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PARTIAL STRIKES AND NATIONAL LABOR POLICY

*Richard Mitterthal**

THE labor-management relationship is put to new tests and strains every year. Each party must continually adjust to the other's innovations. So, unions must adapt policy to the reality of an increased concentration of industrial power through mergers and to the sweeping and unknown possibilities inherent in large scale automation. Management too must adapt policy to the fact of a united labor movement brought on by a different kind of merger and to the ever-increasing desire for greater job security as reflected today by demands for a guaranteed annual wage. These are merely illustrations. The search for new policy which will be responsive to the needs of present day unionists is a continuing one.

Among the more interesting, although seldom explored, areas of policy is that relating to strike technique. Strikes, being the creatures of men, are completely adaptable to a great variety of situations. Depending upon the objective, a union's overall strategy may include not only different types of strikes but also in each strike different degrees of militancy, different forms of picketing and different conceptions of timing. For example, strikes may be described in terms of either their ends—organizational, economic, and sympathy strikes—or their means—total, partial, peaceful, and violent strikes. And the ends will sometimes determine the means.

It is customary to speak of strikes in their broad, generic sense without considering the fact that there are many subtle variants to traditional strike tactics. This article concerns itself with one such variant—the partial strike. The frequency with which unions use this technique is not known. No sound basis exists for making any estimate. However, the scarcity of reported cases in this area intimates that the partial strike is today what it has always been, an anomalous practice. Whether it will remain so in the future is a matter of speculation.

Before proceeding further with this analysis, let me define my subject. A partial strike is precisely what the term suggests. It is part strike, part work. Ordinarily, a union chooses between two obvious alternatives. Its members decide either to strike or to work. Between these poles there is a twilight area where the members may attempt to do both. In that area, we find the partial strike. Indeed, there are also different kinds of partial strikes—

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those where strike and work coincide in point of time and those where strike and work are separate in point of time. One commentator described the partial strike "as an attempt by employees to bring economic pressure against their [or another] employer in order to obtain a change in their [or others'] conditions of employment, while at the same time remaining actively at work."¹ So defined, the partial strike clearly encompasses such diverse tactics as a refusal to perform specific work, a slowdown, and a refusal to cross a picket line. In all three instances, strike and work coincide in point of time. These strikes involve employees who refuse to perform part of their duties while remaining on the employer's premises and on his payroll.²

The quoted definition, however, fails to include other forms of partial strikes which take place off of company premises and which do not involve a demand for pay for time not worked. Consider, for instance, refusals to work overtime and intermittent work stoppages. In both situations, strike and work are separate in point of time. It is these types of partial strikes with which I am primarily concerned. Through the years, these phenomena have been given assorted labels which describe their impact with greater specificity. For example, we know of the intermittent strike, the hit-and-run strike, the "overtime strike,"³ the weekend strike, and the installment plan strike. All are partial strikes because the union successively strikes and works and continues that pattern, withdrawing its members from the employment relationship for only a part of the scheduled work day, work week, or even work month.⁴ The conventional total strike, however, contemplates a complete withdrawal of employees and a continuing refusal to work until a settlement of the underlying causes of the walkout is made. In comparing the two concepts, one can see that the essence of this kind of partial strike is *intermittency*. That is, the presence of employees

¹ Kelsey, "Partial Strikes," NEW YORK UNIVERSITY SIXTH ANNUAL CONFERENCE ON LABOR 281-303 (1953).

² The refusal to cross a picket line has only this latter characteristic. At the outset, it should be made clear that only those employees whose work assignment requires them to cross picket lines at other than their own place of employment and who nevertheless respect such picket lines could be considered partial strikers. By the same token, employees who refuse to cross picket lines at their own plant and thus perform none of their work tasks cannot in any sense be regarded as partial strikers.

³ Refusal to work overtime.

⁴ Compare the "whipsaw strike"—a strike against one member of a multi-employer bargaining unit—which is not partial in nature because the union *completely* withdraws employees from one employer. Buffalo Linen Supply Co., 109 N.L.R.B. 447 (1954).

on the job is merely temporary and is punctuated by recurring work stoppages.

Some authorities have argued that "partial strike" is a misnomer and a contradiction in terms.⁵ In their view, a partial strike is not in fact a "strike" and should not be entitled to any of the legal benefits and protections which may stem from a strike status. That argument is discredited today, especially because of the broad definitions which were incorporated in the amended National Labor Relations Act.⁶ In Title V, section 501 (2) of the act, Congress said: "The term 'strike' includes any strike or other concerted stoppage of work by employees . . . and any concerted slowdown or other concerted interruption of operations by employees."

It should be emphasized that these definitions are significant for other than academic reasons. Because the rights which strikers possess under the act seem to turn on, among other things, the difference between a total strike and a partial strike, the distinction between the two is crucial. The total strike, assuming it is peaceful and for a lawful objective, carries a stamp of legitimacy and a grant of legal protection while the partial strike results in a brand of impropriety and a loss of legal protection. These thoughts will be developed in greater detail later in the article. But this preliminary observation will give the reader some conception of the legal consequences of this distinction.

Application: When Is the Stoppage a Partial Strike?

While these definitions may seem simple in theory, they have proved quite difficult in application. True, the problem is primarily a factual one. It nevertheless has some intriguing features. Certain partial strikes—refusals to perform specific work and refusals to cross picket lines—easily fit the definition. Such refusals are facts which are both seen and heard. The existence of these strikes is thus susceptible to direct proofs. Few nuances are possible.

Slowdowns, however, do pose difficulties. For they are usually surreptitious, seldom overt. Because of this, direct proofs are often unattainable. Proof will usually turn on one element of circumstantial evidence—an otherwise unexplainable decline in production. Any such inquiry will lead inevitably into many other questions in the production area, such as the normal level of production, the extent of the decline, and the uniformity of the decline.

⁵ See, e.g., *C. G. Conn, Ltd. v. NLRB*, (7th Cir. 1939) 108 F. (2d) 390.

⁶ 61 Stat. L. 136 (1947), 29 U.S.C. (1952) §§141-197.

Equally interesting is the problem with respect to intermittent stoppages. When a union regularly calls its members off the job for one hour on each work day, it can hardly be questioned that the union is engaged in a partial strike. But as the time interval between stoppages increases, the likelihood of the stoppages being a partial strike decreases. Could anyone seriously characterize two stoppages more than a year apart as a partial strike? If not, then how should we characterize stoppages one day a month or one day every six months? Arbitrary distinctions between partial and total strikes based solely on time considerations offer no real solution. Where successive stoppages, however far apart, are an integral part of a continuing single strike plan, the union doubtless intended a partial strike. Proof of such a plan, however, might be quite difficult, especially where there had been a considerable time lapse between stoppages.

