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LABOR LAW -REFUSAL TO REINSTATE AS AN UNFAIR LABOR PRACTICE

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LABOR LAW — REFUSAL TO REINSTATE AS AN UNFAIR LABOR PRACTICE —The defendant company, operating a produce plant, was found guilty by the National Labor Relations Board of several unfair labor practices, inter alia,[1] the discrimination against certain employees in refusing to reinstate them because of their union affiliations and activities. Defendant's superintendent testified that he had refused to rehire the employees in question because of their inability to get along with the other employees and the ill feeling which their union activities had engendered toward them. The board did not accept this explanation, and ordered the reinstatement of these employees with back pay. *Held*, there was discrimination under section 8 (3) of the National Labor Relations Act [2] as to those employees who were shown by substantial evidence to have been refused reinstatement because of prior union activities, and, as to them, the order of the board was proper.[3] *Wilson & Co. v. National Labor Relations Board*, (C. C. A. 8th, 1941) 123 F. (2d) 411.

It is recognized that there may be both adequate and inadequate reasons for an employer's refusal to reinstate employees within the meaning of section 8 (3).[4] In the principal case the defendant assigned as the reason for its refusal to reinstate the employees in question the ill will felt toward the union members by the nonunion members and the necessity for keeping peace in the plant. A determination of the adequacy of this reason for refusing to reinstate was not necessary to the decision since the court sustained the finding of the board that reinstatement was refused solely because of the employees' union affiliations and

[1] The company had also been found guilty of "dominating and interfering with and in supporting a local labor organization known . . . as the Club." As to this, the court said: "The Board's finding of domination and interference being supported by substantial evidence, it follows that the orders to withdraw recognition from and to disestablish the Club as a bargaining representative of the employees must be sustained." Principal case, 123 F. (2d) 411 at 413, 414.

[2] 49 Stat. L. 452 (1935), 29 U. S. C. (1940), § 158 (3): "It shall be an unfair labor practice for an employer . . . (3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . ."

[3] The order of the board was modified and narrowed so as to proscribe only those unfair labor practices which the defendant had been found to have committed. National Labor Relations Board v. Express Pub. Co., 312 U. S. 426, 61 S. Ct. 693 (1941).

[4] For example, it has been held that where a strike is not caused by unfair labor practices of the employer, he does not have to reinstate the striking employees: National Labor Relations Board v. Fansteel Metallurgical Corp., 306 U. S. 240, 59 S. Ct. 490 (1939), noted in 37 MICH. L. REV. 804 (1939); National Labor Relations Board v. Columbian Enamelling & Stamping Co., (C. C. A. 7th, 1938) 96 F. (2d) 948 [affd. 306 U. S. 292, 59 S. Ct. 501 (1939), dodging this question]; Kroger Grocery & Baking Co., 27 N. L. R. B. 250 (1940); Southern S. S. Co. v. National Labor Relations Board, (U. S. 1942) 62 S. Ct. 886. An employer may not be required to reinstate an employee who voluntarily quit to work elsewhere: Texarkana Bus Co. v. National Labor Relations Board, (C. C. A. 8th, 1941) 119 F. (2d) 480. But refusal to reinstate an employee because of his activity on a picket line is a violation of the act: National Labor Relations Board v. Blanton Co., (C. C. A. 8th, 1941) 121 F. (2d) 574.

activities.[5] Thus, with the actual decision of the case there can be no quarrel either on reason or authority.[6] However, the court went further and decided by way of dictum that even if the facts were as the company alleged, the reason for the refusal to reinstate would be inadequate. The court's analysis was based on the concept that the employer is not permitted to violate the act and discriminate against certain employees because order in his house seems at the moment to dictate such a policy.[7] Since there is no direct authority on this point, an appraisal of the case must be based on a balance of the policy factors involved. On the one hand, it may be argued that the act does not purport to take away control of the business from the employer,[8] and that the employer should be free to remove friction from the operation of his organization, even if this be due to the union activities of certain employees. On the employees' part it may be contended that the general purpose of the act is to encourage self-organization and collective bargaining,[9] and that to allow a refusal to reinstate because of friction growing out of the very activity encouraged would subvert the whole purpose of the act.[10] It is submitted that the view which protects the interests of the employee against arbitrary action by the employer is to be preferred, even though it may result in temporary inconvenience to the employer.[11] The approach of the dictum in the principal case has such a tendency, and would seem to be the desirable result, within the language of section 8 (3).

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[5] Principal case, 123 F. (2d) 411 at 417.

[6] Phelps Dodge Corp. v. National Labor Relations Board, 313 U. S. 177, 61 S. Ct. 845 (1941), settled the rule that, as a matter of statutory construction, a refusal to hire solely because of union affiliations is an unfair labor practice by force of § 8 (3). Before that case there had been a conflict in the circuit courts. Holding that it was not an unfair practice, National Labor Relations Board v. Carlisle Lumber Co., (C. C. A. 9th, 1939) 99 F. (2d) 533; National Labor Relations Board v. National Casket Co., (C. C. A. 2d, 1939) 107 F. (2d) 992; and Phelps Dodge Corp. v. National Labor Relations Board, (C. C. A. 2d, 1940) 113 F. (2d) 202. Contra, that it was an unfair practice, National Labor Relations Board v. Waumbec Mills, (C. C. A. 1st, 1940) 114 F. (2d) 226. See 29 CAL. L. REV. 642 (1941) and 90 UNIV. PA. L. REV. 105 (1941).

[7] Principal case, 123 F. (2d) 411 at 417, citing National Labor Relations Board v. Star Pub. Co., (C. C. A. 9th, 1938) 97 F. (2d) 465; and McQuay-Norris Mfg. Co. v. National Labor Relations Board, (C. C. A. 7th, 1940) 116 F. (2d) 748.

[8] See National Labor Relations Board v. Jones & Laughlin Steel Co., 301 U. S. 1, 57 S. Ct. 615 (1937).

[9] National Labor Relations Board v. Fansteel Metallurgical Corp., 306 U. S. 240, 59 S. Ct. 490 (1939).

[10] Principal case, 123 F. (2d) 411 at 417-418. "In the instant case, the C. I. O. Union 216 is not the bargaining agent, but it is an established union of employees which the employees have a right to join without penalty or reprisal from the employer. In the final analysis, the members of this group were discriminated against because of their previous union activities, or at least because of a condition which resulted from such activities."

[11] An opposite ruling would result in an allegation of ill will toward the union members in almost all cases where reinstatement is sought. Proof of such an allegation would not be difficult, with a resultant hardship on the employee far greater than the restrictions imposed on the employer by the view taken in the principal case.