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Joy Tannian S.Ed.
University of Michigan Law School

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LABOR LAW—LMRA—DISCRIMINATION DISCHARGE—EFFECT OF LEGAL GROUND FOR DISCHARGE WHERE POSSIBLE DUAL MOTIVATION EXISTS—Respondent discharged an employee under the terms of a union contract which provided that employees could be discharged for failure to carry out the employer's orders. It was undisputed that the employee had failed to submit required reports on at least two occasions. A complaint alleging the commission of an unfair labor practice was filed. The National Labor Relations Board[1] found that the employee had been discharged as a reprisal for his union activities in violation of section 8 (a)(1) of the amended National Labor Relations Act.[2] The Board ordered reinstatement under section 10 (c) of the act. In an action by the Board seeking enforcement of

[1] Huber and Huber Motor Express, 109 N.L.R.B. 295 (1954).
[2] Labor-Management Relations Act, 1947, 61 Stat. L. 141, 29 U.S.C. (1952) §158 (a) (1)

its order, *held,* enforcement denied. Where the Board could as reasonably infer a proper collateral motive as an improper one, the act of the management cannot be set aside as being improperly motivated. *NLRB v. Huber and Huber Motor Express,* (5th Cir. 1955) 223 F. (2d) 748.

Section 10 (c) of the original NLRA, which empowered the NLRB to order reinstatement in unfair labor practice cases,[3] was qualified by a clause in the amended NLRA which forbids reinstatement if the discharge was "for cause."[4] Since it is well established, even apart from the amendment, that discharge for cause does not provide grounds for reinstatement,[5] this provision creates problems of interpretation only when there have been both discriminatory and proper grounds for discharge. Unfortunately, the rationale of the decision in the principal case is not made clear by the court and different interpretations are possible. If the court meant to hold that where the evidence shows both proper and improper grounds for discharge, the Board can no longer find as a matter of law that the employer has violated the act and accordingly order reinstatement, the holding is inconsistent with a long line of both Board and court decisions.[6] Such a rationale would imply that where both proper and improper grounds for discharge exist, the Board may not inquire into the actual motive of the employer for discharging the employee, but must find the discharge to be proper. The Board's approach in cases where there is a possibility of dual motivation has been to determine if in fact the employer was motivated at least in part by anti-union animus. If such were the case, a violation was found and reinstatement ordered.[7] While this approach appears sound, the fact remains that the actual result in a number of cases indicates that union affiliation on the part of the discharged employee seemed to insulate him from discharge, even for the most serious misconduct.[8] Several court decisions under the original NLRA at least impliedly criticized the Board for its over-zealous attitude in this respect and refused to enforce orders of reinstatement on the ground that the evidence was insufficient to justify

[3] Generally under §8 (a) (1) or §8 (a) (3) of the amended NLRA.

[4] Labor-Management Relations Act, 1947, 61 Stat. L. 147, 29 U.S.C. (1952) §160 (c).

[5] NLRB v. Jones and Laughlin Steel Corp., 301 U.S. 1, 57 S.Ct. 615 (1936); Ballston-Stillwater Knitting Co. v. NLRB, (2d Cir. 1938) 98 F. (2d) 758; NLRB v. Citizen-News Co., (9th Cir. 1943) 134 F. (2d) 970.

[6] NLRB v. Harbison-Walker Refractories Co., (8th Cir. 1943) 135 F. (2d) 837; Piedmont Shirt Co. v. NLRB, (4th Cir. 1943) 138 F. (2d) 739; Sorens Motor Co., 106 N.L.R.B. 652 (1953).

[7] See NLRB THIRD ANNUAL REPORT 70 (1939); 7 GEO. WASH. L. REV. 797 (1939).

