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LABOR LAW--ARBITRATION--MANAGEMENT'S DISCIPLINARY AUTHORITY ON UNION'S BREACH OF A NO-STRIKE COVENANT

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LABOR LAW—ARBITRATION—MANAGEMENT'S DISCIPLINARY AUTHORITY ON UNION'S BREACH OF A NO-STRIKE COVENANT—A demonstration protesting the proper discharge of two union officials resulted in the discharge of ninety-six participating employees. The following day the company commuted the penalty to a two-week suspension. The effective collective bargaining agreement provided that there should be no strikes or lockouts "for any reason" unless the grievance and arbitration procedure had been exhausted but it reserved the employer's right to discharge for breach of the agreement. The arbitration board awarded employees back pay for the time of suspension and seniority and other rights incident to employment for the entire period. Although the employee had violated the no-strike clause, *held,* the company by changing the penalty waived the right to use the only disciplinary measure reserved in the contract. The mass suspension was a lockout in violation of the agreement.[1] *Sylvania Electric Products Co.,* 14 Lab. Arb. Rep. 16 (1950).

Arbitrators are limited by the terms of the collective bargaining agreement but may construe the contract in areas where no express provision has been made. Although precedent is not binding, it is often considered in making the award so that "a common law of arbitration is in the making."[2] Even if no express penalty provision appears in the contract, the right to discharge for violation of a no-strike provision[3] is settled[4] and has recently been extended to include situations in which the employer originally was at fault.[5] Punishment, its nature dependent on the wording of the no-strike clause and the

[1] The union arbitrator concurred in this reasoning but dissented on other grounds. See note 13 infra.

[2] 43 ILL. L. REV. 847 at 858 (1949).

[3] For a discussion of the many aspects of such provisions, see Daykin, "The No-Strike Clause," 11 UNIV. PITT. L. REV. 13 (1949).

[4] NLRB v. Sands Manufacturing Co., 306 U.S. 332, 59 S.Ct. 508 (1939); United Biscuit Co. of America v. NLRB, (C.C.A. 7th, 1942) 128 F. (2d) 771; Kittenger Co., Inc., 65 N.L.R.B. 1215 (1946); Copperweal Steel Co., 75 N.L.R.B. 188 (1947); Lancaster Foundry Corp., 75 N.L.R.B. 255 (1947).

[5] National Electric Products Corp., 80 N.L.R.B. 995 (1948).

seriousness of the offense, is usual in these cases.[6] Suspension is a common penal device, and in several awards the arbitrator has reduced the penalty from discharge to suspension.[7] Two cases have considered the possibility that a penalty imposed for violation of a no-strike provision might be an infraction of a corresponding provision against lockouts. *In re Fabet Corp.*[8] held that a mass discharge was not a lockout in violation of the contract, and in *Trustees of Bennington College,*[9] the suspension of an employee was deemed not a lockout but "disciplinary action." The principal case expressly distinguishes cases in which individual discipline problems are involved[10] and is consistent with the *Fabet* award in holding that the mass discharge first contemplated was not a lockout. Its rationale, however, is based exclusively on an interpretation of the contract. Thus, because no penalty other than discharge was expressly provided, the company was denied the right to mitigate the penalty, which was exactly what had been done by the arbitrator in the *Fabet* case.[11] Far from being unusual, inconsistency in arbitration awards is in some respects desirable because it is expected that they will be based on the facts peculiar to each case.[12] But the interpretation of this contract is open to question. Neither party raised the lockout issue in its arguments. Logically, a reservation of the most serious penalty possible would, in the absence of express stipulations to the contrary, include a voluntary reduction of that penalty.[13] The reservation of the right to discharge was a general provision and did not appear in connection with the no-strike clause, indicating that, contrary to the arbitrator's assumption, the penalty for violation of the no-strike clause was not covered by the express terms of the contract. But even though the arbitrator's reasoning seems clearly to ignore the probable intention of the parties, the result might be justified in another way. If, in the proclaimed spirit of the Taft-Hartley Act,[14] management and labor are to be accorded equal treatment, the principle of the *National*

[6] Daykin, "The No-Strike Clause," 11 UNIV. PITT. L. REV. 13 (1949). The awards are not consistent; some arbitrators have held that discharge should be imposed only in cases of flagrant violation of the contract, while others have held that a contract violation immediately suspended or terminated the contract.

[7] Borg Warner Corp., 4 Lab. Arb. Rep. 4 (1946); John R. Evens and Co., 6 Lab. Arb. Rep. 414 (1947); In re Fabet Corp., 5 Lab. Arb. Rep. 466 (1946); Simplicity Pattern Co., 7 Lab. Arb. Rep. 183 (1947); New York Car Wheel Co., 7 Lab. Arb. Rep. 180 (1947). This result can be prevented by express provision in the contract. Pratt, "Arbitration Process in Settlement of Labor Disputes," 31 J. AM. JUD. SOC. 59 (1947).

[8] Supra note 7.

[9] 6 Lab Arb. Rep. 387 (1946).

[10] Principal case at 24.

[11] The discharge was changed to a four day suspension by the award.

[12] See McPherson, "Should Labor Arbitrators Play Follow-the-Leader?" 4 ARB. J. 163 (1949).

[13] This was the gist of a heated dissent written by the company's arbitrator in the principal case.

[14] Labor-Management Relations Act, 61 Stat. 136 (1947), 29 U.S.C. §§141-197.

Electric case[15] should be applied to lockout as well as strike provisions.[16] When an employer has agreed not to engage in a lockout "for any reason" there should be no valid excuse for violation of the agreement.[17] In the principal case the employer actually used the one penalty expressly prescribed by the contract.[18] Ultimately the penalty imposed should be determined by the contracting parties themselves; the arbitrator should not have to decide the possibility or nature of permissible penalty, but merely its reasonableness in a specific fact situation.

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[15] Supra note 5.

[16] As the arbitrator in the principal case pointed out there is no difficulty in finding the suspension of ninety-six men to be a lockout using either a dictionary definition or that of the AMERICAN LAW RESTATEMENT. Principal case at 24.

[17] "The day when the rule of an 'eye for an eye and a tooth for a tooth' was accepted is passing in labor relations. . . . Facts and persuasions, rather than emotion and force, are the socially approved way of settling disputes. . . . The arbitrator would be remiss if he did not at every opportunity oppose unilateral action outside the terms of the contract by either the company or the union." In re Armour and Co., 5 Lab. Arb. Rep. 697 at 698 (1946).

[18] This reasoning would not be valid where the union first breached the contract if the theory that the contract is suspended or terminated when breached is used (supra note 5), but this, too, seems logically to be a question to be determined with reference to the actual provisions of the contract rather than the discretion of the arbitrator.