Supp. 1939), § 160 (c).

[4] In Matter of Republic Steel Corp., 9 N. L. R. B. 219 (1938) the board used the negative approach that since the policy of the act would not be effectuated by having the government take the burden of supporting the employees, the employer should take that burden. Some affirmative acts which have been ordered are: to hire discharged employee at the expense of the man hired in his place, National Labor Relations Board v. Carlisle Lumber Co., (C. C. A. 9th, 1937) 94 F. (2d) 138; to withdraw recognition of the company union and post notices, National Labor Relations Board v. Pennsylvania Greyhound Lines, 303 U. S. 261, 58 S. Ct. 571 (1938); to place employee on preferred list, In the Matter of Cummins Engine Co., 6 N. L. R. B. 642 (1938); to notify the board of compliance with orders, In the Matter of Hewitt Soap Co., Inc., 6 N. L. R. B. 715 (1938); to bargain collectively on request of the union, In the Matter of Missouri-Arkansas Coach Lines, Inc., 7 N. L. R. B. 186 (1938); to repay

into effect (1) if it secures to the employees rights guaranteed them by the act,[5] (2) if it is remedial and not punitive,[6] and (3) if it is not unreasonable, arbitrary or capricious.[7] Failure to satisfy one or more of these requirements has caused four circuit courts of appeals to refuse to enforce reimbursement orders.[8] Two other circuits, emphasizing the criterion of reasonableness, have enforced the board's orders.[9] As to the first requisite, it would appear that the order in the

employees money deducted from pay to go as dues to company union, In the Matter of Lone Star Bag and Bagging Co., 8 N. L. R. B. 244 (1938); to hire at substantially the same position, In the Matter of Republic Steel Corp., 9 N. L. R. B. 219 (1938); and to sign a written contract, Art Metals Construction Co. v. National Labor Relations Board, (C .C. A. 2d, 1940) 110 F. (2d) 148. An order of the type last mentioned was refused in Inland Steel Co. v. National Labor Relations Board, (C. C. A. 7th, 1940) 109 F. (2d) 9.

[5] "On the contrary, the purpose of the Act is to promote peaceful settlements of disputes by providing legal remedies for the invasion of the employees' rights. . . . The affirmative action that is authorized is to make these remedies effective in the redress of the employees' rights, to assure them self-organization and freedom in representation. . . ." National Labor Relations Board v. Fansteel Metallurgical Corp., 306 U. S. 240 at 258, 59 S. Ct. 490 (1938); National Labor Relations Board v. Pennsylvania Greyhound Lines, 303 U. S. 261, 58 S. Ct. 571 (1938).

[6] "We think that this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board be of the opinion that the policies of the Act might be effectuated by such an order." Consolidated Edison Co. v. National Labor Relations Board, 305 U. S. 197 at 235-236, 59 S. Ct. 206 (1938); National Labor Relations Board v. Fansteel Metallurgical Corp., 306 U. S. 240, 59 S. Ct. 490 (1938); National Labor Relations Board v. Bell Oil & Gas Co., (C. C. A. 5th, 1937) 91 F. (2d) 509. The author of the comment in 28 CAL. L. REV. 402 (1940) considers the back pay provisions penalties themselves.

[7] National Labor Relations Board v. Bell Oil & Gas Co., (C. C. A. 5th, 1937) 91 F. (2d) 509; and National Labor Relations Board v. Fansteel Metallurgical Corp., 306 U. S. 240 at 258, 59 S. Ct. 490 (1938): "What we have said also meets the point that the question whether reinstatement or reëmployment would effectuate the policies of the Act is committed to the decision of the Board in the exercise of its discretion subject only to the limitation that its action may not be 'arbitrary, unreasonable or capricious.'"

