THE RIGHT TO DISCHARGE EMPLOYEES FOR "UNION ACTIVITY"

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The purpose of this Article¹ is to consider how far the National Labor Relations Act of July 5, 1935,² by its terms, restricts an employer in the efficient conduct of his business, including his right to discharge employees in connection with a labor dispute. The problem crystallizes into the question—may an employer, who has committed no unfair labor practice, under any circumstances discharge employees merely because they stop work collectively or because they incite others to do so in an effort to coerce him into according them higher wages or what they consider more advantageous working conditions?³

I. THE STATUTE

A. *The Preambles to the Act*

Whenever a modern act of Congress is of doubtful constitutionality, we find it beginning with a section entitled "Findings and Policy". This section, which takes the place of the crude preambles in the older acts, purports to summarize the findings of a legislative investigation resulting in the statute. Its purpose is to supply ammunition for the defense of the constitutionality of the act in the courts. While every-

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1. No attempt is made to analyze or to summarize the decisions of the Labor Board or of the Circuit Courts, certain of their opinions being referred to merely by way of illustration or as containing cogent reasoning; nor to speculate as to whether the pertinent decisions by the Supreme Court, discussed at some length, constitute the final word by the Court on this problem.

2. 49 STAT. 449 (1935), 29 U. S. C. A. § 151 (Supp. 1939). Subsequent references will be made to the direct sections of the Act.

3. Manifestly, there are various definitions of "strike":

"Act of quitting work . . . by mutual understanding by a body of workmen as a means of enforcing compliance with demands made on their employer; a stopping of work by workmen in order to obtain or resist a change of conditions of employment." WEBSTER, *NEW INTERNATIONAL DICTIONARY* (1930) 2058.

"A combined effort by workmen to obtain higher wages or other concessions from their employers, by stopping work at a preconcerted time." 2 BOUVIER, *LAW DICTIONARY* (15th ed. 1883) 672.

"The act of a body of workmen employed by the same master, in stopping work all together at a prearranged time, and refusing to continue until higher wages, or shorter time, or some other concession is granted to them by the employer." BLACK, *LAW DICTIONARY* (2d ed. 1910) 1114.

Since the passage of the Act, it is important to distinguish between a *defensive* strike, in protest against an existing unfair labor practice, for which discharge is clearly no longer permissible, and what may be called an economic or *offensive* strike, where the employees, against whom no unfair labor practice has been committed, themselves take the offensive in an effort thus to further their own interest.

one knows that in reality it was put into the mouths of the legislators by the ingenious draftsmen for this purpose,⁴ nevertheless, by accepting it and thus binding the courts to do likewise, Congress also adopts it as defining the avowed objective of the statute, thus constituting it a potent factor in its construction.

In construing the National Labor Relations Act, it is necessary always to bear in mind that its constitutionality is based solely on the Commerce Clause, Congress having no independent power to regulate the relations between employer and employee. At the time the Act was passed, the chances of sustaining its constitutionality were remote,⁵ unless its scope were restricted to such employer-employee relations as could be demonstrated to have a fairly direct effect in obstructing interstate commerce. It is wholly unreasonable to assume a purpose on the part either of the draftsmen or of Congress to extend its scope beyond that declared.

Section 1 of the Act, entitled "Findings and Policy", consists of four paragraphs.⁶ The philosophy of the first paragraph, very care-

4. The National Labor Relations Act was introduced in the Senate by Senator Wagner, February 15, 1935, as S. 1958 (*Hearings before Committee on Education and Labor on S. 1958*, 74th Cong. (1935), pt. 1, 1-8). The decision in *Schechter Poultry Corp. v. United States*, 295 U. S. 495, declaring the N. R. A. unconstitutional, was announced on May 27, 1935, and both the Title and Section 1 were then redrafted to meet this decision. See H. R. REP. NO. 1147, 74th Cong., 1st Sess. (1935); 79 CONG. REC., pt. 9, 9718, 9731 (1935). The Bill in the form so amended was adopted by the Conference Committee instead of Section 1 (in the form as it had passed the Senate on May 16, 79 CONG. REC., pt. 7, 7681 (1935) because "The House redrafting of Section 1 was thought by the Conferees to contain a better statement of the jurisdictional basis of the bill" and so passed (79 CONG. REC., pt. 9, 10259 (1935) in Senate, and at 10298 in House).

5. See *Carter v. Carter Coal Co.*, 298 U. S. 238, 304, 317, 327 (1936); *Schechter Corp. v. United States*, 295 U. S. 495, 547 (1935); *Industrial Ass'n of San Francisco v. United States*, 268 U. S. 64, 82 (1925); *United Mine Workers v. Coronado Coal Co.*, 259 U. S. 344, 407, 408 (1922).

6. "Findings and Policy.

"Section 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

"The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

"Experience has proved that protection by law of the right of employees to organize, and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other

fully thought out and worded, may be clarified by indicating these successive steps, leading to the conclusion that the Act is needed and constitutional:

(1) "The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining

(2) lead to strikes and other forms of industrial strife or unrest,

(3) which have the intent or the necessary effect of burdening or obstructing commerce by

(4) (a) impairing the efficiency of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) restraining the flow of raw materials or manufactured . . . goods . . . into the channels of commerce, or (affecting) . . . prices . . . ; or (d) causing diminution of employment and wages . . . to impair or disrupt the market. . . ."

To condense this to its essentials: the refusal by employers to permit and recognize the right of the employees to act collectively is a major cause of strikes, which in turn, obstruct commerce in the ways specified.

