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LABOR LAW - NATIONAL LABOR RELATIONS ACT - EMPLOYER'S REFUSAL TO HIRE A UNION MEMBER AS AN "UNFAIR LABOR PRACTICE"

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LABOR LAW — NATIONAL LABOR RELATIONS ACT — EMPLOYER'S REFUSAL TO HIRE A UNION MEMBER AS AN "UNFAIR LABOR PRACTICE" — Following a strike at respondent corporation which had started prior to the effective date of the National Labor Relations Act,[1] the respondent refused to hire two men who had ceased to be in its employ before the strike but who sought employment after its close. The National Labor Relations Board, finding that the men had been refused employment because of their affiliations with a union and hence that the respondent had violated section 8(3) of the act,[2] ordered the corporation to offer the two men employment and also ordered reimbursement for the loss of pay, minus actual earnings in the meantime.[3] The federal circuit court of appeals held that the board lacked power to order instatement of the rejected applicants as they were not "employees" within the meaning of the act.[4] On certiorari to that court, the United States Supreme Court *held* that discrimination against union members at the time of hiring is

[1] 49 Stat. L. 449 (1935), 29 U. S. C. (Supp. 1939), §§ 151-166.

[2] "It shall be an unfair labor practice for an employer . . . (3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . ." 49 Stat. L. 452 (1935), 29 U. S. C. (Supp. 1939), § 158.

[3] Matter of Phelps Dodge Corp., 19 N. L. R. B., No. 60 (1940).

[4] Phelps Dodge Corp. v. N. L. R. B., (C. C. A. 2d, 1940) 113 F. (2d) 202 at 206. Judge Learned Hand disagreed with the majority and indicated he would have voted against the decision were he not controlled by precedent. N. L. R. B. v. National Casket Co., (C. C. A. 2d, 1939) 107 F. (2d) 992.

an unfair labor practice within the meaning of section 8(3), and that the board has the power to order an employer to offer employment and back pay to such applicant as well as to a discharged employee under section 10(c), even where he has obtained substantially equivalent employment, if such will "effectuate the policies of" the act. Chief Justice Hughes and Justice Stone concurred in the holding that refusal by an employer to hire an applicant because of his union affiliation is an unfair labor practice, but felt that the board has no power under section 10(c) to order an employer to hire such applicant or give him "back pay." [5] *Phelps Dodge Corp. v. National Labor Relations Board*, (U. S. 1941) 61 S. Ct. 845.[6]

The principal case gave the Supreme Court its first opportunity to rule on the application of sections 8(3) and 10(c) to cases of discrimination by an employer against union applicants for work and resolve the divergence of rulings in the two circuit courts of appeal which had already passed on the point.[7] The board has consistently held it has the power in question,[8] saying that protection of *prospective* employees is necessary for the protection of *present* employees. The legislative history of the act, together with the clear words of its text, seem to justify the Court's interpretation in the principal case.[9] The dissent expressed

[5] The dissent was based on the belief that § 10(c) only gave the board such power where a discriminatory discharge was involved, interpreting the words following "including" as defining and enlarging "affirmative action," rather than merely illustrating it as was held by the majority. The dissent also asserted that ordering an employer to hire an applicant is far different from ordering him to reinstate a discharged employee (a distinction the majority had difficulty in perceiving), and that authority to exert a power which courts had traditionally avoided even in personal service contracts cases is "not lightly to be inferred." No mention is made of constitutional grounds.

[6] A further important principle of administrative law to govern the board (heretofore not pressed in Labor Board cases, it seems) was laid down by the majority opinion, namely, that the board must state specifically its reasons, when issuing a reinstatement or instatement order, as to why the order will "effectuate the policies of" the act, and also must make a specific finding as to whether any of the loss in pay was "wilfully incurred," and if so, deduct that as well as actual earnings. On these points, Justice Murphy wrote a dissent concurred in by Justices Douglas and Black. As Justice Roberts did not sit in this case and as the present Court consists of only eight members, the ruling may come up for further consideration later. The Court, although not too clearly, due to the three-way split, would seem by remanding the case to the board on these points to overrule the board's policy as indicated in Matter of Western Felt Works, 10 N. L. R. B. 407 (1938).

[7] N. L. R. B. v. Waumbec Mills, (C. C. A. 1st, 1940) 114 F. (2d) 226, which held that an order for offer of employment with back pay was an appropriate remedy for discriminatory refusal to hire. Contra: N. L. R. B. v. National Casket Co., (C. C. A. 2d, 1939) 107 F. (2d) 992, and the circuit court decision in the principal case.