[8] Hearst Consolidated Publications, Inc., 10 N.L.R.B. 1299 (1939). In a particularly extreme decision, the Board found that an employee had been discriminatorily discharged despite uncontradicted evidence to the effect that he was derelict in his duties, played cards during working hours and was incapable of properly carrying out his assigned task which consisted of work in vital aircraft forgings. Wyman-Gordon Co., 62 N.L.R.B. 561 (1945). The reviewing court termed the decision "astounding" and refused to enforce the Board's order of reinstatement Wyman-Gordon Co. v. NLRB, (7th Cir. 1946) 153 F. (2d) 480.

a finding of discriminatory discharge.[9] Since the burden of proving discriminatory discharge rests on the General Counsel of the Board, who must establish this fact by a preponderance of the evidence,[10] these decisions rest fundamentally on the ground that he did not sustain his burden of proof. This criticism of the Board's failure to maintain more exacting standards with regard to the burden of proof imposed on the General Counsel is reflected in a statement issued by the House Committee which revised section 10 (c),[11] indicating that the primary purpose of the amended provision was to remind the Board of its duty with regard to problems of proof. This theory is supported by the fact that the amended section 10 (c) makes still further reference to evidentiary matters which do not appear in the original section. A number of recent Board decisions, refusing to make a finding of discriminatory discharge, manifest in their language a more acute awareness on the part of the Board of its duty to establish a violation of the act by a preponderance of the evidence, rather than by shadowy suspicions and inferences.[12] This realization is enforced by the provisions of section 10 (c) of the amended NLRA and by section 10 (e) of the Administrative Procedure Act[13] which now make the Board's findings of fact conclusive on review only if supported by substantial evidence on the whole record. The Supreme Court has held that these provisions require reviewing courts to assume more responsibility for the reasonableness and fairness of Board decisions.[14] It may well be that the theory of the court in the principal case, as in other recent cases,[15] was merely that where the Board can as reasonably infer a proper motive on the part of the employer in taking a certain course of action as an unlawful motive, substantial evidence has not proved the employer to be guilty of an unfair labor practice. This seems likely since the same court recently decided a case of alleged evasion of statutory obligation to bargain on an identical rationale.[16] The only other possible explanation for the decision in the case is that the court interpreted the amended section 10 (c) to provide that while the Board may still find a discriminatory discharge in dual motivation cases, it may nevertheless not order reinstatement under the qualifying clause of section 10 (c). A literal reading of the clause might

[9] Ballston-Stillwater Knitting Co. v. NLRB, note 4 supra; Boeing Airplane Co. v. NLRB, (10th Cir. 1944) 140 F. (2d) 423; NLRB v. Montgomery Ward and Co., (8th Cir. 1946) 157 F. (2d) 486.

[10] Labor-Management Relations Act, 1947, 61 Stat. L. 147, 29 U.S.C. (1952) 160 (c).

[11] H. Rep. 245, 80th Cong., 1st sess., p. 42 (1947): "A third change [in section 10 (c)] forbids the Board to reinstate an individual unless the weight of the evidence shows that the individual was not suspended or discharged for cause."

[12] Western Textile Products Co., 104 N.L.R.B. 162 (1953); Milwaukee Nash Co., 105 N.L.R.B. 684 (1953); Radio Industries, Inc., 101 N.L.R.B. 912 (1952).

[13] 60 Stat. L. 237 (1946), 5 U.S.C. (1952) §1009 (e).

[14] Universal Camera Corp. v. NLRB, 340 U.S. 474, 71 S.Ct. 456 (1951).

[15] NLRB v. Arthur Winer, Inc., (7th Cir. 1952) 194 F. (2d) 370; NLRB v. Polynesian Arts, Inc., (6th Cir. 1954) 209 F. (2d) 846; NLRB v. American Thread Co., (5th Cir. 1954) 210 F. (2d) 381.

[16] NLRB v. Houston Chronicle Pub. Co., (5th Cir. 1954) 211 F. (2d) 848.

lend support to this view, but, since the very purpose of section 10 (c) is to empower the Board to prevent unfair labor practices, such an interpretation would involve a particularly unlikely internal contradiction in the terms of the act.

Joy Tannian, S. Ed.