In the second paragraph, the same thought is reiterated, omitting the "strikes" as the immediate cause of the burden to commerce and attributing this directly to the present inequality of bargaining power. The reference to business depressions and reduced wages and purchasing power was evidently but a constitutional make-weight, since it has not been seriously urged either by the proponents of the Act in support of, or by the Court in sustaining, its constitutionality.⁷

Paragraph 3 states that by protecting the right of employees to organize and bargain collectively and "by encouraging practices fundamental to the friendly adjustment of industrial disputes", and "by restoring equality of bargaining power between employers and employees", the sources of industrial strife will be removed and the flow of commerce promoted.

Finally, paragraph 4 states the policy of the United States as being to eliminate and mitigate these obstructions and their causes, by encouraging collective bargaining, and by protecting the right of the

working conditions, and by restoring equality of bargaining power between employers and employees.

"It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." See note 2 *supra*.

7. See note 4 *supra*.

employees to organize as they choose "for the purpose of negotiating the terms and conditions of their employment or *other* mutual aid or protection".⁸

The reason for the Act is thus the inability of the employees to act collectively because the employers will not permit or recognize this, which handicap causes strikes, which in turn obstruct commerce. The purpose of the Act is then stated to be the restoration of "*equality of bargaining power*" between employers and employees by protecting the employees' right to organize, and by imposing on the employer the duty to permit and recognize this right, in order to insure to the employees the added bargaining advantage incident to their right to act collectively through their chosen representatives.

There is no intimation whatever that, when this increment of bargaining status has been thus acquired, the employees are to be given any further advantage, or that any further handicap is to be imposed on the employer in restriction of his right to manage his business. Much less is there any intimation of a purpose to support or encourage employees, whose employer has in good faith permitted and recognized such organization and collective bargaining, to take the law into their own hands, and resort to "strikes and other forms of industrial strife" which the statute expressly designates as the immediate cause of the restraint of commerce sought to be prevented.

B. *Substantive Provisions Recognizing Rights in the Employees and Imposing Duties on the Employer*

The provisions relevant to the present discussion are found in Sections 7 and 8, entitled "Rights of Employees", together with the definitions of "employee" and "labor dispute" in Section 2. Bearing directly on the construction of these provisions is Section 13, preserving the "right to strike", and the provision of Section 10(c) giving the Board power to make orders requiring the employer to "take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act". These provisions all require careful analysis.

Section 7 provides that "employees⁹ shall have the right

- (1) to self-organization,
- (2) to form, join, or assist labor organizations,
- (3) to bargain collectively through representatives of their own choosing,
- (4) and to engage in concerted activities,

8. Italics supplied.

9. See definition p. 810 *infra*.

for the purpose of collective bargaining or other mutual aid or protection".¹⁰

Clearly, these four rights are not thus given¹¹ to the employees for all purposes, but solely for the purpose specified, namely, "collective bargaining or other mutual aid or protection". Consequently, the employees can claim no sanction under the Act to organize or to engage in concerted activities for any other purpose, particularly for the attainment of an unlawful object or of a lawful object by unlawful means. Also, the use of the word "other" in the final clause points strongly to the conclusion that the "mutual aid or protection" contemplated is of a kind similar to that involved in collective bargaining.¹² While a defensive strike against the employer's interference with or denial of the right to organize and bargain collectively would be a "concerted activity for the purpose of collective bargaining or other mutual aid or protection" and protected as a necessary incident to the primary rights recognized by the Act, this phrase cannot have been intended by Congress to include the right to call or carry on an offensive strike in an effort to coerce an employer guilty of no unfair labor practice. Otherwise Section 13,¹³ specifically preserving the "right to strike", would have been wholly superfluous.

The definition of "employees" in Section 2(3)¹⁴ also requires comment. Like all legal definitions which, Humpty-Dumpty-wise, seek to attribute to a familiar word a meaning different from that in which it is ordinarily understood, this "definition" has given rise to difficulties which might readily have been avoided by spelling out substantive

10. This is based on Section 7 (a) of the National Industrial Recovery Act: "Every code of fair competition, agreement, and license approved, prescribed, or issued under this title shall contain the following conditions: (1) that employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; (2) that no employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing; . . ." 48 STAT. 198 (1933), 15 U. S. C. A. §§ 701-711 (1939).

11. That the Act recognized these rights rather than "created" them, see the opinion of Chief Justice Hughes in *Amalgamated Utilities Workers v. Consolidated Edison Co.*, 60 Sup. Ct. 561 (1940).

12. Compare the similar phrase at the end of the Preamble section: "for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection". (Italics supplied.) See p. 808 *supra*.

13. See p. 816 *infra*.

14. "Section 2. When used in this Act—

"(3) The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse."

provisions and limitations, instead of attempting to cover them by a definition.

It is not at first sight clear whether "*current labor dispute*"¹⁵ refers to the time the employee ceased work, in which case, read literally, the definition would cover all discharges for whatever cause, and would preserve his status indefinitely until he secured "other regular and substantially equivalent employment"; or whether "*current*" refers to the existence of the dispute at the later date as of which the Board or the court is called upon to consider who are and who are not "employees". In the latter event, read literally, the provision might similarly preserve the employee status indefinitely. Employees who struck for an admittedly exorbitant increase, or for a demand that each be given a private automobile, or that the plant be deeded to them in fee simple, *and who persisted in such demand*, would have to be treated as such, with the right to vote, even after all their places had been filled by more reasonable workmen and the plant was again operating normally, provided the strikers maintained their picket line or otherwise indicated that at least as far as they were concerned the dispute still existed.¹⁶