On the other hand, can a union be engaged in a partial strike even though it has called but *one* stoppage? Recently, the National Labor Relations Board split 3-2 in answering this question in the affirmative.⁷ The majority felt that the coincidence of a single refusal by employees to work overtime and an intention to continue such practice amounted to a partial strike. It held that the record established both "the union's plan to engage in a series of partial strikes and its effectuation of that plan." The dissent, however, argued that a partial strike is a "*continuing and recurring* refusal to work the hours set by an employer." And, as there was but one stoppage, which by itself must be considered perfectly proper, the dissent concluded that the employees were adjudged partial strikers only because they *intended* to continue to refuse to work overtime hours. If a second stoppage had occurred, the Board apparently would have been unanimous in describing the activity as a partial strike. On balance, the majority's view would seem to be more realistic. The dissent's position that there must be at least two stoppages before there is a partial strike seems unduly mechanistic. The dissenting opinion was mainly concerned with the majority's allegedly equating the intention to engage in a partial strike with the strike itself. In this regard, the dissent's fears seem unfounded, for nowhere in the majority opinion is there any suggestion that the same result would be reached absent proof of one

⁷ Valley City Furniture Co., 110 N.L.R.B. 1589 (1954).

actual stoppage. Thus, a union's intentions have become decidedly relevant in determining whether or not a partial strike situation exists.

Motivation

One might well wonder why the partial strike warrants discussion. Surely, its history shows little, if any, acceptance by union policy makers. What then are the motivating factors which will impel unions to attempt a partial, rather than a total, strike? And are these factors of such general application as to presage an increase in the use of this tactic? Once again the intermittent work stoppage is my main focus of attention. I conceive of three fundamental situations where this form of partial strike may prove valuable to a union.

First, there is the problem created by large scale "automation." Technological advances promise startling new developments in the automatic machinery, electronics, and machine tool industries. The new machines will replace men in the direction and control of other machines. This augurs a change in the composition of our labor force. Today's production line worker will be tomorrow's maintenance worker. His sole function will be to service machines which by themselves will carry out the entire production process. In one sense, this is no revolution. Innovations in automatic equipment have been a continuous feature of our mass production environment, especially in the oil refining, chemical, food packaging and bottling industries, all of which are now highly automated. True, other industries which require considerable assembly work or which experience frequent periodic variation in the characteristics of their product will resist automation as being initially too expensive or uneconomical. In time, even their objections are likely to be overcome.

One of the significant features of the automated plant may be its power to resist strike pressures. Production may well continue during a strike when the producers are automated machines. These machines will not only be unresponsive to a union strike vote but will also often run without their usual complement of employees. Continued production may be dependent on no more than a standby maintenance force. While supervisory and office clerical personnel are generally not adaptable to traditional production line operations, they may be able to handle the maintenance chores posed by an automated plant. This is not to say that most automated plants can operate without their maintenance men. Different industries

will have different experiences in this area. Still, the more independent the machines are of human supervision, the greater the likelihood that the plant can continue to operate under strike conditions. Automation thus in some instances may result in a company's power to "hold out" being immeasurably enhanced. In such circumstances, a union's power to shut down production is throttled. The traditional total strike would be unable to evoke the economic pressures which warrant its use. Unions may have to look to new strike techniques to use against the automated company. And the intermittent work stoppage would have strong recommendations as a tactic designed to neutralize a company's advantage in automated equipment. For that kind of partial strike would exert a maximum of pressure with a minimum of risk. Certain disruptions accompany the inception of any strike situation and inevitably cause some production loss to the company. And that loss would be multiplied by the total number of stoppages which take place. Moreover, the severity of the loss in relation to any particular stoppage might depend upon whether or not the company is forewarned of the union's strike plans. In this way the union could harass an employer without putting itself through a prolonged and fruitless total strike.

There is some evidence that this causal relation between automation and partial strikes has actually existed between the Bell Telephone Company and the Communication Workers of America.⁸ The introduction of automatic dialing equipment in the telephone industry has made the traditional strike ineffective. As the telephone company is able to continue at least its local service during a strike situation, it can without serious injury to itself withstand a lengthy total strike by the CWA. As an alternative, this union devised its version of an intermittent work stoppage. It periodically struck the telephone company at unexpected times and places, each stoppage lasting for a relatively brief period of time. Many of the company's offices were struck two or three times. In this way, the union was able to disrupt substantially the company's operations. Employees, affiliated with other unions, refused to cross the picket lines and the company was unable to marshal its reserve strength with sufficient speed to fill the vacant jobs. As the stoppages lasted only a short time, the employees were returning to their jobs by the time the company had consummated its emergency measures. The company "was hard put to maintain tele-

⁸ See *Pacific Telephone and Telegraph Co.*, 107 N.L.R.B. 1547 (1954).

phone services in the face of the intermittent loss of" employees. The strategy behind the union's tactics was described in its own publication:

"Why is the 'hit-and-run' tactic successful? Let's take stock.

"By adopting the surprise hit-and-run picket line, the union taxes management's ability to organize its offices to the utmost. The chain of command in the telephone company is a long one. And telephone supervision is well trained to use no initiative—but wait for orders from the top.

"By striking quickly and unexpectedly, the Company has a problem getting its defenses set up. They can't spare supervisors from other non-struck areas, because they have to carry on normal work. The ones they do gather together reach the picketed place, only to have the picket line gone.

"The Telephone Company can't function efficiently in its nation-wide operations if any part of its circulation is cut off. During a full blown strike all of its operations operate in low gear—but in a hit-and-run attack, most of the company's functions must be maintained. The company accounting records must be maintained, its workers are largely on the job, and the public expects normal service.

"Another advantage for the union in this tactic is that most of the workers are on the job, maintaining their financial take home while harassing the company into a state of confusion. Having suffered no great loss, these workers can aid the men and women who are off the job all the time of the strike.

"The Hit and Run strike will beat the telephone industry—if properly applied."⁹

Implicit in the Union's comment is the realization that the traditional total strike could not produce sufficient pressure to win the desired economic concessions. Thus, the emergence of the hit-and-run strike technique.

There is a second, quite obvious motivation behind the use of the intermittent stoppage. Those unions which are ill-equipped, financially or organizationally, to enter a total strike situation may find in this particular weapon a workable middle ground. The striking union with limited resources has two objectives. It must of course assert real pressure and at the same time it must conserve

⁹ Id. at 1548, n. 3, quoting COAST CO-ORDINATOR (official CWA publication) Nov. 20, 1950.

its resources. The intermittent stoppage may well satisfy both requirements. It obviously will harass a company and deprive it of some income. But, more important, it may avoid a protracted and costly test of strength. While it deprives the strikers of some income, it does not cut off their entire earnings. In such a situation, the employer is in a sense underwriting the striking employees. By contrast, a total strike leaves the strikers without income and taxes the union's treasury for all kinds of strike expenditures. Some of these very factors were behind a recent series of weekend bus strikes by the Transit Workers Union of Hawaii.¹⁰ One of the reasons for that partial strike was the union's desire "to turn the tables on the [bus company] by depriving [it] of some income while the employees could have some force and still have income."¹¹

Finally, there is excellent reason for utility unions to embrace intermittent work stoppages. These unions must of necessity be sensitive to public opinion. For it is the public which is always either inconvenienced or injured by a utility work stoppage. Although public opinion will not by itself determine the outcome of such a strike, it may often be one of the decisive factors. Attempts to enlist the public's sympathy are therefore a characteristic of disputes in this area. If the union can win public support through thoughtful consideration of the public's needs, its chances of strike success are improved. For example, it may attempt to minimize a disruption in service by striking for only part of a scheduled work day or work week. Without such consideration, the public's hostility will likely be against whichever side initiated its discomfiture, usually the union. Even absent elements of self-interest, the union may, as a matter of principle and social responsibility, oppose total stoppages which tend to cripple the community where partial stoppages are feasible. This is illustrated by the Transit Workers Union of Hawaii who called weekend bus strikes in order "to give service to the public during the week so that children could get to school and others could get to work."

