

Michigan Law Review

Volume 53 | Issue 5

1955

Labor Law - Labor-Management Relations Act - Effect of Section 8(D) on the Right to Strike

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Recommended Citation

Lawrence W. Sperling, *Labor Law - Labor-Management Relations Act - Effect of Section 8(D) on the Right to Strike*, 53 MICH. L. REV. 760 (1955).

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LABOR LAW—LABOR-MANAGEMENT RELATIONS ACT—EFFECT OF SECTION 8(D) ON THE RIGHT TO STRIKE—A union gave notice of its desire to modify the existing collective bargaining agreement sixty days before the date when, according to the terms of the contract, modification would be allowed. Eight months later, but prior to the termination date of the contract, the union called a strike. After several weeks the employees returned to work but the employer refused to reinstate them on the ground that they had struck before the expiration date of the contract in contravention of section 8(d) of the amended National Labor Relations Act¹ and had thereby lost their employees status. On petition to the National Labor Relations Board, *held*, the employees were entitled to reinstatement. As used in section 8(d), the term "expiration date"

¹Labor Management Relations Act, 1947, 61 Stat. L. 142, 29 U.S.C. (1952) §158(d).

connotes not only the terminal date of the contract but also an agreed date during its life when the parties may re-open the contract to modify some of its terms. *Lion Oil Co.*, 109 N.L.R.B. No. 106, 34 L.R.R.M. 1410 (1954).

The problem the Board faces is whether under the provisions of section 8(d) a union has the right to engage in an economic strike² during the life of a fixed term contract.³ Basically this depends upon the interpretation given to the language of part (4) of the proviso to this section. Part (4) provides that after notice is given of a proposed modification there can be no strike for a period of sixty days ". . . or until the expiration date of such contract, whichever occurs later." Clearly a union must comply with the notice provisions.⁴ The question is whether the union may strike at the end of sixty days or must wait until the expiration of the contract. In an earlier decision, *United Packinghouse Workers*,⁵ the Board found that this language was intended only to emphasize that the full sixty-day waiting period must be observed even if it extends past the termination date of the contract. This led the Board to decide that a strike at any time during the contract term is allowed, provided the sixty-day waiting period is observed. The court of appeals,⁶ in overruling the Board's decision, held that this section prohibits any strike before the terminal date of the contract. The view in the principal case that "expiration date" includes "reopening dates" represents a compromise position. One of the basic concepts of the framers of the LMRA was that industrial peace could best be preserved through the medium of collective bargaining.⁷ Section 8(d) was not intended to put significant limitations on labor's right to strike, but rather to give practical significance to the policy favoring the use of the collective bargaining process. This is indicated by the wording of section 8(d), which begins with a comprehensive definition of collective bargaining and introduces the "cooling off" provisions with the words, ". . . the duty to bargain collectively shall also mean. . . ." If clause (4) is read with the "or expiration date" phrase deleted, this is clearly its import. Any contention that this phrase was intended to prohibit strikes which were previously protected activities appears to be erroneous.⁸ The Board's view in the *Packinghouse Case*, that these words were added simply to clarify the intended result where notice is given less than sixty days before the expiration date, is the only contention for which support can be found in the legislative

² The word "strike" as used in this note refers only to economic strikes. These are strikes for the improvement of working conditions, e.g., wages, hours. In *NLRB v. Mastro Plastics Corp.*, (2d Cir. 1954) 214 F. (2d) 462, it was decided that §8(d) is not applicable to strikes in protest against an employer's unfair labor practices.

³ A contract containing an annual renewal clause is considered a fixed term contract.

⁴ Section 8(d)(1) and (3).

⁵ 89 N.L.R.B. 310 (1950).

⁶ *Local No. 3 United Packinghouse Workers of America, CIO v. NLRB*, (8th Cir. 1954) 210 F. (2d) 325, cert. den. 348 U.S. 822, 75 S.Ct. 36 (1954). See also 38 *MINN. L. REV.* 886 (1954).

⁷ S. Rep. 104, 80th Cong., 1st sess., part I, p. 14 (1947).

⁸ Senators Taft and Ball, both members of the committee which framed this provision, stated that it placed no real limitation on the rights of labor. 93 *CONG. REC.* 3839, 5014 (1947).

history.⁹ Though section 8(d) was not intended to affect basically their right to strike,¹⁰ workers engaging in economic strikes during the life of a contract still run a serious risk of losing the protection of the LMRA. If the strike takes place in conjunction with a reopening period they should be protected since, in the absence of a no-strike clause in the contract, such strikes were allowed prior to the LMRA¹¹ and nothing therein prohibits them. However, a strike to modify one of the fixed provisions of the contract at any other time during its term would probably fall within the doctrine of *NLRB v. Sands Manufacturing Co.*¹² There the Supreme Court decided that a strike while a contract is in effect is not a protected activity if its objective is to force a departure from some term of the contract.¹³ This doctrine has since been recognized by the Board but its application has been limited to strikes which violate a no-strike provision.¹⁴ Though no case requiring invocation of the doctrine has reached the Supreme Court since its original determination, the Court has frequently cited the *Sands* case¹⁵ without recognizing any such qualification. The fact that Congress twice cited this case as a limitation on the right to strike¹⁶ further supports the conclusion that the repudiation of contract doctrine is a much more significant limitation on labor's right to strike than the ambiguous section 8(d).¹⁷

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⁹ That the framers felt the need to clarify this becomes apparent when it is noted that the major part of the Labor Committee's report on §8(d) is devoted to such clarification. S. Rep. 104, 80th Cong., 1st sess., part I, p. 24 (1947). See also 93 CONG. REC. 3839 (1947).

¹⁰ Of course it delays strikes for sixty days.

¹¹ An arbitration board held that the union could legally strike during the reopening period even though the contract contained a no-strike clause. U.S. Steel Subsidiaries, 1 Lab. Arb. Rep. 630 (1946).

¹² 306 U.S. 332, 59 S.Ct. 508 (1939).

¹³ It is not clear whether this doctrine would apply to a strike to add a new term to the contract.

¹⁴ *Joseph Dyson & Sons, Inc.*, 72 N.L.R.B. 445 (1947); *United Packinghouse Workers*, note 5 *supra*, at 312. See Blinn, "NLRB Policy on Strikers' Breach of Collective-Bargaining Agreements," 32 ORE. L. REV. 277 at 281-285 (1953).

¹⁵ *NLRB v. Rockaway News Supply Co.*, 345 U.S. 71 at 80, 73 S.Ct. 519 (1953).

¹⁶ S. Rep. 104, 80th Cong., 1st sess., Part I, p. 28 (1947). 93 CONG. REC. 6442, 6443 (1947). See also 93 CONG. REC. 6454 (1947).

¹⁷ The significance the Court places on congressional approval of its doctrines is strongly indicated in *International Union, Local 232 v. Wisconsin Employment Relations Board*, 336 U.S. 245 at 260, 69 S.Ct. 516 (1949).