It would seem that the primary purpose of this definition was to provide that workmen, as a class, should not lose the right to organize and to bargain collectively, recognized by the Act, *merely* because they have temporarily stopped work by reason of a current labor dispute; also to preserve their right to be counted and to vote at an election ordered by the Board,¹⁷ and to be reinstated with or without back pay if the Board finds that they have been the victims of an unfair labor practice and that such reinstatement is necessary to protect their right to self-organization and to collective bargaining.¹⁸

Certainly the definition of "employees" cannot be read literally, so as to apply, for example, to the "employees" of the Labor Board, as the term is used in Sections 3 and 4, requiring the Board to report the names of all those who had been discharged because dissatisfied with their wages or conditions. Such a strictly literal interpretation would include the officers of a corporation and all the superintendents, foremen, and other supervisory officials, none of whom are construed

15. "Section 2. When used in this Act—

"(9) The term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee."

16. That the total absence of a labor dispute within the plant does not determine the non-existence of such a dispute with men outside, see *Lauf v. E. G. Shinner & Co.*, 303 U. S. 323 (1938). See also *New Negro Alliance v. Sanitary Grocery Co.*, 303 U. S. 552 (1938).

17. § 9 (a). See p. 815 *infra*.

18. § 10 (c). See p. 815 *infra*.

to be "employees" within the definition. It might exclude one who, during a defensive strike, worked as a domestic on a farm for his parent or spouse, and preclude an employee who has ceased work, whether because of an unfair labor practice or unreasonable dissatisfaction with his wages or working conditions, from effectively resigning as such (though persisting in his dispute) so that he would have to be counted in determining a majority under Section 9. So, also, a literal reading of the definition would preserve indefinitely the status of one who after thus ceasing work has, through an accident, become permanently disabled, or that of an overzealous striker who had deliberately burned down the factory or shot the president of the company, with the right to vote, bargain, "present grievances", and be reinstated. Obviously, such construction would give rise to "grave constitutional questions", which, in 1935, we may not assume that Congress intended unnecessarily to invite.

Manifestly, then, the definition cannot thus be construed literally without leading to absurdity or to the unnecessary injection of constitutional difficulties, which are resolved by keeping the Act within the purpose and scope defined by the preamble. Thus construed, the effect of the definition is to preserve the status of "employee" *merely* for the purpose of insuring the rights guaranteed by the Act, and to preclude the employer, by whatever ingenuity or legal subterfuge, from depriving the worker of his appropriate remedy when he is the victim of unfair labor practices.

Section 8 defines five unfair labor practices, all of which are confined to the employer:¹⁹

"Sec. 8. It shall be an unfair labor practice for an employer

"(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.

"(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it . . .

"(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; . . .

"(4) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.

"(5) To refuse to bargain collectively with the representatives of his employees subject to the provisions of Section 9(a)."

19. Nothing that the employees may do, no matter how flagrant or inexcusable, is characterized as an unfair labor practice, even though intended and having the direct effect of destroying commerce, such as burning up the factory to prevent the employer from underselling a union operator in an adjoining state.

In construing the first subdivision, it is essential to bear in mind the limitations on the employees' rights specified in Section 7, such rights being guaranteed only "for the purpose of collective bargaining and *other* mutual aid and protection." Also, it will be noted that what subdivision (1) prohibits is the *interference, restraint, or coercion* of the employees, which would seem to imply some *affirmative* action by the employer, and not cover mere passive neglect, including refusal to bargain, the latter being specifically covered by subdivision (5). Otherwise, the latter clause would be wholly superfluous.

Nor does the Act give employees the right to do collectively anything which they could not previously do individually.

Subdivision (1) does not preclude an employer, who has scrupulously refrained from interfering with the right of his employees to organize and has bargained with them, in good faith, from combating with all his available economic forces the concerted effort of the employees to coerce him to agree to what he considers an unfair bargain, or to close his plant and keep his goods out of commerce unless he complies with their demands. Section 7 in no way guarantees to the employees *success* in the exercise of their collective action; nor does it restrain the employer from interfering with the successful *use* of their collective bargaining power or of their combined effectiveness, *so long as he recognizes and does not interfere with their right to act together*. Otherwise it would be an unfair labor practice to employ strike-breakers, which it certainly is not.²⁰ All that the Act does is to recognize in the employees the unrestrained right to act collectively, impose on the employer the handicap of being precluded from hitting in the one forbidden spot occupied by this right, and leave them to assert their resultant economic strength, even though their unwise use of their power ultimately results in the weakening of their union. Irrespective of whether or not Congress has power to give additional rights to the employees or to impose additional handicaps on the employer, certainly it did not purport to do so by this statute.

The second unfair practice defined in Section 8 consists of the domination or interference with the formation or administration of a union or the contribution to it of financial or other support.²¹

In subdivision (3), the order of the phrases is reversed.²² Clearly, what is made an unfair labor practice is "to encourage or discourage"

20. N. L. R. B. v. Mackay Radio & Tel. Co., 304 U. S. 333 (1938). See p. 828 *infra*.

21. Whether or not the "other" support must be material support *ejusdem generis* with financial support, or may consist merely of moral support, is an interesting question yet to be settled.

