Michigan Law Review

Volume 52 | Issue 7

1954

LABOR LAW--LABOR-MANAGEMENT RELATIONS ACT--DISPARAGEMENT OF EMPLOYER'S PRODUCT AS PROTECTED CONCERTED ACTIVITY

George B. Berridge S.Ed.
University of Michigan Law School

LABOR LAW—LABOR-MANAGEMENT RELATIONS ACT—DISPARAGEMENT OF EMPLOYER'S PRODUCT AS PROTECTED CONCERTED ACTIVITY—When contract negotiations between an employer, a Charlotte, North Carolina TV station, and a local union representing the station's technicians reached an impasse, the technicians remained on the job but circulated handbills attacking the inferior quality of the employer's programs. These handbills, which were distributed throughout Charlotte as well as on a picket line which the technicians maintained during their off-duty hours, were signed simply *"WBT Technicians"* and made no reference to the labor dispute. The company discharged the

technicians, whereupon the union filed a complaint with the National Labor Relations Board charging a violation of sections 8(a)(1) and 8(a)(3) of the amended National Labor Relations Act.[1] The Board upheld the company's right to fire those employees responsible for distributing the handbills, on the ground that such conduct was "indefensible" under the circumstances and therefore outside the protection of section 7 of the NLRA. However, the Court of Appeals for the District of Columbia reversed, holding that concerted activities do not lose the protection of section 7 unless they are "unlawful." On certiorari, *held*, reversed, Justices Frankfurter, Black, and Douglas dissenting. The Board was correct in not ordering reinstatement of these employees since their discharge was "for cause" within the meaning of NLRA section 10(c).[2] *NLRB v. Local Union No. 1229, International Brotherhood of Electrical Workers*, 346 U.S. 464, 74 S. Ct. 172 (1953).

"In its essence," said Justice Burton speaking for the majority, "the issue is simple."[3] But, surprisingly enough, the majority apparently felt it unnecessary to resolve the question upon which the court below and the NLRB had disagreed.[4] Instead, the Court turned to the "discharge for cause" proviso of section 10(c), a provision which had not even been mentioned by either the Board or the court of appeals, and which indeed has received relatively little judicial attention since its addition to the NLRA in 1947. Exactly why the majority took this approach to the case is not made clear, but at least two possibilities suggest themselves. One possible explanation is that the majority proceeded on the assumption that the scope of section 7 has been to some extent narrowed by the section 10(c) proviso; i.e., the majority may have felt that some activities which would have been considered protected but for the proviso may now constitute cause for discharge. This is apparently not the position which has been taken by the NLRB.[5] Nor does this interpretation of the 10(c) proviso receive much support from its legislative history.[6] In fact, the opinion as a whole gives little indication that the Court actually intended to subscribe

[1] Labor-Management Relations Act, 1947, 61 Stat. L. 136 (1947), as amended, 29 U.S.C. (Supp. V, 1952) §§ 158(a)(1), 158(a)(3). The former section makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7," which provides that employees shall have the right to engage in concerted activities "for the purpose of collective bargaining or other mutual aid or protection. . . ." 61 Stat. L. 136 (1947), 29 U.S.C. (Supp. V, 1952) §157. Sec. 8(a)(3) forbids employer discrimination to encourage or discourage union membership.

[2] 61 Stat. L. 146 (1947), as amended, 29 U.S.C. (Supp. V, 1952) §160(c), which provides: "No order of the Board shall require the reinstatement of any individual as an employee . . . if such individual was suspended or discharged for cause."

[3] Principal case at 471.

[4] The court of appeals seems to have been in error in deciding that "lawfulness" is the proper test. For discussions of the court of appeals' decision reaching this conclusion see Gregory, "Unprotected Activity and the NLRA," 39 VA. L. REV. 421 (1953); 66 HARV. L. REV. 1321 (1953); 4 SYRACUSE L. REV. 377 (1953).

[5] See NLRB, THIRTEENTH ANNUAL REPORT 81 (1948).

[6] See H. Rep. No. 510, 80th Cong., 1st sess., pp. 38, 39, 55 (1947), and the statements of Senator Taft, 93 CONG. REC. 6518 (1947).

to such a view. Justice Burton's approach is probably better explained by a feeling on the part of the majority that because the handbills had not been issued "in the context of a conventional appeal for support of the union in the labor dispute,"[7] their distribution was "separable" from, and therefore not to be treated as, activity which even initially falls within the ambit of section 7. Of course under this view there would be no need to consider the nature of the test to be applied in determining the existence of an implied exemption from section 7's protection. This rationale, however, would seem to constitute a departure from the well-established practice of treating conduct (such as that here involved) which comes within the literal terms of section 7 as protected unless it is found to be "indefensible" or, perhaps, "illegal."[8] But whatever the real basis for the principal case may be,[9] in view of repeated references to the lack of connection between the labor dispute and the handbills' distribution, it is fairly clear that notwithstanding some language to the contrary, the Court did not intend to assert as a general proposition that activity is withdrawn from section 7's protection simply because it may reasonably be characterized as "disloyal." Nevertheless, the result of the case seems to indicate that the Court will hold unprotected any union conduct which it regards as highly questionable and which may somehow be "separated" from a labor dispute. Thus, not only has the Court left unanswered the problem which troubled the court of appeals, but by apparently resting its decision upon a rather vague concept of separability it has raised new and unnecessary doubts regarding the protection to be accorded concerted activities.

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[7] Local Union No. 1229, IBEW, 94 N.L.R.B. 1507 at 1512 (1951). The majority placed considerable emphasis upon the fact that the handbills did not on their face disclose the existence of a labor dispute. But could not the reader be expected to deduce the existence of a dispute? And what about the picketing, which would certainly tend to spread knowledge of the controversy throughout the city?

[8] Of course not all concerted activities are "for the purpose of collective bargaining or other mutual aid or protection." See, e.g., Joanna Cotton Mills Co. v. NLRB, (4th Cir. 1949) 176 F. (2d) 749. For discussions of the scope of §7 see Cox, "The Right to Engage in Concerted Activities," 26 IND. L.J. 319 (1951); Petro, "Concerted Activities—Protected and Unprotected," 1 LAB. L.J. 1155 (1950), 2 LAB. L.J. 3 (1951).

[9] The Court did indicate that "even if the attack were to be treated, as the Board has not treated it, as a concerted activity wholly or partly within the scope of those mentioned in §7, the means used by the technicians in conducting the attack have deprived the attackers of the protection of that section, when read in the light and context of the purpose of the Act." Principal case at 477. The latter half of this statement represents the type of analysis usually employed in §7 cases; the reference to the Board's treatment of the attack seems to be in error. In reaching its conclusion the Court may have been influenced by the fact that the technicians remained at work which conducting their attack (see principal case at 476), although the Board specifically discounted this factor. Local Union No. 1229, IBEW, note 7 supra, at 1510.