Michigan Law Review

Volume 53 | Issue 6

1955

Labor Law - Labor-Management Relations Act - Rights of Replaced "Economic" Strikers Under Section 8 (a)(3)

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LABOR LAW—LABOR-MANAGEMENT RELATIONS ACT—RIGHTS OF REPLACED "ECONOMIC" STRIKERS UNDER SECTION 8 (a) (3)—One hundred and seventy employees of the respondent, predominantly union members, engaged in an "economic" strike. Thirty of them returned during the strike; the others were permanently replaced. After the strike had ceased, the union asked the respondent if it would take back the remaining strikers as soon as possible, to which the respondent replied that it would rehire them when it could. About 100 strikers then applied for employment and 73 were rehired. The remaining strikers caused a complaint to be filed, alleging discrimination in violation of section 8 (a) (3) of the amended National Labor Relations Act.[1] The trial

[1] Labor-Management Relations Act, 1947, 61 Stat. L. 140, 29 U.S.C. (1952) §158(a)(3): "It shall be an unfair labor practice for an employer by discrimination in regard to hire or tenure of employment . . . to encourage or discourage membership in any labor organization. . . ."

examiner found that the statements of the respondent constituted an "agreement to rehire" entitling the strikers to a preferential status in hiring, the violation of which contravened section 8 (a) (3).[2] *Held,* complaint dismissed. Permanently replaced economic strikers do not have a preferential status and are in the position of applicants for new employment. Even if the employer made an "agreement to rehire," this does not affect their status. The burden resting on the Board to prove discrimination against them was not satisfied. *In re Bartlett Collins Co.,* 110 N.L.R.B. No. 58, 35 L.R.R.M. 1006 (1954).

It was early held under the original National Labor Relations Act that if a strike is called against an employer who is not guilty of any act in violation of the statute (an economic strike), he can protect and maintain his business by replacing strikers with permanent employees.[3] Neither in this case, nor in the case where for business reasons the employer has no openings due to a reduction in his working force, is he under any duty to reinstate or rehire the strikers.[4] It has sometimes been stated that in this situation the replaced strikers are in the position of new job applicants, who have only the right not to be discriminated against for union activity.[5] This proposition is not completely accurate however. It is true that replaced strikers must apply for work and be refused before they may allege discrimination,[6] and that their applications must be understood as requests for new employment, not reinstatement to their old jobs.[7] In four situations, however, the replaced striker is treated differently than a new applicant. The first of these exists when a job opening occurs after termination of the strike, and both a former striker and a new applicant apply for it. Although theoretically both stand on the same footing, the Board has been quick to draw an inference of discrimination because of union activity if, in the absence of extenuating circumstances, the employer should

[2] Other evidence also contributed to the conclusion of the trial examiner. One relevant assumption not specifically stated by the report of the case is that some new employees had been hired since the application of the strikers.

[3] NLRB v. Mackay Radio & Telegraph Co., 304 U.S. 333, 58 S.Ct. 904 (1938). The LMRA suggests no distinction between "economic" and "unfair labor practice" strikes. On the contrary, from the definition of "employee" in §2(3), and the provision of §13 that nothing in the act should be construed to interfere with the right to strike, the opposite result might be reached.

[4] NLRB v. National Die Casting Co., (7th Cir. 1953) 207 F. (2d) 344.

[5] In addition to the principal case, see Penokee Veneer Co., 74 N.L.R.B. 1683 (1947); Kroger Grocery & Baking Co., 27 N.L.R.B. 250 (1940).

[6] Sax v. NLRB, (7th Cir. 1948) 171 F. (2d) 769. No application for employment is necessary if the employer discharges or threatens to discharge economic strikers because of their strike activity before replacing them. Discharge in this situation is a violation of §8(a)(3) and reinstatement will be ordered. Duluth Glass Block Store Co., 76 N.L.R.B. 1064 (1948). And the strikers need not apply if the employer agrees to take the strikers back on a preferred basis. Kokomo Sanitary Corp., 26 N.L.R.B. 1 (1940).

