Michigan Law Review

Volume 39 | Issue 5

1941

LABOR LAW-REINSTATEMENT OF SIT-DOWN STRIKERS NOT FORMALLY DISCHARGED BY THE EMPLOYER

Walter B. Connolly
University of Michigan Law School

LABOR LAW — REINSTATEMENT OF SIT-DOWN STRIKERS NOT FORMALLY DISCHARGED BY THE EMPLOYER — A one-day sit-down strike occurred in the employer's plant on March 16, 1937. A general strike was called on the following day and lasted until June 24, 1937. On March 25, 1937, the employer sent a notice to all employees including the "sit-downers" urging them to return to work. The National Labor Relations Board found the company guilty of various unfair labor practices, all of which occurred during the general strike, and ordered a reinstatement of all employees who were on strike March 23, 1937, with back pay and full seniority rights.[1] Petitioner asserted that the men who engaged in the sit-down strike were no longer "employees" entitled to the protection of the act and challenged the order in so far as it reinstated them. *Held*, that since the "sit-downers" were never formally discharged by the employer, they retained their status as employees and the order for reinstatement must be obeyed. *Stewart Die Casting Corp. v. National Labor Relations Board*, (C. C. A. 7th, 1940) 114 F. (2d) 849, cert. denied (U. S. 1941) 61 S. Ct. 449.

[1] In the Matter of Stewart Die Casting Corp., 14 N. L. R. B. 872 (1939).

While the National Labor Relations Act guarantees the employee the right to strike,[2] the right to be free from discriminatory discharge for union activities,[3] and the right to reinstatement by order of the board,[4] it does not give him *carte blanche* with respect to illegal or improper conduct when he seeks to assert these rights.[5] In the *Fansteel* case, reinstatement was denied men who had engaged in the illegal activity of a sit-down strike.[6] Whether this conduct deprives the board of jurisdiction to act or whether such circumstances only render an order of reinstatement by the board an abuse of discretion is not clear from the opinion.[7] If the board is powerless to act in the face of such misconduct, a formal discharge by the employer should be unnecessary, for the striker is precluded from reinstatement by his own acts. But if the board has discretionary power, a formal discharge should be required and the reasons which prompt this action should be considered by the board in reaching its decision on the reinstatement order.[8] The jurisdiction of the board would not be affected because the "sit-downers" would continue to be "employees" under the act.[9] The effectiveness of the discharge would depend upon the decision of the board

[2] 49 Stat. L. 449 at 457, § 13 (1935), 29 U. S. C. (Supp. 1939), § 163; National Labor Relations Board v. Remington Rand, (C. C. A. 2d, 1938) 94 F. (2d) 862, cert. denied sub nom. Remington Rand v. National Labor Relations Board, 304 U. S. 576, 58 S. Ct. 1046 (1939).

[3] 49 Stat. L. 452, § 8(3) (1935), 29 U. S. C. (Supp. 1939), § 158(3).

[4] 49 Stat. L. 454, § 10(c) (1935), 29 U. S. C. (Supp. 1939), § 160(c). The board is empowered "to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act."

[5] In the Matter of Aladdin Industries, 22 N. L. R. B., No. 101 (1940) (discharge of men who had engaged in a sit-down strike held not to be an unfair labor practice); General Iron Works Co., 28 N. L. R. B., No. 39 (1940) (refusal of reinstatement because of sloppy attitude toward work); Waterman Steamship Corp. v. National Labor Relations Board, (C. C. A. 5th, 1939) 103 F. (2d) 157 (board order of reinstatement vacated because evidence showed that steward had been discharged for incompetency); Wilson & Co. v. National Labor Relations Board, (C. C. A. 8th, 1939) 103 F. (2d) 243; In the Matter of Standard Insulation Co., 22 N. L. R. B., No. 46 (1940); National Labor Relations Board v. Union Pacific Stages, (C. C. A. 9th, 1938) 99 F. (2d) 153.

[6] National Labor Relations Board v. Fansteel Metallurgical Corp., 306 U. S. 240, 59 S. Ct. 490 (1939). See also, Standard Lime & Stone Co. v. National Labor Relations Board, (C. C. A. 4th, 1938) 97 F. (2d) 531 (here the strikers were guilty of crimes perpetrated against the employer).