22. See N. L. R. B. v. National Casket Co., 107 F. (2d) 992, 997 (C. C. A. 2d, 1939).

union membership, "discrimination" being merely the *means* which the employer is forbidden to use in effecting such encouragement or discouragement. This conclusion is made entirely clear by comparing subdivision (3) with (4),²³ where the discrimination itself is made the unfair practice. Accordingly, it is not an unfair labor practice to discriminate in regard to hire or tenure of employment, or in regard to any term or condition of employment, unless this *results*, or at least is calculated or intended to result, in encouraging or discouraging union membership or constitutes an interference with the rights guaranteed under Section 7. The employer is not forbidden to discourage *union activities*, but only union membership. To discharge an employee for overzealous *union activity* in burning down the company's plant in the course of a strike would surely tend to discourage this particular kind of *union activity*, but not, reasonably viewed, to discourage union membership.

Another disputed point in connection with subdivision (3) is whether the preposition to be understood after the second "or" in the first line is "in regard to" or "by".²⁴ Both the grammar and the purpose of the Act point clearly to the insertion of "in regard to", making anti-union discrimination in terms of employment essential. Otherwise, it would be an unfair labor practice for an employer, none of whose employees were members of any union, to pay them such high wages and to continue to treat them so well that they would never wish to join a union. In this connection, it is well to remember that one of the principal purposes and functions of subdivision (3), not perhaps generally appreciated, is to protect employee minorities from oppression by the duly chosen representatives of the majority.²⁵

Subdivision (5) covers the refusal to bargain collectively with the chosen representatives of the employees. As so far construed both by the Board and by the courts, it applies, in view of Section 9, only to the representatives of the majority of an appropriate bargaining unit, and imposes no obligation to bargain with a minority or with their representatives, even though no representatives have been chosen by a

23. Under this subsection, it would be an unfair practice to discharge the one remaining non-union employee for filing charges or testifying, even though this might have no effect on the membership of the union which has been recognized as representing the employees.

24. "(3) By discrimination in regard to hire or tenure of employment or [in regard to/by] any term or condition of employment to encourage or discourage membership in any labor organization."

25. See Ward, "*Discrimination*" under the *National Labor Relations Act*, 48 YALE L. J. 1152, 1158, 1166-1169. An interesting and important question, not yet settled by the decisions, is whether it is legally possible for the employer, in a contract with the representatives of a majority of the employees, to agree to any condition other than the specifically permitted provision for the closed shop, which discriminates against a minority not wishing to join the union. Similarly, may the employer thus validly agree to discharge all employees who will not pay their union dues?

majority. Section 9 forbids the employer to bargain with the representatives of a minority where majority representatives have been chosen, the only protection of such minority from oppression by the majority being subdivision (3), and their right, under the proviso in Section 9(a),²⁶ to present "grievances", the meaning and scope of which proviso is as yet undetermined.

Another interesting and undetermined question is how long an employer is required to continue bargaining about something which he has thoroughly made up his mind not to concede. Probably he must be more patient than is his wont with business men, the duration of the negotiations leading to a demonstrable impasse being inverse to the reasonableness of the employees' demands.²⁷

Section 10(c) gives the Board power, after finding that an employer has engaged in a specified unfair labor practice, and ordering its cessation, to require the employer to "take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act".²⁸ While this provision clearly confers on the Board discretion to determine what affirmative action on the part of the employer is necessary, under the circumstances presented in each case, to "effectuate the policies" of the Act, it certainly gives the Board no discretion to determine *what are those policies*. This is the function of the court, basing its determination on the language of the Act.²⁹ Hence, the unusual importance of the preamble Section.

26. "Section 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, that any individual employee or group of employees shall have the right at any time to present grievances to their employer."

27. Employers will, it is believed, find that it is by no means a waste of time for their responsible officials or attorneys to be more than patient in discussing the demands or grievances of the employees, even where they are clear in their own minds as to how far they are willing to go in meeting such demands. It is principally by means of such discussions, interminable as they may sometimes seem, that the employees' representatives can be made to understand the problems with which the employer is confronted and which the employees have never before attempted to consider from the employer's point of view.

28. "Section 10. Prevention of unfair labor practices.

"(c) . . . If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. . . ."

29. It is interesting to compare the similar clause in Section 9 (b): "The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, *and otherwise to effectuate the policies of this chapter*, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." Since the provision last quoted specifies the two immediate purposes of the Act,—to insure to em-

It would seem clear that the express inclusion of the power of "reinstatement of employees with or without back pay" impliedly excludes power to reinstate persons who have ceased to be "employees"; Congress did not word the phrase "reinstatement of employees *or of anyone else*".³⁰ Is this exclusion confined to the persons *expressly* excluded from the definition, namely, those who have since "obtained any other regular and substantially equivalent employment"? Or does the exclusion also include those who, after ceasing work, have resigned or become disabled or been discharged for proper cause? This question is discussed below.³¹

The final provision to be discussed is Section 13:

"Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike."

At common law it was an unlawful conspiracy for workmen, by planned and concerted action, to cease work in order to coerce their employer to grant them higher wages. Subsequently, in part by statute and in part by decisions holding restraints of trade through orderly strikes "reasonable",³² the law was modified so that the mere collective cessation of work was not *of itself* unlawful, when not accompanied by unlawful acts. The "right to strike" was thus established, without, however, any sanction of independent acts on the part of the strikers in violation of law or of contract. Employers, seeking to manage their business as economically as possible, used their power and position to prevent the employees from organizing and thus improving their potentiality for collective bargaining. Thus precluded from exerting their combined effectiveness by peaceable and orderly means, the employees (though often professing preference for more orderly methods of redress) were forced to resort to strikes, resulting in frequent interruptions of commerce. When the Wagner Act, in order to prevent such interruptions through strikes, recognized in employees the legal right to organize and bargain collectively without interference by the employer, providing the legal procedure and remedies necessary to make such right effective, it might well have been

ployees the right to self-organization, and to collective bargaining,—it would seem that the italicized phrase (italics supplied) as used in Section 9 (b), refers to the prevention of "strikes and other forms of industrial strife and unrest", in order to promote the free flow of commerce.

