Michigan Law Review

Volume 55 | Issue 2

1956

Labor Law - Labor Management Relations Act - Unfair Labor Practice Strike Permitted During Sixty-Day "Cooling-Off" Period

Edward C. Hanpeter S.Ed.
University of Michigan Law School

LABOR LAW—LABOR-MANAGEMENT RELATIONS ACT—UNFAIR LABOR PRACTICE STRIKE PERMITTED DURING SIXTY-DAY "COOLING-OFF" PERIOD—Petitioner clearly committed unfair labor practices and a strike in protest resulted. Thirty-one days prior to the strike the union had given petitioner notice, in accordance with section 8 (d) of the amended National Labor Relations Act,[1] of its desire to modify the existing collective bargaining agreement. [Section 8 (d) makes it an unfair labor practice for a party to an existing contract to modify the contract without, inter alia, giving notice to the other party of the desire to modify 60 days before the expiration of the contract, and continuing in effect, without resorting to strike or lockout, all terms of the existing contract for 60 days or until the expiration date of the contract, whichever occurs later.[2] An employee who strikes during the 60-day period loses his status as an employee for the purposes of sections 8, 9, and 10 of the act.[3]] Petitioner refused to reinstate the strikers upon their offer to return to work.[4] Both the NLRB[5]

1 61 Stat. 142 (1947), 29 U.S.C. (1952) §158 (d).

2 This is referred to as the no-strike clause of §8 (d).

3 This is referred to as the loss-of-status clause of §8 (d). Sections 8, 9, and 10 of the amended National Labor Relations Act, 1947, 61 Stat. 140, 29 U.S.C. (1952) §§158, 159, 160, specify employer and union unfair labor practices, regulations for election of bargaining representations, and remedial powers of the Board. The effect of the loss-of-status clause would be to withdraw from an employee the benefit of the Board's administrative remedies.

4 In addition to arguing that the strike violated §8 (d), petitioner maintained that the strike also violated the contract's no-strike clause. The union had promised "to refrain from engaging in any strike or work stoppage during the term of this agreement." Principal case at 281. The NLRB, court of appeals, and Supreme Court unanimously held that this clause did not prevent a strike to protest petitioner's unfair labor practices. The Supreme Court said that since the contract dealt with the economic relation-

and the court of appeals[6] held that 8 (d) does not prohibit an unfair labor practice strike during the 60-day period, and ordered reinstatement of the strikers. On certiorari to the Supreme Court, *held,* affirmed, three justices dissenting.[7] Section 8 (d) applies only to strikes that seek to modify or terminate an existing agreement. A prohibition on unfair labor practice strikes during the 60-day period would penalize a union that complies with the statute. *Mastro Plastics Corp. v. NLRB,* 350 U.S. 270 (1956).

A literal interpretation of the language of section 8 (d) would prohibit all strikes during the 60-day "cooling-off" period. The legislative history of 8 (d) does not indicate conclusively what kinds of strikes Congress intended to prohibit, but it does suggest that the draftsmen did not intend to restrict seriously the existing rights of labor.[8] Section 8 (d) does not define "strike," despite the fact that important union and employee rights hinge upon the kind of strike engaged in. Strikes are classified generally as unfair labor practice strikes and economic strikes[9] and may be protected or unprotected activity.[10] Employees may not be discharged for engaging in protected activity,[11] but may be if they participate in unprotected

ship between the parties, the no-strike clause was aimed at avoiding interruptions of production prompted by efforts to change the existing economic relationship. This is in accord with previous law. The NLRB has held that strikes in breach of no-strike clauses are unprotected activity, but only if there has been no antecedent unfair labor practice or breach of contract by the employer. Scullin Steel Co., 65 N.L.R.B. 1294 (1946), enforced as modified (8th Cir. 1947) 161 F. (2d) 143; Joseph Dyson & Sons, Inc., 72 N.L.R.B. 445 (1947). But see National Electric Products Corp., 80 N.L.R.B. 995 (1948), which the Board distinguished in the principal case, 103 N.L.R.B. 511 at 514 (1953).

[5] Mastro Plastics Corp., 103 N.L.R.B. 511 (1953).

[6] (2d Cir. 1954) 214 F. (2d) 462.

[7] Justice Frankfurter wrote the dissenting opinion which was concurred in by Justices Harlan and Minton.

[8] The Senate minority report raised the problem of the principal case. S. Rep. (Minority Views) 105, Part 2, 80th Cong., 1st sess., pp. 21-22 (1947). But the majority report gives no answer. S. Rep. 105, 80th Cong., 1st sess., p. 24 (1947). Note the following remarks by Senators Taft and Ball. Taft: "So it [section 8 (d)] seems to me to be no real limitation of the rights of labor unions." 93 CONG. REC. 3839 (1947). Ball: Section 8 (d) "merely says to unions, 'You must have a 60-day reopening clause in your contract.'" 93 CONG. REC. 7530 (1947). For a compilation of the legislative history by the NLRB, see "Legislative History of the Labor Management Relations Act, 1947" (1948).

[9] An unfair labor practice strike is a strike to protest an employer unfair labor practice; an economic strike is aimed at improvement of wages, working conditions, etc.