[7] 37 MICH. L. REV. 1256 at 1265, 1267 (1939); 39 COL. L. REV. 1369 at 1378 (1939).

[8] The Court in the Fansteel case, 306 U. S. 240, 59 S. Ct. 490 (1939), vacated the order of the board reinstating employees who aided and abetted the sit-downers but who were not formally discharged by the company. However, this decision can be explained. The Court decided the case under § 10 (c) on the theory that such an order would not effectuate the policies of the act. Hart and Prichard, "The Fansteel Case: Employee Misconduct and the Remedial Powers of the National Labor Relations Board," 52 HARV. L. REV. 1275 at 1308 (1939).

[9] 49 Stat. L. 450, § 2(3) (1935), 29 U. S. C. (Supp. 1939), § 152(3). "The term employee . . . shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute. . . ." See 37 MICH. L. REV. 1256 at 1262 (1939).

as to whether reinstatement in the particular case would effectuate the policies of the act.[10] In actual practice the board is continuing to exercise jurisdiction and to decide reinstatement cases involving workers guilty of misconduct.[11] In the principal case the board ordered the reinstatement of individuals who had engaged in a sit-down strike.[12] In upholding the order, the court emphasizes the fact that the "petitioner would have been justified in discharging such employees and thereby severing such relation, but petitioner did not do so. . . ." [13] The *Fansteel* case was interpreted as requiring a discharge and not as authority for the proposition that the sit-down strike automatically terminates the strikers' rights to benefits under the act.[14] This interpretation has not been accepted by some circuit courts, which have decided that the question of discharge is immaterial, for the board has no authority to reinstate those who have been guilty of a sit-down strike.[15] The decision in the principal case appears to be the more desirable one, for it permits the employer to exercise a right of discharge for cause, but does not continue that right indefinitely to the prejudice of the working man.[16]

Walter B. Connolly

[10] 49 Stat. L. 454, § 10(c) (1935), 29 U. S. C. (Supp. 1939), § 160(c).

[11] In the Matter of Aluminum Goods Mfg. Co., 25 N. L. R. B., No. 106 (1940); In the Matter of Mexia Textile Mills, 11 N. L. R. B. 1166 (1939); In the Matter of Aronsson Printing Co., 13 N. L. R. B. 799 (1939); 39 COL. L. REV. 1369 at 1379 (1939).

[12] In the Matter of Stewart Die Casting Corp., 14 N. L. R. B. 872 (1939).

[13] Principal case, 114 F. (2d) 849 at 855. It is interesting to note from the board decision that "shortly after the sit-down strike began Goff [the plant manager] notified the employees engaged therein that they would be 'considered through' and their employment terminated if they did not leave the plant within 15 minutes. . . ." 14 N. L. R. B. 872 at 896 (1939). The board found that this was a "threat" which had not been carried into execution. This raises the question as to what affirmative action the employer must take in order to "discharge" men who are guilty of improper conduct.

[14] Principal case, 114 F. (2d) 849 at 855-856.

[15] McNeely & Price Co. v. National Labor Relations Board, (C. C. A. 3d, 1939) 106 F. (2d) 878. Here there was no discharge, but since the fact of the sit-down was established, the court held that there could be no reinstatement. National Labor Relations Board v. Bradford Dyeing Assn., (C. C. A. 1st, 1939) 106 F. (2d) 119. The board in this case ordered reinstatement of men who had been refused reemployment because they had attempted to incite their fellow employees to indulge in a sit-down strike. The court refused to enforce the order and remarked flatly that "The reinstatement in such case is not a matter of discretion. . . ." 106 F. (2d) 119 at 124.

[16] It seems only fair that a point in time should be reached after the commission of the illegal activity on the part of the striker where the right to discharge for that illegal activity is lost. The employer may be said to have waived his right or to be estopped to assert it. For if the illegal activity precludes investigation by the board of an employer's refusal to reinstate, the employer may hold the threat of refusal over the heads of the working men in an effort to disrupt unionization, and the board would have no jurisdiction to hear the complaints of these men, since their illegal activity would have placed them outside the protection of the act.