[7] American Snuff Co., 109 N.L.R.B. No. 141 (1954). An application for reinstatement is nugatory, since the employee has no right to reinstatement.

prefer the new applicant over the experienced striker.[8] The employer has a practical burden, not easily dischargeable, to justify his action. The failure of the employer to give a reason for his preference is sufficient ground for finding a violation.[9] Attempts to prove the striker inefficient, physically unfit, or guilty of misconduct prior to the strike are viewed by the Board with suspicion, since the previous experience of the strikers and the failure of the employer to take action before the strike negate these reasons as the only motivating factors in the refusal to rehire.[10] Unavailability of the strikers at the time of hiring has met with more success.[11] A comparison of the number of union members or strikers rehired with the number of non-union members or new employees hired after the strike often provides strong evidence of either justification or discrimination.[12] In short, the burden placed on the employer to prove non-discrimination in this situation is much the same as that placed on him when he refuses to reinstate economic strikers who have not been replaced.[13] The general counsel is required to prove only (1) that the striker applied and was qualified for the job, and (2) that a new employee was hired within a reasonable time.[14]

[8] See the concurring opinion of Board Member Murdock in Union Bus Terminal of Dallas, Inc., 98 N.L.R.B. 458 (1952), enf. den. on other grounds (5th Cir. 1954) 211 F. (2d) 820.

[9] Textile Machine Works, 96 N.L.R.B. 1333 (1951). A spurious reason was also given in this case, however.

[10] Union Buffalo Mills Co., 58 N.L.R.B. 384 (1944) (employee had worked for 22 years with above average pay); Cleveland Worsted Mills Co., 43 N.L.R.B. 545 (1942) (superior skill because of more recent employment was presumed although employer had hired former employees); Aladdin Industries, Inc., 22 N.L.R.B. 1195 (1940), affd. and mod. (7th Cir. 1942) 125 F. (2d) 377, cert. den. 316 U.S. 706, 62 S.Ct. 1310 (1942) (proof of inefficiency of each striker held necessary); Republic Steel Corp., 62 N.L.R.B. 1008 (1945) (employer found to prefer experienced employees). See also Kokomo Sanitary Corp., 26 N.L.R.B. 1 (1940) (showing of physical unfitness rejected); Jackson d.b.a. Western Printing Co., 34 N.L.R.B. 194 (1941) (drunkenness as an excuse accepted). Cf. Penokee Veneer Co., note 5 supra.

[11] Sax d.b.a. Container Manufacturing Co. v. NLRB, note 6 supra; Export Steamship Corp., 12 N.L.R.B. 309 (1939). Where the strikers make clear to the employer that their requests are continuing applications, the employer may be under a duty to attempt to locate them. Sax v. NLRB, note 6 supra; Republic Steel Corp., note 10 supra.

[12] Aladdin Industries, Inc., note 10 supra (employer reemployed higher percentage of non-union strikers than union strikers); American Snuff Co., note 7 supra; Anchor Rome Mills, 110 N.L.R.B. No. 162 (1954). The employer used this analysis in the principal case to justify his actions.

[13] Although it is often stated that non-replaced economic strikers have a right to reinstatement after application, the employer may refuse reinstatement if he can show non-discriminatory motives. National Grinding Wheel Co., 75 N.L.R.B. 905 (1948) (employer reasonably thought that strikers had obtained work elsewhere); Aldora Mills, 79 N.L.R.B. 1 (1948) (striker had worked only two days prior to strike, and did not apply until ten months after strike). An analogy may also be drawn to the case where an employer refuses to rehire laid off employees who have subsequently engaged in concerted activities. Prior experience of these employees has been held to justify an inference of discrimination. NLRB v. Holtville Ice & Cold Storage Co., (9th Cir. 1945) 148 F. (2d) 168.