[10] Protected activity is any concerted activity within the terms of §7, amended National Labor Relations Act, 1947, 61 Stat. 140, 29 U.S.C. (1952) §157. Unprotected activity includes specific union unfair labor practices which were added in 1947, the amended National Labor Relations Act, 1947, 61 Stat. 141, 29 U.S.C. (1952) §158 (b), and certain kinds of activity carved out of the protection of §7 by the courts. NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240 (1939) (sit-down strike); NLRB v. Sands Mfg. Co., 306 U.S. 332 (1939) (breach of contract); Southern SS Co. v. NLRB, 316 U.S. 31 (1942) (strike in violation of federal statute); American News Co., 55 N.L.R.B. 1302 (1944) (illegal objective). See Petro, "Concerted Activities—Protected and Unprotected," 1 LAB. L. J. 1155 (1950) and 2 LAB. L. J. 3 (1951).

[11] NLRB v. Mackay Radio & Telegraph Co., 304 U.S. 333 (1938); NLRB v. Cowles Pub. Co., (9th Cir. 1954) 214 F. (2d) 708.

activity.[12] An employer must reinstate unfair labor practice strikers even if he must discharge replacements hired during the strike,[13] but an employee who strikes for economic gains is entitled to his job only if he has not been replaced during the strike.[14] If section 8 (d) applies to unfair labor practice strikers it deprives such strikers of their highly protected status and subjects them to discharge at the discretion of the employer. It seems doubtful that Congress would do this without an express provision to that effect, or without a more cogent reason than section 8 (d) suggests, namely, that collective bargaining during the "cooling-off" period would be made more effective by depriving employees of the right to strike in protest of employer unfair labor practices. The fundamental distinction in treatment accorded economic and unfair labor practice strikers is probably the principal reason why the NLRB, the court of appeals, and the Supreme Court could not believe Congress intended an unfair labor practice strike to be included in section 8 (d).[15] The uncertainty due to the failure to define "strike" is compounded by separate penalties for the union (the no-strike clause) and for the employee (the loss-of-status clause). The minority of the Court concluded that unless section 8 (d) applies to all strikes, the loss-of-status clause has no significance. Since a strike in violation of 8 (d) is a union unfair labor practice, strikers participating in such activity would be unprotected, and the loss-of-status claim is redundant in the case of economic strikes. In the absence of the loss-of-status clause, if a strike were caused by an antecedent employer unfair labor practice, the NLRB could hold that the strike was protected.[16] The loss-of-status clause would prevent such a result, however, since that clause deprives strikers of their status as employees. Therefore, according to the minority, the loss-of-status clause is effective only if it applies to unfair labor practice strikers. The majority answers that the "clause is justifiable as a clarification of the law and as a warning to employees against engaging in economic strikes during the statutory waiting period."[17] Since Congress did not prescribe any employee unfair labor practices, perhaps the loss-of-status clause was intended to state explicitly that employees striking during the "cooling-off" period would be outside the act. However, if one believes that section 8 (d) was not intended as a departure from the distinction between economic and unfair labor practice strikes, he will not be convinced by the minority's argument, even though there is no objection to it as a matter of statutory construction.

[12] See cases cited note 10 supra.

[13] NLRB v. Biles–Coleman Lumber Co., (9th Cir. 1938) 96 F. (2d) 197, 98 F. (2d) 18; Wheatland Electric Cooperative v. NLRB, (10th Cir. 1953) 208 F. (2d) 878.

[14] NLRB v. Mackay Radio & Telegraph Co., note 11 supra; United Biscuit Co. of America v. NLRB, (7th Cir. 1942) 128 F. (2d) 771; West Coast Casket Co., 97 N.L.R.B. 820 (1951).

[15] See note 4 supra.

[16] Section 10 (c), amended National Labor Relations Act, 1947, 61 Stat. 147, 29 U.S.C. (1952) §160 (c).

[17] Principal case at 287.

The majority holds that the strikers are not subject to the penalties of section 8 (d) because the objective of the strike "was not *to terminate or modify* the contract."[18] This reasoning may be interpreted to mean that any strike during the "cooling-off" period for an objective other than terminating or modifying an agreement is not subject to section 8 (d). In the principal case the employer had clearly committed unfair labor practices. What if the strike were in protest of an alleged unfair labor practice, but the NLRB found that none had been committed? In such a case, the strike is not an unfair labor practice strike. However, the union nevertheless struck for an objective other than terminating or modifying the agreement. The majority reasoning supports the conclusion that such strike activity is not covered by section 8 (d). Such an interpretation will, unfortunately, permit unions to apply economic pressure for bargaining purposes by striking on the pretext of an unfair labor practice. It is often difficult to determine whether or not an employer has committed an unfair labor practice, especially when the charge is refusal to bargain in good faith.[19] It would therefore be difficult to determine whether a union which strikes in protest of an unfair labor practice has struck in good faith to protest the unfair labor practice or has struck to strengthen its bargaining position. One may reasonably conclude from the unqualified language of section 8 (d), which is literally broad enough to prohibit all strikes, and the fundamental distinction between economic and unfair labor practice strikes, that Congress intended to prohibit all strikes except those protesting actual unfair labor practices. Unions and employees would be reluctant to strike during the 60-day period to protest an unfair labor practice, since they would be subject to 8 (d) unless one had in fact been committed. Although the Court in the principal case reached a result in accord with the probable intent of Congress, in seeking to justify its conclusion on statutory language it has, perhaps, unduly restricted the application of section 8 (d).

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[18] Principal case at 286.

[19] See, for example, Associated Unions of America, Insurance Employees Local 65 v. NLRB, (7th Cir. 1952) 200 F. (2d) 52.