30. To hold that the Board is powerless (whether by reason of the wording of this Act or because of the 5th Amendment) to compel an employer to hire one who has never been or who has ceased to be an "employee", does not mean that it could not enforce an order on the employer to cease and desist from anti-union discrimination, without thereby giving any rights to particular prospective workmen. Cf. *N. L. R. B. v. National Casket Co.*, 107 F. (2d) 992 (C. C. A. 2d, 1939).

31. See p. 829 *infra*.

32. See *Amalgamated Utilities Workers v. Consolidated Edison Co.*, 60 Sup. Ct. 561 (1940); *American Steel Foundries v. Tri-City Central Trades Council*, 257 U. S. 184, 209 (1921).

contended that it was no longer "reasonable" for the employees to burden commerce by strikes. To preclude this contention, Section 13 was inserted, preserving the "right to strike".

Section 13 does not, however, provide that anything in the Act shall be construed as *enhancing* such preexisting right, as promoting the *success* of any strike or as precluding the employer from interfering with the *effectiveness* of the strike. The right is still accompanied by the same economic risk—discharge—which was present before the Act. Manifestly, if the employer were precluded from impeding the *progress* or *success* of strikes, the most obvious right of which he would be deprived would be that of employing new men to take the positions of the strikers, or, in the case of a strike by but part of the employees, the right to continue the operation of the plant with a reduced force.³³ He would thus be wholly at the mercy of the strikers, who would naturally use this much more effective method of attaining their ends, resulting in *more* strikes and *increased* interference with commerce, instead of a diminution thereof. Since the last thing that can properly be gathered from the "Findings and Policy" Section of the Act is a desire to *promote* strikes, it is wholly unreasonable to attribute to Congress a purpose to encourage labor to resort to them. It is one thing merely to preserve the right to strike, and quite another to encourage its exercise by creating new advantages from its use. The mere license to carry firearms in no way implies insurance to the bearer against injury to himself or to his companions by their use, or immunity from being locked up or subjected to damages for using them in such a way as to injure or invade the rights of neighbors. Indeed, it might not have been unfair to labor if the Act had expressly curtailed the right to strike, pending the exhaustion by the employees of the legal remedies newly provided. Since it did not, the most that labor can now reasonably claim for Section 13 is that it leaves the right to strike exactly where it found it, neither subtracting nor adding anything.

II. THE PROBLEMS

With this preliminary review of the principal relevant provisions of the Act, we may now consider the basic related problems which, despite certain exploratory decisions and dicta, it is believed the Courts have not yet been called upon squarely to recognize and to answer.

33. It would seem also that the employer is justified, in case of a strike not the result of any unfair labor practice, in using every means at his disposal, except only an effort to disrupt the employees' organization, to attempt to bring them back to work. The fact that a defection in the ranks of the strikers thus brought about may operate to weaken their organization would not convert the efforts of the employer into an unfair labor practice, any more than would a similar result from hiring strike-breakers. On this basis, one may question the soundness of much of the Board's condemnation of "back to work" efforts on the part of the employer.

To precisely what extent does the Act restrict the employer in the choice and discipline of his employees, and in the efficient operation of his plant?

To what extent, if any, do the employees owe to their employer, who has provided them with a plant in which to work and with efficient direction without which their efforts would be futile, and owe to commerce, which is fed by the joint efforts of capital, labor, and management, a duty to keep the wheels of industry turning?

Granted the entire propriety of giving to the employees—heretofore handicapped by inability to exert their combined effectiveness—the right to organize and to bargain collectively without interference by the employer, if, having acquired this right, they go farther and attempt aggressively to use their collective efforts in unreasonable violation of the rights of the employer and in restraint of commerce, may they not properly expect to suffer the natural economic consequences which usually follow the unreasonably selfish and anti-social disregard of the rights of other people?

Finally, has the employer, since the passage of the National Labor Relations Act, under any circumstances the right to discharge or to refuse to reinstate striking employees, *merely because they have struck?*³⁴

A reasoned answer to the last of these four questions involves the answer to the other three. In undertaking to suggest the solution, it is important again to recall the limited powers of Congress and the clearly defined scope and purpose of the Act.

Strikes impede commerce; labor unrest, resulting from the unfair denial by employers to employees of the right to organize and to bargain collectively, produces strikes; *therefore*, the Act is designed to promote commerce by ensuring to employees the right to organize and to bargain collectively and by forbidding employers to interfere with or to disregard this right. While the right to strike is preserved, to imply any intent to encourage its aggressive use would be contrary to the obvious purpose of the Act to free commerce from the interruption which strikes entail.

Let us test the problem by illustrations.

In a collective bargaining agreement negotiated by the union representatives of a 100 per cent organized plant, running for a year at agreed wages and working conditions, the employees, in consideration of an increase of wages, agree not to demand a further increase and not to strike during the life of the agreement. In reliance on this,

34. By "strike" is meant the collective cessation of work by employees for the purpose of coercing the employer to accord them higher wages or what they consider more advantageous working conditions.

the employer takes on work, the failure to deliver which on time will be disastrous to his business. Realizing his predicament, the employees demand treble their current wages. Part engage in a deliberate and demonstrable "slow-down"; the rest go out on strike. Clearly, the employer may discharge both classes and replace them by other more conscientious workmen. Furthermore, despite the fact that the work of all of them would thus cease "in connection with a current labor dispute", they could not thereafter, if the new men were less in number than they, successfully claim any longer to constitute the exclusive bargaining agency for the plant.