[14] NLRB v. Textile Machine Works, Inc., (3d Cir. 1954) 214 F. (2d) 929. This was a case where strikers were entitled to reinstatement but had been barred from bringing a complaint by the six-month limitation requirement of §10(b), so they applied as new

The principal case seems to increase the quantum of proof required by the Board. Although the exact extent of the increased burden is not clear, there is an indication that, besides the above factors, some independent evidence of discrimination must exist before a violation will be found. The second pitfall which an employer may encounter when he refuses to rehire a former striker is the requirement that replacements during the strike must be made for business reasons as required by *NLRB v. Mackay Radio & Telegraph Co.*,[15] and not for the purpose of discriminating against the strikers. The fact that the replacement was inexperienced has been held to be some evidence of a discriminatory replacement.[16] The third preference given the replaced striker occurs when his replacement quits before the striker applies for his old job. It has been held in this situation that the striker's right to full reinstatement is restored as though he had never been replaced.[17] There is still doubt concerning the length of time which the replacement must work before the replaced striker's rights are permanently extinguished, but indications are that these rights last for a considerable length of time.[18] The fourth situation in which permanently replaced strikers may obtain an advantage over new employees exists when the employer agrees to place them on a preferred hiring list. Violation of this agreement has been held discriminatory, even though the strikers do not subsequently apply for work.[19] Although the Board in the principal case denied that an "agreement to rehire" has any efficacy in giving the strikers a preferred

employees. This case, however, has been held identical to that involving replaced economic strikers. American Snuff Co., note 7 supra. Seven months after application was held to be a reasonable time in the Textile Machine Works case because the application was construed as a continuing one.

[15] 304 U.S. 333, 58 S.Ct. 904 (1938).

[16] Wiltse d.b.a. Ann Arbor Press, 85 N.L.R.B. 58 (1949), enf. as mod. (6th Cir. 1951) 188 F. (2d) 917. See also Republic Steel Corp., note 10 supra. This reasoning seems questionable. It would be more logical to infer that the intent of the employer was to replace an experienced worker only temporarily where the replacement was inexperienced. It has also been held that where the employer is expanding operations, new employees hired are presumed to be hired for new jobs opening up and not as replacements for strikers. Ohio Ferro-Alloys Corp., 104 N.L.R.B. 542 (1953), enf. den. on other grounds (6th Cir. 1954) 213 F. (2d) 646.

[17] Union Bus Terminal of Dallas, Inc., note 8 supra. Combined with the continuing application doctrine (see note 11 supra) this may afford the replaced striker a substantial advantage over a new applicant.

[18] In Roure-DuPont Mfg. Co., 93 N.L.R.B. 1240 (1951), enf. as mod. (2d Cir. 1952) 199 F. (2d) 631, the Board indicated that the replaced employee's application might still have to be respected, although the case was decided two years after the strike. It would seem that the strikers should at least lose their employee status under §2(3) when the labor dispute is no longer "current." For an analogous case involving the definition of "employee" in representation proceedings, see Standard Insulation Co., 22 N.L.R.B. 758 (1940).

[19] Kokomo Sanitary Corp., note 6 supra; Roure-DuPont Mfg. Co. v. NLRB, note 18 supra; Wilson & Co. v. NLRB, (7th Cir. 1941) 124 F. (2d) 845. Compare Sax v. NLRB, note 6 supra. If the employer were to agree to hire only new employees who were union members, this would certainly be a violation of §8(a)(3).

status, this case may be distinguished from cases applying the above rule. Here the employer agreed only to rehire in a manner not violative of the LMRA, not necessarily on a preferred basis. There is little doubt that the principal case has lessened the obligations of the employer toward replaced economic strikers to some degree. It still remains clear, however, that an employer must be ready either to justify a refusal to employ these strikers, or to place them on a preferred hiring list.[20]

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[20] In this connection see J. & H. Clasgens Co., 56 N.L.R.B. 898 (1944).