Other partial strikes are born of entirely different motivations. For instance, refusals to perform specific work often result from so-called "hot cargo" clauses in collective bargaining agreements. Employees are given the contractual right to refuse to handle the goods of a non-unionized employer. When this "hot cargo" ar-

¹⁰ Honolulu Rapid Transit Co., 110 N.L.R.B. 1806 (1954).

¹¹ Ibid. Trial Examiner Hemingway's Intermediate Report, p. 5, n. 5.

rives on the plant premises, the employees refuse to touch it. This type of conduct, however, is more likely to appear before the Board as an alleged secondary boycott than as an alleged partial strike. Slowdowns are a pressure tactic which could spring from numerous causes. In piecework wage systems, slowdowns are sometimes directed against production standards set by a company's time studies. On such occasions, the slowdown is a *sub rosa* attempt to prove that a production standard is in error or is unrealistic. But more often this device is merely a pressure tactic to win an argument over some condition of employment.

Statutory and Policy Consideration—Are All Strikes Protected?

What are some of the legal consequences of the partial strike? Is it to be treated like any other strike? Is it to be considered a protected or an unprotected concerted activity? In order to answer these questions, I must first detail the relevant statutory considerations. Section 7 of the Labor-Management Relations Act (1947) provides, in part, "Employees shall have the right to self-organization, to form, join, or assist labor organizations . . . and to engage in other *concerted activities* for the purpose of collective bargaining or other mutual aid or protection. . . ." (Emphasis added.) Section 8 (a) (1) forbids employer interference, restraint, or coercion of employees in the exercise of any of these rights. Section 8 (a) (3) forbids employer discrimination against employees which is aimed at either encouraging or discouraging union membership. And section 13 states, "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right." Together, these sections constitute the congressional guarantee of the right to strike. Elsewhere, in sections 8 (b) and 8 (d), the Congress placed certain substantive and procedural restrictions on the right to strike. Sections 7 and 8 make no other distinction between different types of concerted activities. Assuming then that a strike in no way violates section 8 (b) or 8 (d), does it nevertheless fall within the protection of sections 7, 8 (a) (1) and 8 (a) (3)? While a strike is the most obvious form of concerted activity, it has long been held that not all strikes will be protected by these provisions against employer reprisal. Statutory construction permits the modification of express language—"concerted activities"—where its literal application would lead to absurd results or results inconsis-

tent with the intent of Congress. For example, sit-down strikes and other seizures of plant property are concerted union activities but are also trespasses in violation of law. To protect such strikes against employer interference would be to sanction such illegality. Any such result would be foreign to the policy objectives of the act. In its declaration of policy, Congress stated that one of its purposes was . . . "to provide orderly and peaceful procedures for preventing the interference by either [union or employer] with the legitimate rights of the other. . . ."

As early as 1939, the United States Supreme Court declared that the protection of the act did not extend to all forms of concerted activities in labor disputes. The Court was concerned particularly with illegal union activity. It ruled that employees who engage in "sitdown strikes"¹² or in acts amounting to mutiny¹³ are without the protection of the act, notwithstanding the fact that such conduct, literally construed, constituted a "concerted activity."

Although the illegal strike is thus unprotected, it does not follow that all legal strikes are protected. For some legal strikes are so contrary to the policies of the act that Congress could not have intended to give such activities immunity from employer interference. A strike in violation of a no-strike clause is an example of a legal strike held to be outside the protection of the act. The Board has embraced this dichotomy. It affirms the rights of only those strikers who are engaged in *protected* concerted activity; it denies its facilities to those strikers who are engaged in *unprotected* concerted activity. This administrative graft onto the language of section 7 is not seriously questioned by anyone today. The only problems arise from the Board's policy determinations as to the kind of union conduct which will be classified as either protected or unprotected activity. In making such policy, the Board generally asked itself one question: was the strike illegal or otherwise so indefensible that Congress could not have intended that employees engaging in such activity be protected under section 7 of the act? This issue in turn seems to be partly controlled by the degree to which the particular strike departs from a legal or traditional norm. If the strike is held unprotected, then the parties are left

¹² *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 59 S.Ct. 490 (1939), reversing *Fansteel Metallurgical Corp.*, 5 N.L.R.B. 930 (1938).

¹³ *Southern Steamship Co. v. NLRB*, 316 U.S. 31, 62 S.Ct. 886 (1942), reversing *Southern Steamship Co.*, 23 N.L.R.B. 26 (1940).

to their own devices. If it is held protected, the employer cannot discharge or otherwise discipline the strikers without violating the act.

Partial Strikes and the Law

The history of partial strikes before the Board and the courts is brief indeed. Few cases need be examined to get a complete picture of the evolution in the treatment of these strikes.¹⁴ In its early days, the Board considered all peaceably conducted strikes as within the protection of the act. No employer was allowed to discharge or discipline employees who were engaged in such a strike. The Board drew no distinction between the traditional total strike and the variants described here as partial strikes.¹⁵ Partial strikers received the same measure of protection as any other striker. Apparently, to use the phrase of the Board, this kind of activity was not thought "so indefensible" as to incur a forfeiture of the protection of the act. The courts, however, were in complete disagreement with the Board. The very concerted activities which the Board found protected, the Supreme Court found unprotected.¹⁶ Nor were the courts of appeals more kindly disposed toward the Board's rulings.

Refusals to Work Overtime

In the *Conn* case,¹⁷ the Seventh Circuit dealt with the question of whether an employer might discharge employees who, although willing to work the regular hours, had refused to work the scheduled overtime hours. Their refusal was underscored by one actual work stoppage during overtime hours. The following day, the employer discharged those employees who persisted in refusing to work overtime. The Board held that the employees had engaged in a concerted protest against the prevailing overtime and that this concerted activity amounted to a strike—refusing to work in

¹⁴ A detailed and thoughtful analysis of these cases can be found in Kelsey, "Partial Strikes," NEW YORK UNIVERSITY SIXTH ANNUAL CONFERENCE ON LABOR 281-303 (1953).

¹⁵ See, e.g., *Harnischfeger Corp.*, 9 N.L.R.B. 676 (1938); *C. G. Conn, Ltd.*, 10 N.L.R.B. 498 (1938); *Mt. Clemens Pottery Co.*, 46 N.L.R.B. 714 (1943). This last case indicated, however, that an employer need not allow employees to return to work, where they had refused to work overtime, until they indicated a willingness to work on the employer's terms. But discharge was not allowed if the employees' refusal amounted to a concerted activity aimed at obtaining a change in their conditions of employment.

¹⁶ See, e.g., cases cited in notes 12 and 13 *supra*.

¹⁷ *C. G. Conn, Ltd. v. NLRB*, (7th Cir. 1935) 108 F. (2d) 390. See, to the same effect, *Mt. Clemens Pottery Co. v. NLRB*, (6th Cir. 1945) 147 F. (2d) 262.

excess of 48 hours per week.¹⁸ And, presumably, as these strikers fell within the protection of section 7, their discharges were not warranted. In reversing the Board, withdrawing the protection of section 7 from these employees and sustaining their discharges, the court stated:

"We are of the opinion that the facts in the instant situation do not bring the discharged employees within this or any other definition of the word 'strike' of which we are aware. We are unable to accept . . . [the Board's] argument to the effect that an employee can be on a strike and at work simultaneously. We think he must be on the job subject to the authority and control of the employer, or off the job as a striker, in support of some grievance. . . .