Why not? Because, although their cessation of work, in the exercise of their right to strike, did not of itself operate as a forfeiture of the rights given or preserved to them, as employees, by the Act, it gave them no immunity from discharge by the employer for reasons other than a purpose to interfere with their right to organize and to bargain collectively.

Assume next an open shop, but 95 per cent organized plant, operating with 100 employees under a union contract containing no agreement not to strike and no express reservation of this right, and with no agreement not to demand higher wages during the operation of the contract. The five non-union engineers who run the boilers must be licensed and no others are immediately obtainable. Demanding an increase, against the protest of the union officers and bargaining committee, the engineers go out on strike, tying up the whole plant. Clearly, the employer would be justified in permanently discharging all five forthwith, *for the sole reason* that they thus went out on strike, the employer not having been guilty of any unfair labor practice and it being conclusively demonstrable that their discharge was in no way calculated to interfere with their right to organize and to bargain collectively.

Assume now that the five engineers are satisfied to remain at their posts, but that the 95 union men go on strike without any breach of contract, but in an attempt to enforce a demand that the plant be deeded to them in fee simple. Would not the employer, who has accorded them all the rights given them by the Act, be equally justified in permanently discharging them as not the kind of employees he wants in the plant, and in replacing them by 80 new men, half of whom happen to be members of a rival union and half non-union, with the result of precluding the 95 strikers from voting, the following week, in an election to determine whether the new union shall be the exclusive bargaining agent or whether there shall be none? ³⁵

35. In the Matter of A. Sartorius & Co. and United Mine Workers, 9 N. L. R. B. No. 7, p. 19, 10 N. L. R. B. No. 37, p. 493, the appropriate unit contained 30 employees

If an employer, who has scrupulously obeyed the Act, may thus discharge employees, all of whom happen to be union men, merely because they stop the operation of his plant in the furtherance of a contractually permissible, though manifestly exorbitant, demand, why may he not similarly discharge them for striking to compel the grant of higher wages or a closed shop, or to obtain exclusive bargaining rights when in fact they do not represent a majority? Higher wages, better working conditions, and a closed shop are rights which the Act does not insure to the employees; it merely gives the employees the *opportunity* to obtain these rights for themselves. This they may do in either of two ways: by collective bargaining, in an effort peaceably to *persuade* the employer to grant their demands, in which case the Act protects them from discrimination by the employer; or by tying up the plant in a strike, in an effort to coerce him. By the second method, they risk their jobs in case their effort is unsuccessful.

One additional illustration.

A company employs 100 men, of whom 90 belong to the CIO and 10 to the AFL. It has fully recognized the CIO as the exclusive bargaining agency. The 90 strike for a wage increase. The employer promptly discharges them, brings in 70 AFL men, and operates the plant with 80 men. Must he continue to recognize the 90 strikers as employees and bargain with their representatives as those of the 80 AFL employees who do not want them; and may the 90 participate in a new election?³⁶ Should the employer's case turn on the mere question of whether he went through the form of a technical discharge, if it is clear that he meant to let them go permanently?

From a consideration of these cases, where, from the nature of things, it is clear that the employer has in no way, directly or indirectly, denied to his employees the rights insured them by the Act, or violated or neglected the duties imposed thereby on him, it would follow that an employer with a perfect background of union recognition is not only still free to choose new employees on any basis he chooses, but also to discharge any or all of them for any motive whatever, except

who went out on strike in the absence of an unfair labor practice. Some of them soon returned, and the company employed six new men. Without an election, 18 designated the union to represent them, which was exactly half of the 30 plus the 6 new ones. The Board first directed an election, and held that those eligible to vote consisted of the 30 original employees (including, against the company's protest, a number who had been employed but a short time) and the 6 new employees. By its supplemental decision, however (December 12, 1938), the Board held that the 6 new employees were not eligible to vote, and certified the union as the bargaining agent, without holding any election, on the ground that 18 of the 30 had designated the union. This decision, it is submitted, is unsound and inconsistent with the decisions by the Supreme Court hereafter reviewed.

36. It is not believed that this problem can be solved by holding that when the plant is running normally with the new force, the labor dispute is no longer "current", where the strikers still maintain their picket line. See cases cited in note 16 *supra*.

only the desire to interfere with their right to organize and to bargain collectively through their chosen representatives. So long as he scrupulously and wholeheartedly permits his employees to organize as they choose, and bargains in good faith with such representatives, preserving total impartiality between union and non-union employees *as such*, he would seem to be entirely justified in preferring one lot of employees over another, not because one lot are union members and the other not, but because the group preferred are better and more effective workmen.³⁷ Just as the employer may not (as often happens) use the pretense of unfitness to camouflage his desire to rid the plant of an effective union organizer, so also the union men and leaders may not (as also often happens) use their union position as a defense against discharge for actual neglect of or absence from work, or for inefficiency.³⁸ Although in many cases the local union officers wisely make it a point to do their plant work so efficiently as to defy criticism, it is a practical fact that, under conditions as they exist today, in a plant where the management sincerely tries to obey the law, a local union officer is about twice as secure against discharge for inefficiency as is a member of the rank and file, and about four times as secure as a non-member.³⁹

From the foregoing considerations it follows also that, under proper circumstances, an employer may be justified in discharging the union leaders themselves for engaging in "union activities", provided such discharge is not calculated or motivated by a purpose to discourage union membership or to deny the employees the rights of organization and collective bargaining. Suppose, for example, that local union officers have autocratic power to expel members, by means of which they coerce and incite the rank and file, against the latter's will and better judgment, to attack and burn down the plant. Clearly, in such