[8] National Labor Relations Board v. Tovrea Packing Co., (C. C. A. 9th, 1940) 111 F. (2d) 626 at 630: "To our minds the discretion conferred upon the Board is limited to the point of whether an order for back pay will do more toward effectuating the purposes of the Act than to omit it—or possibly than an order for payment of part thereof. Whether or not this provision is held to be punitive in nature, we see no warrant for doing other than it provides. Certainly it does not authorize the Board to go outside of the statute and prescribe its own coercive measures in aid of 'effectuating' the purposes of the Act." The court in both National Labor Relations Board v. Waumbec Mills, Inc., (C. C. A. 1st, 1940) 114 F. (2d) 226, and National Labor Relations Board v. Leviton Mfg. Co., (C. C. A. 2d, 1940) 111 F. (2d) 619, has considered the order punitive. Stewart Die Casting Corp. v. National Labor Relations Board, (C. C. A. 7th, 1940) 6 L. R. R. 691, adds unreasonableness to the other counts against the order.

[9] National Labor Relations Board v. Planters Mfg. Co., Inc., (C. C. A. 4th, 1939) 105 F. (2d) 750, enforced an order with no discussion of the particular point. In the

principal case does not aid the securing of an invaded right. The board itself has admitted that the employee has no just claim against the employer for duplication of money received from work-relief.[10] Actually, the employee's right to engage in union activities and still retain his job has been protected by the order of reinstatement with money equal to what he would have earned if there had been no unwarranted discharge, less net earnings, including relief wages, during the period of discharge. It is difficult to assume that Congress intended the reimbursement of relief agencies to be one of the policies of the act which the board could effectuate by affirmative orders, when such reimbursement is of no direct aid to the employees in their efforts to achieve collective action. Secondly, since it appears that the order neither redresses a grievance nor hinders a possible invasion of rights, it would follow that the order is not remedial. If not remedial, an order to pay money would appear to be punitive. The Supreme Court has previously ruled that an affirmative order under section 10(c) cannot inflict a penalty on the employer.[11] Thirdly, even if an order secures a right for the employee, and is not punitive, it still cannot be unreasonable, capricious, or arbitrary. As to this test, there is ample room for argument. The board, bolstered by two circuit courts of appeals, finds such an order reasonable on the theory that an employer should not force the whole community to assume the burden of supporting an employee who has been unlawfully discharged.[12] Other circuit courts conclude that such an order is unreasonable since the government's work-relief projects are founded on the idea that the recipient of work-relief gives work equal to the remuneration.[13] Furthermore, even if an agency asked for the money, which none has, it is doubtful if it would have authority to accept it. Judge Major of the Circuit Court of Appeals for the Seventh Circuit has suggested that it is extremely unreasonable to ask an employer to determine how much each of several possible agencies contributed to the employee's relief checks.[14] Granting that the order for reimbursement is reasonable on the grounds of policy as urged by the board, the Court in the present case wisely refused to enforce an affirmative order which secured no right to the employee and which was plainly punitive on its face.

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lower court decision of the principal case, 107 F. (2d) 472, the Circuit Court of Appeals for the Third Circuit thought the order reasonable.

[10] The very fact that the board continued to make such orders would indicate that they did not believe the employee should have his relief monies duplicated. See the lower court decision in the principal case, 107 F. (2d) 472.

[11] The United States Supreme Court has been quite definite in its assertion that the power is remedial and not punitive. See note 6, supra. Consolidated Edison Co. v. National Labor Relations Board, 305 U. S. 197, 59 S. Ct. 206 (1938); National Labor Relations Board v. Fansteel Metallurgical Corp., 306 U. S. 240, 59 S. Ct. 490 (1938). National Labor Relations Board v. Remington Rand, Inc., (C. C. A. 2d, 1938) 94 F. (2d) 862, held that the power was remedial and designed to enable the board to restore the status quo as nearly as possible as of the time before the wrong was done—and further the board could not go.

[12] See cases cited note 9, supra.

[13] Judge Major's decision in Stewart Die Casting Corp. v. National Labor Relations Board, (C. C. A. 7th, 1940) 6 L. R. R. 691, is the best exposition of the argument.

[14] Stewart Die Casting Corp. v. National Labor Relations Board, (C. C. A. 7th, 1940) 6 L. R. R. 691.