"Undoubtedly, when . . . [the employer] refused to comply with . . . [the employees'] request [for an increase in overtime rates], there were two courses open. First, they could continue work, and negotiate further with . . . [the employer], or, second, they could strike in protest. They did neither, or perhaps it would be more accurate to say they attempted to do both at the same time. . . .

"We are aware of no law or logic that gives the employee the right to work upon terms prescribed solely by him. That is plainly what was sought to be done in this instance. It is not a situation in which employees ceased work in protest against conditions imposed by the employer, but one in which the employees sought and intended to continue work upon their own notion of the terms which should prevail. If they had a right to fix the hours of their employment, it would follow that a similar right existed by which they could prescribe all conditions and regulations affecting their employment."¹⁹

The impact of this case has been pronounced. An analysis of subsequent Board and court decisions in this area reveals the pervasive influence of the Seventh Circuit's theory.

Intermittent Work Stoppages

Equally significant in the growth of theory relating to the partial strike was the United States Supreme Court's decision in *UAW-AFL v. Wisconsin Employment Relations Board*.²⁰ In this

¹⁸ C. G. Conn, Ltd., 10 N.L.R.B. 498 (1938).

¹⁹ C. G. Conn, Ltd. v. NLRB, (7th Cir. 1935) 108 F. (2d) 390 at 397.

²⁰ 336 U.S. 245, 69 S.Ct. 516 (1949).

case, the union called a series of "intermittent and unannounced work stoppages." The employer was not informed of any specific demand which these tactics were designed to enforce. Without disciplining the employees, the employer asked the Wisconsin Employment Relations Board for relief under the Wisconsin Employment Peace Act. When the requested relief was granted in the form of a cease and desist order, the union appealed to the Supreme Court contending that the relief granted under the Wisconsin act conflicted with the guarantee of the right to engage in concerted activities provided by section 7 of the NLRA. The Supreme Court dismissed the appeal, ruling that section 7 did not protect all union activities merely because they were concerted. Rather, the Court said, the aim of section 7 was simply to insure that traditional, conventional labor action should never again be comprehensively outlawed. Section 7 could not be extended into a blanket immunity for all kinds of concerted labor activity. If such immunity were granted, then management, in the Court's own words, "would be disabled from any kind of self-help to cope with these coercive tactics of the union except to submit to its undeclared demands."²¹

Refusal to Perform Specific Work

During this same period, another form of partial strike was being explored for the first time. Situations arose in which employees were unwilling to perform all of the duties of their jobs. Without engaging in any formal strike action, they refused to perform a particular part of their assigned work. In *Montgomery Ward & Co.*²² the Board held that the employees' refusal to process orders from a struck plant of their employer constituted "lawful assistance of their union protected by section 7 of the act." The Board felt that although they had not actually struck, these employees assumed a position analogous to that of economic strikers and as such they could be replaced, but not discharged. Their discharges were accordingly unlawful. On appeal, the Eighth Circuit reversed the Board's order and sustained the discharges.²³ In so holding, the court in essence found the employees to be disobe-

²¹ Id. at 264.

²² 64 N.L.R.B. 433 at 445. Note also, Pinaud, 51 N.L.R.B. 235 (1943), where the Board held that an employee who continued during a strike to perform her pre-strike functions, but refused to perform work that had been done by strikers, might properly be ordered to leave the plant. However, thereafter she was an economic striker not subject to discharge.

²³ NLRB v. Montgomery Ward & Co., (8th Cir. 1946) 157 F. (2d) 486.

dient non-strikers in breach of their implied promise to perform their work faithfully and satisfactorily. Its rationale is best expressed in this excerpt:

"... Any employee may, of course, be lawfully discharged for disobedience of the employer's directions in breach of his contract. . . . While these employees had the undoubted right to go on a strike and quit their employment, they could not continue to work and remain at their positions, accept the wages paid them, and at the same time select what part of their allotted tasks they cared to perform of their own volition, or refuse openly or secretly, to the employer's damage, to do other work."²⁴

In the *Home Beneficial Life Insurance Co.* case²⁵ the Company had a rule requiring salesmen to report at the office at the beginning of each day's work. After unsuccessful negotiations to alter this rule, the union notified the company that the salesmen would only report in two days of each week. The company discharged employees who failed to report the following morning. Actually, these employees had gone on strike, although the company believed that they were working and at the same time refusing to obey the company's rules. The question thus was whether the company could discharge employees whom it believed to be partial strikers while, in fact, the employees were engaged in a legitimate total strike. Both the Board and the Fourth Circuit agreed that the employees could not be discharged if they were actually on a full strike.²⁶ The court added, however, that the company had a right to discharge the employees if they were engaged only in a refusal to abide by the company's reporting rules. In the court's words, "the statute [section 7] expressly recognizes the right of employees to 'engage in concerted activities' but does not and could not confer upon them the right . . . to defy the authority of the employer to manage his business while remaining in his service."

In *Aurora Wall Paper Mill, Inc.*,²⁷ employees refused to unload a railroad car, a minor and infrequent aspect of their job, in an effort to induce their employer to increase the rate of pay for

²⁴ Id. at 496.

²⁵ 69 N.L.R.B. 32 (1946), affd. (4th Cir. 1947) 159 F. (2d) 280.

²⁶ Compare *Underwood Machinery Co.*, 74 N.L.R.B. 641 (1947), where the Board found that the employer had not violated the act in taking reasonable disciplinary action against employees whom he mistakenly believed to have engaged in a slowdown.

²⁷ 73 N.L.R.B. 188 (1947).

such work. At the same time, they performed all the other duties of their job. When one of the employees persisted in this refusal to unload on the following day, he was discharged. The Board sustained the discharge, apparently on the ground that this was an insubordinate and unwarranted violation of company regulations and on the further ground that the employer had not by such action foreclosed collective bargaining. The inaction of the employees in this and the *Mongomery Ward* cases seems quite similar. Yet, the Board arrived at different results in each case. As suggested by another writer, the distinction would seem to lie in the fact that in the *Aurora* case the *essence* of the employees' conduct was solely the flouting of managerial authority while in *Montgomery Ward* the employees' conduct in refusing to substitute on "struck work" was a traditional trade union response, which only *incidentally* involved a flouting of managerial authority.²⁸

The Board Follows the Courts

These court rulings, illustrating an almost total divergence in viewpoint between the courts and the Board, had a decided influence on Board thinking. Since the mid-forties the Board has retreated far from its original position on partial strikes. In the process, an ever-widening area of partial strike tactics has been placed outside the protection of the act. The enactment of the 1947 Taft-Hartley amendments preserved the general principle that employees engaging in concerted activities do not thereby always gain immunity from employer discipline or discharge. The Board itself stated: "There is an area of employee activity, not precisely defined, which, while not constituting [union] unfair labor practices under Section 8 (b) of the Act, is nevertheless not protected by the Board when employees seek affirmative relief themselves under Section 8 (a)."²⁹

Slowdowns

First, the Board ruled that slowdowns were not a protected concerted activity under section 7 of the act. In *Elk Lumber Co.*³⁰ the employer changed a loading operation which in turn necessitated the introduction of an hourly rate of pay for the loaders in place of the previously prevailing incentive system. The employees

²⁸ See Kelsey, "Partial Strikes," NEW YORK UNIVERSITY SIXTH ANNUAL CONFERENCE ON LABOR 291 (1953).