[8] N. L. R. B., THIRD ANNUAL REPORT 68, 72 (1939); FIFTH ANNUAL REPORT 39 (1941); In re Cherry Cotton Mills, 11 N. L. R. B. 478 (1939). See 2 TELLER, LABOR DISPUTES AND COLLECTIVE BARGAINING, § 323 (1940), some of the cases there cited being pertinent.

[9] Chairman Walsh of the Senate Labor Committee stated that "no employer may discriminate in hiring a man, whether he belongs to a union or not. . . ." 79 CONG. REC. 7674 (1935). However, the wording of § 7(a) of the National Industrial Recovery Act, 48 Stat. L. 198 (1933), 15 U. S. C. (1934), § 707(a), expressly pro-

the feeling that the power recognized in the board by the majority decision is extreme, but this view seems hardly justified since the board has been held practically without dissent to have analogous powers almost as onerous from the employer's standpoint.[10] Whether the decision follows a sound statutory construction or not, the ruling gives rise to certain troublesome practical problems. Does it mean that an order to hire would be enforced where the employer had other motives also for refusing employment? It is said the act does not touch "the normal exercise of the right of the employer to select its employees or to discharge them"; [11] and yet it is a well-established rule of the board "that if the employer affects an employment relationship because of pro- or anti-union reasons he is violating section 8(3), although he may also have lawful reasons for so doing." [12] This rule is criticized,[13] for where the employer discharges an employee for lawful reasons, or rejects an application for lawful reasons, it is hard to see that there is any discrimination just because the employer also happens to have some personal feelings on the matter of unionism, as long as such feelings do not exclusively motivate his action. Although the board rule imposes liability unless the discharge or rejection is solely for reasons other than discrimination, the majority opinion in the principal case states that the issue is whether an employer may refuse "to hire [employees] solely because of their affiliations with the Union," [14] thus leaving for future decision the problem of multiple motives in "refusal to hire" cases. Will the decision tend to cause the employer to prefer to hire union members rather than run the risk of board action? If so, it would seem that the employer might be led to discriminate so

hibited anti-union conditions of employment not only as to employees but also as to "one seeking employment," and the House committee in H. REP. 1147, 74th Cong., 1st sess. (1935), p. 3, said the Wagner Act is "merely an amplification and further clarification of the principles enacted in the law . . . by Sec. 7(a) of the National Industrial Recovery Act. . . ." However, the earlier statute was apparently aimed at the "yellow-dog" contract rather than outright refusal to employ.

[10] See Continental Oil Co. v. N. L. R. B., (C. C. A. 10th, 1940) 113 F. (2d) 473, where the court upheld the board's order to reinstate two men whom the company had discriminatorily attempted to transfer to another oil field; Kansas City Power & Light Co. v. N. L. R. B., (C. C. A. 8th, 1940) 111 F. (2d) 340 (similar facts and order); N. L. R. B. v. Kentucky Fire Brick Co., (C. C. A. 6th, 1938) 99 F. (2d) 89 (refusal to reemploy following a strike); N. L. R. B. v. Mackay Radio & Telegraph Co., 304 U. S. 333, 58 S. Ct. 904 (1938) (same; strike not caused by unfair labor practice); North Whittier Heights Citrus Assn. v. N. L. R. B., (C. C. A. 9th, 1940) 109 F. (2d) 76 (discrimination in rehiring after seasonal shutdown); N. L. R. B. v. Waterman Steamship Corp., 309 U. S. 206, 60 S. Ct. 493 (1940) (discrimination in rehiring maritime employees for a new voyage).

[11] Principal case, 61 S. Ct. at 847, 849, quoting from N. L. R. B. v. Jones & Laughlin Steel Corp., 301 U. S. 1 at 45, 57 S. Ct. 615 (1938).

[12] N. L. R. B., FIFTH ANNUAL REPORT 38 (1941).

[13] Ward, " 'Discrimination' Under the National Labor Relations Act," 48 YALE L. J. 1152 at 1164 (1939), points out the board will hold the employer in violation of § 8(3) if it finds out that the employer dislikes the union even though he had a perfectly good publicized reason for his action. This result is contrary to the plain words of the section.

[14] Principal case, 61 S. Ct. 849.

as to encourage union membership, in direct violation of section 8(3). But the board and the courts seem to worry little about employer actions tending to encourage unionism, except where the union is a company-dominated one in violation of section 8(2). It should be pointed out that the administrative requirements laid down in the principal case and the suggestion that there may be a duty to mitigate by securing other employment also will raise practical problems in the administration of the rule. The already voluminous decisions of the board will swell even more in size in order to get in the opinion everything suggested by the Court.

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