37. See p. 827 *infra*.

38. See note 64 *infra*.

39. When, as not infrequently happens, the employee appointed or elected as the local union president or chairman is a chronic trouble-maker, whose antagonistic attitude, neglects, and activities have for some time been barely tolerated by his foremen and superintendent, his consciousness of added security by reason of his new status usually makes him even more difficult to get along with and a sore test of the patience of the management. Yet in a recent decision the Board held the company not justified in discharging an employee who, while engaged in a strike not caused by an unfair labor practice, called out to the superintendent: "You have always been on top in the plant." . . . "We are going to put you on the bottom and keep you there, and we will be on the top." In the Matter of Republic Creosoting Co., 19 N. L. R. B. No. 30, p. 27, Jan. 11, 1940. The Board (Member Leiserson not participating) interpreted this as an expression on the part of the picket "that the union would, through collective bargaining with the respondents, be put on a basis of equality or superiority in its relations with the respondents." Obviously a ruling such as this has a strong tendency to encourage insolence, insubordination, and disorder. See N. L. R. B. v. Union Pacific Stages, 99 F. (2d) 153, 175 (C. C. A. 9th, 1938) (involving an impertinent stage driver); Ballston-Stillwater Knitting Co. v. N. L. R. B., 98 F. (2d) 758, 763-764 (C. C. A. 2d, 1938); N. L. R. B. v. Thompson Products, Inc., 97 F. (2d) 13, 17 (C. C. A. 6th, 1938).

a case, the employer would be justified in discharging the leaders and in retaining or rehiring the deluded rank and file, since this would not be an unreasonable discrimination or one calculated to discourage union membership, but merely unlawful union activity.⁴⁰

The Board itself has held that when the employees have organized and thus fully attained their chosen bargaining status, which has been recognized in good faith by the employer, they may negotiate as they see fit, being free to bargain away even their right to strike.⁴¹ Certainly, then, this is not contrary to the "policy of the Act", and they can validly agree to work for a given wage and under stated conditions and not to strike to obtain more. If they can validly agree not to strike, the employer may validly insist that they so agree, and if they will not, he may replace them permanently with others who will, just as he may if they insist on an exorbitant wage. While he must bargain in good faith and endeavor to reach an agreement with his employees, he is not bound, as the Board would seem to hold,⁴² to let them do all the bluffing, and to wait indefinitely for them to become reasonable, but may call their bluff when he sees fit. There is nothing in the Act which requires an employer to bargain *more gently* with his employees than he does with his customers or his competitors, or than they do with him. Nor is there any provision which would preclude an employer, at the outset of the bargaining session, from saying to his representatives: "I prefer you to new men, and sincerely hope that we can come to an agreement, which, if you will be as reasonable as I will try to be, I believe we can. However, I insist that you remain at work and keep the plant running during our negotiations, and if you choose, as you have the right to do, to strike, I will discharge you all."

40. See *N. L. R. B. v. Fansteel Metallurgical Corp.*, 306 U. S. 240, 254-255 (1939), where the court sustained the rehiring of the deluded members of the sitdown strikers.

41. In its 1939 Annual Report, p. 60, the Board said: "An agreement not to strike is, on its face, a limitation on the exercise of such a right—the right to engage in concerted activities. Such a limitation also interferes with the right to self-organization, since it eliminates one of the most effective methods of organization and one of the activities for which organization is designed. The limitation may be unobjectionable when reached as a result of collective bargaining with the representatives of the employees in an appropriate unit; in such case, by hypothesis, organization has been attained and the conclusion of the agreement is itself an exercise of the right of engaging in collective activities. . . ."

42. It not infrequently happens that when employees, whose organization the employer has fully recognized, have struck, in the absence of any unfair labor practice, the employer, clear that he will not concede their demands and indignant at their having, arbitrarily and without cause, shut up his plant, refuses to argue with them further. The Board invariably treats this as a violation of Section 8 (5) (refusal to bargain), although it would be considered a perfectly proper move in bargaining with a customer or competitor. The employees, however, are apparently not regarded by the Board as sufficiently mature bargaining entities to be subjected to full-fledged bargaining tactics. Sometimes, also, the employer has discharged them all before the alleged refusal to bargain, which discharge the Board (erroneously, it is believed) refuses to recognize. If, as seems to be the proper conclusion from the statute, the employees have been properly discharged, the employer is no longer under any duty to bargain with them.

If then the men strike and are discharged, they are no longer employees. If the employer, despite the blanket discharge, chooses to rehire some of his old men, he must see to it only that there is no discrimination calculated to discourage union membership; otherwise it may properly be held that his whole course of action was but a pre-arranged scheme to get rid of the union leaders.

Suppose, in such a case, that the union bargaining committee consists of five members. One of them, an employee, is the president of the local union, who organized it and is regarded in the plant as the union leader; another, not an employee, is the local secretary of the international organization. These two are conservatives and strongly oppose a strike. The other three, however, are chronic agitators and can be shown to be more interested in furthering their own prestige than in acting for the best interests of the employees. The union rules provide for forfeiture of membership on the part of any who stay at work after a strike vote. Incited by the three radicals, who promise a "short and successful war", the men, by a narrow majority, vote for a strike, as a result of which they are all discharged. Under such circumstances, would not the employer be justified in reemploying all the men who voted against the strike, including the union officer, and in refusing to take back those who voted for the strike, including the three radicals? ⁴³

While most union leaders have the real interest of the men truly at heart and while many of them are so firmly entrenched with their constituents that they can withstand the insistence of the overly-radical, unfortunately it is still the fact that many union leaders find themselves compelled to acquiesce in or even advocate, measures which they do not believe to be to the ultimate benefit of the employees. Such a leader sees standing constantly at his elbow a candidate for his office who, by extravagant promises and radical statements, threatens to oust him unless he, too, is forever stirring up trouble. Anyone looking at these labor problems in the "realistic" way in which we are constantly urged to study them must realize that radicals such as these, by their wholly unfair and selfish incitement of the ignorant rank and file to extreme action, including violence, have actually been the direct cause of innumerable interruptions to commerce, which a Labor Board primarily interested in relieving commerce of removable burdens should do everything in its power to discourage. Obviously, to hold out to such extremists the assurance that wholly unsocial action on their part will be successful, will but encourage them to incite further unnecessary strikes.