²⁹ *Perry Norvell Co.*, 80 N.L.R.B. 225 at 241 (1948).

³⁰ 91 N.L.R.B. 333 (1950).

were dissatisfied with their hourly rate and decreased their loading speed. They told the employer that they would work at a slower speed unless he either increased the hourly rates or returned to the piecework system. Shortly thereafter they were discharged. In sustaining the discharges, the Board held that while the employees' conduct amounted to concerted activity, it was not entitled to the protection of the act. The Board made this forceful statement:

" . . . the test [citing *UAW-AFL v. WERB*, 336 U.S. 245 (1949)] . . . is whether the particular activity involved is so indefensible as to warrant the employer in discharging the participating employees. Either an unlawful objective or the adoption of improper means of achieving it may deprive employees engaged in concerted activities of the protection of the Act.

" . . . To achieve [a lawful] . . . objective, however, they adopted the plan of decreasing their production to the amount they considered adequate for the pay they were then receiving. In effect, this constituted a refusal on their part to accept the terms of employment set by their employer without engaging in a stoppage, but to continue rather to work on their own terms. The Courts, in somewhat similar situations; have held that such conduct is justifiable cause for discharge."³¹

Two years later, the Board in *Phelps Dodge Copper Products Corp.*³² affirmed and extended the above holding. Here the employees engaged in a slowdown during the course of negotiations for a new contract. The Board held that the employer not only was free to discharge such employees but also was under no obligation under section 8 (a) (5) of the act to bargain with the union for the duration of the slowdown. In thus further limiting the effectiveness of a slowdown, or indeed, of any partial strike, the Board said:

" . . . The Union was unwilling to choose between working under the existing terms of employment and engaging in a total strike with the loss of wages and the risk of lawful replacement incident thereto. Instead it engaged in a harassing tactic irreconcilable with the Act's requirement of reasoned discussion in a background of balanced bargaining relations upon which good faith bargaining must rest. . . . [T]he

³¹ Id. at 337.

³² 101 N.L.R.B. 360 (1952).

authorized slowdown negated the existence of honest and sincere dealing in the Union's contemporaneous request to negotiate. In these circumstances, the . . . [employer] was not required to indulge in the futile gesture of honoring the Union's request."³³

Refusals to Cross Picket Lines

One final and important line of cases is noteworthy. These concern employee refusals to cross picket lines.³⁴ Unlike the partial strikes previously discussed, where an employee refuses to cross a picket line at other than his own plant, he generally is seeking neither to change his conditions of employment nor to bring economic pressure on his employer. In another sense, a refusal to cross a picket line is in no way different from a refusal to perform specific work. For each involves an insubordinate refusal by the employee to perform some of the work assigned him. Yet, the Board itself drew a clear line between these different types of activity. The former refusal has been held protected, the latter unprotected. The Board consistently ruled that an employer may not discharge an employee who refuses to perform those parts of his job which require him to cross a picket line.³⁵ In so holding, the Board found such employee refusals to be a protected form of concerted activity. In one case, *Rockaway News*,³⁶ although repeating that no discharge was warranted, the Board added that the employer's remedy under such circumstances was to require the employee either to perform all his duties or to vacate his job and thus make possible the hiring of a replacement. The Board spoke of the employer's right to force such an employee to become an economic striker "as a normal incident of its right to maintain its operations." This distinction by the Board saved for employees important substantive rights. For the economic striker is entitled to reinstatement if he makes an unconditional offer to return to work before a permanent replacement is hired; while the lawfully discharged employee has no right to reinstatement.

³³ Id. at 368. See *Valley City Furniture Co.*, 110 N.L.R.B. 1589 (1954), where the Board discontinued the employer's bargaining obligation while the employees refused to work the scheduled overtime hours.

³⁴ A recent comprehensive discussion of this subject was undertaken by O'Connor, "Respecting Picket Lines: A Union View," *NEW YORK UNIVERSITY SEVENTH ANNUAL CONFERENCE ON LABOR* 235-274 (1954).

³⁵ For example, *Illinois Bell Telephone Co.*, 88 N.L.R.B. 1171 (1950); *de Cordova & Bro.*, 91 N.L.R.B. 1121 (1950); *West Coast Casket Co.*, 97 N.L.R.B. 820 (1951).

³⁶ *Rockaway News Supply Co.*, 95 N.L.R.B. 336 (1951).

The courts, however, were again unsympathetic to the Board's viewpoint.³⁷ The Second Circuit in *Rockaway News* held that the employee who refused to cross a picket line at another plant was properly discharged and that the distinction between the right of discharge and the right of replacement drawn by the Board was "wholly unrealistic." More important, the Court found this refusal to be a concerted activity unprotected by section 7 of the act. In this regard, the court, citing the *Conn* and *Montgomery Ward* cases, said:

"... In other words an employee is of course free to exercise his right to refuse to cross a picket line when he is on his own time and his discharge for so doing would doubtless be a violation of Section 8 (a) (1). But he is not free to exercise the right during his working time in violation of his employer's working rules by refusing to perform that part of his regular duties which requires him to cross the picket line. To hold otherwise would be to permit an employee unilaterally to dictate the terms of his employment which it is well settled he may not do."³⁸

The Supreme Court decided the above case upon entirely different grounds—the discharge was proper because the employee's conduct had amounted to violation of a "no-strike" clause in a collective bargaining agreement. By way of dictum, however, the Court did approve of the above reasoning by the Second Circuit. It too found "the distinction between discharge and replacement in this context . . . [to be] unrealistic and unfounded in law. . . ."³⁹

The reason for this difference in approach between the Board and the courts is apparent. Respect for picket lines has traditionally been a far more acceptable type of activity than slowdowns and other insubordinate refusals to work. Such respect is a conventional means of sympathetic expression between unionists and usually is not a deliberate and pre-conceived violation of plant rules and regulations. As the refusal to cross a picket line conforms to a traditional norm, the Board refused to regard it

³⁷ See, e.g., *NLRB v. Illinois Bell Telephone Co.*, (7th Cir. 1951) 189 F. (2d) 124, denying enforcement of 88 N.L.R.B. 1171; *NLRB v. Rockaway News Supply Co.*, (2d Cir. 1952) 197 F. (2d) 111, *affd.* on different grounds 345 U.S. 71, 73 S.Ct. 519 (1953). Some courts did agree with the Board theory. See, e.g., *NLRB v. West Coast Casket Co.*, (9th Cir. 1953) 205 F. (2d) 902; *NLRB v. Montag Bros., Inc.*, (5th Cir. 1944) 140 F. (2d) 730, *affirming* *Montag Bros., Inc.*, 51 N.L.R.B. 366 (1943).

³⁸ *NLRB v. Rockaway News Supply Co.*, (2d Cir. 1952) 197 F. (2d) 111 at 113-114.

³⁹ *NLRB v. Rockaway News Supply Co.*, 345 U.S. 71 at 75, 73 S.Ct. 519 (1953).

as an "indefensible" activity and granted it the protection of the act. These factors were much more meaningful to an agency steeped in labor relations history and *expertise* than to any court. But that protected status, in face of the *Rockaway News* decisions, was to be short lived.

