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Labor Law - LMRA - Strike Without Compliance with Arbitration Clause of Collective Agreement as Unprotected Concerted Activity

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LABOR LAW—LMRA—STRIKE WITHOUT COMPLIANCE WITH ARBITRATION CLAUSE OF COLLECTIVE AGREEMENT AS UNPROTECTED CONCERTED ACTIVITY—A dispute arose over the working hours and assignment of one of the employer's truck drivers. The employer suggested to the union that they refer the question to an arbitration panel for adjudication. The collective bargaining agreement provided that the panel was to be the exclusive means of settling all such matters, but the agreement did not contain a specific no-strike clause.[1] The union refused to arbitrate and ordered a strike. Subsequently, the employer discharged twenty of the strikers and then refused to reinstate them at the termination of the strike. The union claimed that the strike was a protected concerted activity under section 7 of the amended National Labor Relations Act,[2] and that the discharges were violations of sections 8 (a) (1) and 8 (a) (3) of the act.[3] The National Labor Relations Board *held* that, by striking, the employees had breached their collective bargaining agreement, and, therefore, had forfeited any protection the act might give to such concerted action. *W. L. Mead, Inc.*, 113 N.L.R.B. No. 109, 36 L.R.R.M. 1392 (1955).

It has been uniformly held in the past that economic strikes are unprotected concerted activities, where the collective bargaining agreement contains a no-strike clause.[4] Absent such a provision, the employees may

[1] Article VIII of the collective bargaining agreement read: "Should any dispute, grievance or complaint arise during the life of this agreement which the Business Representative fails to adjust, the dispute, grievance or complaint shall be referred to the Arbitration Panel, which Panel shall be the exclusive means of adjudicating all matters." Principal case at 1393.

[2] Labor-Management Relations Act, 1947, 61 Stat. L. 140, 29 U.S.C. (1952) §157.

[3] Labor-Management Relations Act, 1947, 61 Stat. L. 140, 29 U.S.C. (1952) §158 (a) (1), (3).

[4] NLRB v. Columbian Enameling & Stamping Co., (7th Cir. 1938) 96 F. (2d) 948, affd. 306 U.S. 292, 59 S.Ct. 501 (1939); Scullin Steel Co., 65 N.L.R.B. 1294 (1946); Joseph

strike in furtherance of their disputes with the employer without subjecting themselves to discharge.[5] But there are exceptions to this rule, other than the no-strike clause cases. An employer may discharge employees who strike for an unlawful purpose,[6] or for the promotion of interests other than their own.[7] The principal case has added yet another exception. There is authority for the Board's ruling in *NLRB v. Sands Mfg. Co.*, where the Supreme Court said that "the Act does not prohibit an effective discharge for repudiation by an employe of his agreement, any more than it prohibits such discharge for a tort committed against the employer."[8] And in *NLRB v. Dorsey Trailers, Inc.*,[9] it was held that an employer could discipline employees who struck without resorting to an agreed upon grievance procedure. The question arises, however, whether the Board is equating arbitration clauses with no-strike clauses, or is limiting its decision in the principal case to those arbitration clauses which state that arbitration is to be the *exclusive* means of settling disputes. If all arbitration clauses and grievance procedure provisions in collective agreements are to have the same effect as no-strike clauses, the facts of life of traditional collective bargaining will be overlooked. It is normally the union which bargains for arbitration clauses, while the employer makes concessions for the inclusion of a no-strike clause.[10] To hold that a union has waived its right to strike under such circumstances is contrary to the probable intent of the parties. In the principal case the Board held that the unambiguous language of the agreement precluded resort to parol evidence to show that the union did not intend the arbitration clause to be a waiver of the right to strike.[11] However, both logic and the inferences of the Board would seem to limit the right of the employer to discharge his striking employees to situations where it is agreed that arbitration is to be the *only* method

Dyson & Sons, Inc., 72 N.L.R.B. 445 (1947); United Elastic Corp., 84 N.L.R.B. 768 (1949); Marathon Electric Mfg. Corp., 106 N.L.R.B. 1171 (1953); Kraft Foods Co., 108 N.L.R.B. 1164 (1954). See Daykin, "The No-Strike Clause," 11 UNIV. PITT. L. REV. 13 (1949); 48 COL. L. REV. 1109 (1948); 63 YALE L. J. 1186 (1954).

[5] NLRB v. Globe Wireless, Ltd., (9th Cir. 1951) 193 F. (2d) 748.

[6] American News Co., 55 N.L.R.B. 1302 (1944).

[7] See Daykin, "The No-Strike Clause," 11 UNIV. PITT. L. REV. 13 at 15 (1949).

[8] 306 U.S. 332 at 344, 59 S.Ct. 508 (1939).

[9] (5th Cir. 1950) 179 F. (2d) 589. In Goodyear Aircraft Corp., 63 N.L.R.B. 1340 (1945), the discharged employee had refused to follow the production schedule set by management, but it is not clear whether the Board allowed the discharge because of his insubordinate conduct or because of his failure to follow the regular grievance procedure. See also United Elastic Corp., note 4 supra.

[10] See Dorsey Trailers, Inc., 80 N.L.R.B. 478 (1948); 68 HARV. L. REV. 1472 (1955).

[11] Is the language quoted in note 1 supra so unambiguous? Is it not a question of whether the union intended the arbitration clause as a waiver of the right to strike or whether it merely intended it to be the exclusive means of settling those disputes submitted for adjustment?

of settling disputes.[12] The Board does point out that the strike involved in the principal case was not the result of an unfair labor practice by the employer. Apparently, therefore, the doctrine of *NLRB v. Mastro Plastics Corp.*,[13] in which an unfair labor practice strike was held to be protected by the act even though the collective bargaining agreement contained a specific no-strike clause, would apply to cases where an arbitration clause similar to the one in the principal case is involved. It may be noted that the instant ruling does not exclusively benefit the employer. It would seem only logical that clauses such as that involved in the principal case should preclude both strikes and lockouts.

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[12] See Dorsey Trailers, Inc., note 10 supra. Though holding that an agreement as to grievance procedures does not act as a waiver of the right to strike, that case indicated that, if it was agreed that the procedure was to be the only method of settling disputes, the agreement could act as a waiver.

[13] (2d Cir. 1954) 214 F. (2d) 462, affd. (U.S. 1956) 76 S.Ct. 349. See Wagner Iron Works, 104 N.L.R.B. 445 (1953); 53 COL. L. REV. 1023 (1953).