The New Board and Partial Strikes

The change in the Board's composition wrought by the 1952 national elections has resulted in no startling decisions in this area. Even the new members' predecessors were unanimous in characterizing various partial strikes as unprotected activity. It came as no surprise when the present Board extended the concept of the unprotected partial strike to include week-end strikes, overtime strikes and hit-and-run strikes.⁴⁰ In doing so it merely followed the trend which had been forcefully stated by both the courts and the previous Boards. If there should be any criticism of this trend it must therefore be directed not at any particular Board but rather at all the Boards.

A few innovations in theory were made. The Board reversed its previous position on refusals to cross picket lines and in effect held such refusals to be partial strikes outside the protection of the act. The Board further determined new legal consequences which will hereafter attach to the unprotected partial strike. Moreover, it has been made abundantly clear that all partial strikes are now unprotected. There is no longer any possibility that this Board will indulge in serious distinctions between different varieties of partial strikes. Such distinctions can be made but whether or not they would be real and meaningful is an arguable matter, one which I would prefer exploring in greater detail in my conclusion. Thus, the only remaining query is a factual one — did the employees engage in a partial strike? If so, only one result is possible.

Surely, the Board's recent *Auto Parts* case⁴¹ must be considered an important policy decision. There, an employer was held free to discharge an employee who refused to cross a picket line in performing his work assignment. In the Board's view, the employee's conduct amounted to a refusal to do the job for which he had been hired and a direct disregard of his employer's

⁴⁰ The Board's previous position on the slowdown as an unprotected partial strike was affirmed recently in *California Cotton Cooperative*, 110 N.L.R.B. 1494 (1954).

⁴¹ 107 N.L.R.B. 242 (1953).

instructions. It concluded that, there being no anti-union bias on the part of the employer, his action was intended only to preserve the efficient operation of his business. Nowhere does the decision classify this employee conduct as either protected or unprotected activity. In effect, however, the Board here ruled that respecting picket lines is a partial strike and is accordingly outside the protection of section 7. No other interpretation would be realistic.

Quite understandably, the majority of the Board's recent work in this area has dealt with intermittent work stoppages. As already mentioned, in *Pacific Telephone and Telegraph Co.*⁴² the CWA's strategy consisted of "a multiplicity of little 'hit-and-run' work stoppages . . . to 'harass the company into a state of confusion' . . . [by a] period of calculated unpredictability." Relying on the Supreme Court's decision in *UAW-AFL v. WERB*, the Board held that "the inherent character of the method used sets this strike apart from the concept of protected union activity envisaged by the Act," and, more specifically, that the CWA intended to "bring about a condition that would be neither strike nor work." No detailed examination of the vice in such a strike was attempted. The Board concluded that employees affiliated with a different union (Tollmen) who refused to cross the CWA picket lines, with knowledge of their intermittent character, made common cause with the CWA and thus joined in the unprotected strike. The temporary layoffs of the tollmen were sustained, primarily on the ground that the company was motivated only by economic considerations in effectuating the layoffs but also on the further ground that, even assuming discriminatory motivation, these employees were outside the protection of the act. The novel feature of this holding is that a refusal to cross the picket line of unprotected strikers was itself considered unprotected. Employees hereafter respect picket lines at their own risk. For such respect is tantamount to association, the guilt or innocence of which will turn on the conduct of the picketing union. The Board did not and could not consider this refusal to cross a picket line to be a partial strike for the tollmen performed *none* of their duties. The refusal was unprotected only because the underlying "hit-and-run" stoppages were unprotected partial strikes.

Then, in *Kohler Company*,⁴³ the Board affirmed its trial examiner without comment. The latter had ruled that stoppages

⁴² 107 N.L.R.B. 1547 at 1548-1549, Member Murdock dissenting.

⁴³ 108 N.L.R.B. 207 (1954).

during four successive shifts in protest of over-heated working conditions amounted to an unprotected partial strike.

The next problem was an obvious outgrowth of the above cases. In order to characterize this kind of partial strike as unprotected activity, is it necessary to find that it is *both* intermittent and unpredictable in nature? The Board and the courts had emphasized both elements. Would intermittency alone support a conclusion that such a strike was unprotected? The answer was soon forthcoming. In two companion cases, the Board found that an intermittent work stoppage was unprotected without regard to its predictability. Moreover, the fact that these partial strikes were, unlike some of the previous cases, designed to enforce specific demands was also held to be without significance.

In the *Valley City Furniture Company* case,⁴⁴ already discussed, the union engaged in an overtime strike. That is, the employees refused to work the overtime hours set by the employer and actually engaged in one such stoppage. The majority characterized this conduct as an unprotected partial strike and held that the participating employees could be replaced. And the fact that the partial strike was provoked by employer unfair labor practices did not make it a protected strike. The Board went on to say:

"The vice in such a strike derives from two sources. First, the Union sought to bring about a condition that would be neither strike nor work. And, second, in doing so, the Union in effect was attempting to dictate the terms and conditions of employment. Were we to countenance such a strike, we would be allowing a union to do what we would not allow any employer to do, that is to unilaterally determine conditions of employment."

Even more important was the Board's ruling that the employer's duty to bargain is suspended during the existence of a union threat to engage in a partial strike. The Board so held even though *no* stoppage had taken place. This unique holding was properly criticized by the dissenting members who believed that any such suspension of the duty to bargain was premature. The dissent wisely maintained that such threats should stimulate bargaining because at such times negotiations might be the only means of preventing the materialization of an unprotected strike.

⁴⁴ 110 N.L.R.B. 1589 at 1594-1595 (1954), Members Murdock and Peterson dissenting.

In their own words, "to sanction a refusal to bargain [in these circumstances] is to insure the outbreak of economic warfare."

In *Honolulu Rapid Transit Co.*⁴⁵ a series of weekend stoppages by bus drivers were found to be unprotected partial strikes. The company meted out one-day and fifteen-day suspensions to the drivers participating in these strikes. The Board stated that "the employer may lawfully insist that the employees choose either of the two avenues available to them — either quit work or discharge the obligations for which they are hired and paid."

The most interesting feature of this case, however, was the attempt by the concurring voices — Chairman Farmer⁴⁶ and Member Peterson — to inject a new and, I think, untenable theory in this area. In defining unprotected activity, they felt that the Board must "accommodate the right of employees to engage in concerted action to the right of the employer to continue his business." Specifically, they suggested that the nature of an employer's "response" to a partial strike will determine his guilt. Where that "response" is "retaliatory in motivation or effect," the concurring members would find a violation of the act; where that "response" is not retaliatory, they would find no violation. Thus, *discharges* of partial strikers might not be privileged where under similar circumstances *layoffs* of such strikers would be privileged. Dissenting Member Murdock's incisive analysis of this theory bears quotation:

"In other words, a small amount of discrimination to discourage union activity converts what would otherwise be protected activity into unprotected activity! . . . These statements . . . present a new and dangerous concept in the interpretation of Section 8(a)(3) of the Act. In effect, they add up to the conclusion that discrimination by an employer will be exonerated by this Board if the Board believes such discrimination is 'reasonable'. . . . [This] amounts to an obvious form of administrative legislation."⁴⁷

I, for one, agree with Member Murdock, and apparently Members Rodgers and Beeson (respectively, the dissenting and majority opinions in this case), that the protection afforded employees by section 7 of the act is dependent solely on the nature and the

⁴⁵ 110 N.L.R.B. 1806 (1954), Member Murdock dissenting.

⁴⁶ The Chairman urged the very same position in his concurring opinion in *Valley City Furniture*, note 44 *supra*.

⁴⁷ 110 N.L.R.B. 1806 at 1817 (1954).

objective of their concerted activity, not on the nature of the employer's retort to that activity.

One further comment should be made. In all of these recent cases, the tendency has been to find not only that the strike was an unprotected activity but also that the employer's response to such strike was primarily calculated to protect his right to continue his business. Such has been the case where the employer laid off, suspended, replaced and even discharged employees who were engaged in a partial strike. Reading these cases, it becomes difficult to conceive of a factual context in which the Board would find employer *retaliation* against partial strikers. For it must be remembered that even the rankest discriminations are in part motivated by the employer's effort to keep his business going. Thus, the attempt to distinguish factually between employer retaliation and employer self-protective measures will prove to be no more than an exercise in semantics. Indeed, a few members of the Board seem to have formulated, *sub silentio*, some kind of presumption. Evidently, employer responses are presumed to be privileged exercises of the right to continue his business, unless convincing evidence of retaliatory motive is established. This subtle use of presumptions is more manifest in other recent Board decisions.⁴⁸ Practically speaking, the above approach is identical with the view that partial strikers are unprotected for all purposes. Both theories arrive at the same result — that employer action against partial strikers is not violative of the act.

Another significant case requires mention. In *Personal Products Corporation*⁴⁹ the Board unanimously held that a union refused to bargain in good faith, in violation of section 8 (b) (3), when it engaged in "unprotected harassing tactics" during negotiations. The tactics found to be evidence of bad faith on the part of union included slowdowns, intermittent stoppages, and a refusal to work special hours or overtime. The Board said:

"... Such unprotected harassing tactics were an abuse of the Union's bargaining powers—'irreconcilable with the Act's requirement of reasoned discussion in a background of balanced bargaining relations upon which good-faith bargaining must rest' — which impaired the *process* of collective bargaining that Congress intended not only to encourage but to protect."⁵⁰

⁴⁸ See *Buffalo Linen Supply Co.*, 109 N.L.R.B. 447 (1954).

⁴⁹ 108 N.L.R.B. 743 (1954).

⁵⁰ *Id.* at 746-747.

Generalizing from this decision, it now seems apparent that any form of partial strike during negotiations is not only unprotected but also evidence of unlawful conduct.

Conclusion

A summary of these holdings can be simply stated. For the Board has taken a position which makes possible generalization with regard to partial strikes. Without exception, the Board will consider all partial strikes outside the protection of section 7 of the act. Employers will therefore have the right to suspend, discipline and, perhaps, discharge partial strikers without fear of committing unfair labor practices, although a few members have some reservations here on the limits of employer retaliation against such strikers.

The theory behind these Board and court holdings has evidently been that partial strikes are so "indefensible" in nature that Congress could not possibly have intended to protect such activities under section 7 of the act. This is a policy level decision as to which little guidance can be found in the act itself. In justifying its position, the Board has had three principal ideas in mind: (1) that partial strikes create a condition that is neither strike nor work; (2) that partial strikers unilaterally attempt to set their own terms and conditions of employment; and (3) that an element of industrial insubordination is implicit in most partial strike situations. These ideas are further buttressed by the fact that partial strikes clearly depart from the traditional norm of union strike activity.

This theory is unquestionably applicable to some of the partial strikes. For example, slowdowns and refusals to perform specific work, regardless of their objectives, are tactics which primarily defy the employer's control over the conduct of employees while at work. These employees refuse to perform part of their duties while remaining on the employer's payroll and on his premises. The resulting situation is neither strike nor work. Surely, to afford the protection of section 7 to such partial strikers would be to mock the policy objectives of the act. This type of conduct clearly deviates from most conceptions of traditional union activity and it can hardly be considered anything other than "indefensible."

The refusal to cross a picket line is identical to the refusal to perform specific work in most respects. Thus, it is understand-

able why the Board has in effect concluded that the former refusal, like the latter, is an unprotected partial strike. But there are differences. Respect for picket lines has been a conventional response by trade unionists for such a long period of time that it has become imbedded in tradition and has won much popular acceptance as a reasonable tactic. These factors have led some to argue, logical considerations aside, that section 7's protective cloak should cover the refusal to cross a picket line. One commentator persuasively elaborated as to how the employee who respects a picket line differs from other partial strikers:

"First of all, the employee is reacting, not acting. He is merely a passive agent, not an active one. Second, he is acting in a traditional union manner, which takes on a certain propriety by virtue of its lengthy history, and its acceptance as part of our nation's mores. The activities condemned in the partial strike cases enjoy no such status in our culture. Third, in respecting picket lines, there is but one form of concerted activity open to the employee. This is not true in the other cases for there the employees are afforded many means of handling their grievances."⁵¹

These arguments have been to no avail. And the Board stands on the very brink of declaring this conduct to be "indefensible" and thus unprotected activity.

Should intermittent work stoppages be similarly characterized as "indefensible"? This question has caused some controversy. These stoppages differ significantly from the other varieties of partial strikes mentioned in the preceding paragraphs. For they do not take place on company premises and do not anticipate pay for time not worked. It is also clear that such a stoppage cannot be equated with the situation where employees simultaneously strike and work. In other words, the phases of strike and of work are here separated in point of time. Surely, the intermittent stoppage is not tantamount to insubordination. It does, however, in a real sense result in the employees' setting up their own hours of employment. Whether or not these distinctions are real and substantial is a vital question. If they are, then it would appear that the Board was too precipitate in classifying all partial strikes as unprotected activities.

⁵¹ O'Connor, "Respecting Picket Lines," NEW YORK UNIVERSITY SEVENTH ANNUAL CONFERENCE ON LABOR 274 (1954).

The United States Supreme Court said that unannounced and unpredictable intermittent stoppages for unstated ends were unprotected.⁵² Did this mean that all intermittent stoppages were unprotected? Even those which were announced and predictable and for stated, lawful objectives? The Board so extended the Supreme Court's holding, finding the distinctions between intermittent stoppages and other partial strikes to be without substance and finding all intermittent stoppages to be unprotected concerted activities. The Board's action was not taken without a dissenting voice. Member Murdock in one case expounded his belief that a regular weekend bus strike for stated objectives is not so indefensible as to deprive employees of their guaranteed protections under section 7.⁵³ He further asked:

"Is it absurd to find that employees who engage in peaceful weekend strikes rather than a continuous strike are entitled to the protection of sections 7 and 8 of the Act? Have these employees engaged in such indefensible conduct that Congress could not possibly have intended to protect them?"

His rhetorical questions required no reply. So, too, in another case, Member Murdock stated that the question of whether unpredictable "hit-and-run" stoppages were unprotected "is a close one."⁵⁴ While he felt that that question need not be decided, he did argue that these stoppages were less objectionable than "a wild-cat or a sit-down strike," or other forms of partial strikes.

In questioning the validity of the Board's conclusion some other observations are certainly in order. In a dynamic industrial environment, unions are constantly forced to discover more effective means of administering their affairs. Union policy must be responsive, for example, to changes in the economy, to new technological developments, and to changing industrial practices. So, the level of employment, the degree of automation, and the interrelation of companies in a particular industry may all be factors which influence and shape a union's strike policy. Take automation as an illustration. As already noted, in certain industries this phenomenon may strengthen employer ability to withstand traditional strike pressures. Faced with a loss in effectiveness of their principal weapon, unions understandably will seek and create workable alternatives. The partial strike, particularly

⁵² *UAW-AFL v. WERB*, 336 U.S. 245, 69 S.Ct. 516 (1949).

⁵³ *Honolulu Rapid Transit Co.*, 110 N.L.R.B. 1806 at 1816 (1954).

⁵⁴ *Pacific Telephone and Telegraph Co.*, 107 N.L.R.B. 1547 (1954).

the intermittent stoppage, is one such alternative. Assuming the truth of the following premise — automation may in certain circumstances rebut traditional strike pressure — does the intermittent stoppage then seem an “indefensible” tactic? I think not, at least not in every instance. This is especially true if one believes that the power to assert economic pressure, not necessarily its exercise, is an indispensable condition and a basic encouragement to healthy collective bargaining. In other words, will collective bargaining relationships be hindered by a union’s inability to bring traditional strike pressure? If so, then should not new “untraditional” strike techniques be stimulated by characterizing them as protected activities? I would think so if the act’s objective of restoring, and presumably maintaining, “equality of bargaining power between employees and employers,” and of “encouraging the practice and procedure of collective bargaining” is to have significance. I do not mean that union necessity alone justifies an otherwise indefensible strike tactic. No such position would be tenable. I mean only that for the above reasons it may well be that the intermittent stoppage is not always indefensible.

An even clearer explanation of my point can be gained from a different perspective. The public’s increasing impatience with utility strikes, as reflected by a sizeable increase in legislation in that field, will ultimately force utility unions to seek pressure devices other than total strikes in attempting to win stalemated arguments. Again the intermittent stoppage looms as an alternative. Indeed, in utilities this type of partial strike may be better for the community than a total strike. Should not the Board encourage the minimizing of disruptions in essential services? A strike one day a week is better than the suffocation of a total strike. In such circumstances, is an intermittent stoppage always “indefensible”? I hardly think so. After all, one of the purposes of the act is “to protect the rights of the public in connection with labor disputes affecting commerce.” Does the Board protect the public by discouraging intermittent stoppages which would lessen a strike’s impact on the community? Member Murdock stated in one recent dissent in connection with weekend bus strikes:

“Certainly, the public interest here was better served by a limitation of strike activity to nonessential weekend travel rather than continuing the strike throughout the week with serious disruption to the entire economic life of the city. The effect of the majority’s decision in this case will be to serve

notice on transportation unions that they *must strike continuously*, without regard to the paralyzing consequences of their strike, to receive the protection of the Act."⁵⁵

An enlightened Board, I suggest, should consider giving some intermittent stoppages by utility unions the protection of the act.

The Board, however, has shown little sympathy for this middle ground. Its rigid and mechanistic approach to this problem does not reflect a spirit of compromise and reasonableness which is the essence of good labor relations. To the contrary, it reflects a technical, perhaps even legalistic, frame of reference, all too remote from an appreciation of the changing needs in this field. Only in such a frame of reference can absolutes flourish.

Yet, it must be acknowledged that there is some logic in the Board's position. Surely, all intermittent stoppages cannot be protected. The Supreme Court said this, but only in connection with unannounced stoppages for unstated ends. This does not mean that all announced stoppages for stated ends are to be protected. Even these stoppages can constitute such improper harassment as to be indefensible. For example, a stoppage of ten minutes every half-hour would create an intolerable situation under which production of any kind would be unlikely. A stoppage of one day a week would hardly have the same effect and would not be subject to the same objections. Yet, these stoppages are different only in degree, not in kind. The problem is manifest. Is there any logic in protecting some intermittent stoppages and in not protecting others? Any such double standard would require the drawing of arbitrary lines between different types of intermittent stoppages on a case-by-case basis. Such a path has obvious administrative shortcomings. But the other path, taken by the Board, indicates that the efficiency and logic of neat formulas do not always produce a just result.

What would the consequences be if the protection of the act were accorded some intermittent stoppages? To begin with, it would not result in a surrender by the employer of control over hours of work or other conditions of employment. While the employees were engaged in such a stoppage, they would be subject to replacement just like any other economic striker. And the employer could not be forced to continue to run his business in face of such continuing stoppages. In other words, he would have the

⁵⁵ Honolulu Rapid Transit Co., 110 N.L.R.B. 1806 at 1815 (1954). Emphasis added.

right to convert a partial strike into a total strike. These are employer rights which the Board recognized years ago when it considered partial strikes to be protected. What the employer would not be allowed to do is discipline or discharge the employees because of their partial strike activity. To some, this may seem little advantage for the partial striker. But there is a considerable difference in Board law between being a protected economic striker and being an unprotected partial striker. Moreover, the unprotected partial strike suspends the employer's bargaining obligation. And the threat of such a strike has the very same effect. Clearly, the protection of the act would be a real benefit to a union using partial strike tactics.

It should be emphasized that unions are still free to engage in any form of partial strike. The partial strike is unprotected, not unlawful (except in the limited situation where the union uses these tactics during bargaining negotiations). The withdrawal of protection by the Board means only that the parties will be left to their own devices, free of federal interference. The parties are thus placed precisely where they would be without the Board. So viewed, the effects of existing policy will largely depend upon the relative strength of the union. The absence of protection will hardly deter a strong union from engaging in partial strike tactics. Many powerful unions find little need to resort to the Board. The weaker unions, to whom Board protection is often quite meaningful, will be wary of using this tactic. The partial strike will thus be no more effective than the union behind it. Today, partial strikers run the risk of almost any kind of employer retaliation. To succeed, they must have a strength which is capable not only of winning the underlying argument behind the dispute but also of resisting any employer reprisal.

In the final analysis, the announced intermittent stoppage may be an act of moderation. It is a self-imposed limitation on the union's maximum power, couched of course in terms of self-interest. I believe there is good reason for considering some intermittent stoppages to be protected concerted activity. Moreover, I believe that the concept of protected and unprotected activity should not be static. The Board's authority to classify concerted activities in one of these two categories is indeed significant. In doing so, the Board should be responsive to the changing conditions of our industrial relations environment as well as the act's overall objectives. The Board has done this in other areas of the

law. For example, it gravitated from its initial (1937) strict proscription of any employer anti-union speech to its recent (1954) almost unqualified approval of employer speechmaking. Different conditions warranted a change in the act's interpretation. Similarly, an indefensible strike, in 1951 for instance, should not necessarily be indefensible today. By the same token a strike which was held protected in the past need not be held protected today. Slavish adherence to precedent is not the answer. Rather the Board must in part evaluate strike tactics in light of the dynamic characteristics of our industrial life. If the Board will do this, I submit that it will find that not all intermittent work stoppages should be considered indefensible and thus unprotected activities. In any event, in important policy areas of this kind, it is best for the Congress itself to draw the guiding lines. Only in that way will this kind of partial strike escape from the present unprotected status in which both the Board and the courts have placed it. Perhaps in its next deliberations on amendments to the Taft-Hartley law, Congress will give this problem the searching examination it deserves.