43. See *N. L. R. B. v. Bradford Dyeing Ass'n*, 106 F. (2d) 119, 123 (C. C. A. 1st, 1939), *cert. granted* 60 Sup. Ct. 386 (1940); *Standard Lime & Stone Co. v. N. L. R. B.*, 97 F. (2d) 531, 535 (C. C. A. 4th, 1938).

The normal way to discourage them is to provide that, in the absence of an unfair labor practice by the employer, the men strike at the risk of losing their jobs.⁴⁴

Employees have erroneously been given to understand that, by reason of the Wagner Act, they are entitled to additional rights and additional protection against discharge merely because of their joining a union, and that they thus acquire the right by means of a strike deliberately to injure their employer's business without danger of being discharged. It is believed that this mistaken idea on the part of the employees and the public has been a major cause of the interruptions to commerce by means of strikes. While under no circumstances should an employer be able to succeed in an attempt to get rid of the union leaders as a means of undermining the union, nevertheless there may well be cases in which he is entirely justified in discharging such agitators, and thus ridding commerce of the burden which their activities entail.

The principal difficulty has been that when the Act first went into effect, some employers were unwilling to relax and obey it. It has taken considerable pounding to get the principles of the Act generally accepted, as a by-product of which not a little injustice has been done to employers who approve the law and also to others who, in good faith, have endeavored to obey it. There has likewise been unfair treatment accorded the many employees who honestly believe that, with

44. The recent testimony of Chairman Madden before the House Committee contains an interesting side-light on the question as to whether sit-down strikes, clearly in conflict with the policy of the Act, would have been promoted by enforcing the Board's order in the *Fansteel* case, rather than by denying its enforcement. Chairman Madden's statistics relative to strikes show that there has been but a single sit-down strike since the decision of the Supreme Court was announced, whereas, in the month of March, 1937, immediately after an intimation on the part of high governmental authority of the possible propriety of sit-down strikes, there were 170 such strikes involving 167,210 employees, while the figures for February were 47 strikes involving 31,326 employees.

In his testimony, Chairman Madden said:

"It has been recognized by practically all authorities on the subject that industrial strife tends to rise and fall with the increase and decline in business activity." *Id.* at 369.

On page 363 he gives a table showing the number of strikes with the number of workers involved, in each year from 1916 through 1939. This table shows that the number of strikes in the war years, 1917 and 1918, were respectively 4450 and 3353; that this number declined steadily until 1922, when the number of strikes was but 1112; and from that date on the number of strikes, with the number of workers involved, was as follows:

Year	Strikes	Employees	Year	Strikes	Employees
1922	1,112	1,612,562	1931	810	341,817
1923	1,553	756,584	1932	841	324,210
1924	1,249	654,641	1933	1,695	1,168,272
1925	1,301	428,416	1934	1,856	1,466,695
1926	1,035	329,592	1935	2,014	1,117,213
1927	707	329,939	1936	2,172	788,648
1928	604	314,210	1937	4,740	1,860,621
1929	921	288,572	1938	2,772	688,376
1930	637	182,975	1939	2,283	1,146,052

a fair-minded employer, they will be better off, in the long run, to allow him to manage the business untroubled by the "engrossing and non-productive process of collective bargaining," even though all their rights are not advocated by an expert in such bargaining, and reduced to the form of a written agreement.

As has been seen, the basic idea and purpose of the Act was to enable the employees to get together for the purpose of collective bargaining and for that purpose to compel the employer to recognize and to deal with their chosen representatives. There is nothing in the Act from which can be implied a purpose to give the employees the right to do anything *collectively* which, without it, they could not lawfully do individually. Without the Act, each employee had the inherent right to make his own bargain; but by reason of their insignificant individual bargaining potentiality and the collective strength of their organized employers, they were impotent. The Act gives them the increased potentiality inherent in collective action and nothing more. By it, they get no license to do anything together which they previously had no right to do singly. When they act collectively in destroying or taking possession of their employer's property, or in breaking their contract with him, they are no more protected by the Act than they formerly were when they did these unlawful acts individually.

Just as the employer may validly discharge a single employee for leaving his work contrary to orders, so he may equally discharge a group of them for doing exactly the same thing collectively. An employee who deliberately let a vat of valuable cooking chemicals spoil by leaving his job, whether to see a ball game, or to visit his best girl, or to attend a union meeting, would be discharged instantly and without a question. A group of employees, small or large, is properly dischargeable for the same reason. Why should there be any difference whether the injury to the employer's business is the mere destruction of a vat of chemicals, by quitting in the middle of a day's work, or the much more serious injury to good will of the business, by quitting at the end of the day or the week, and thus preventing the completion of important contracts with valued customers? May employees insist on their right to be continued at their jobs with no duty whatever to protect the business which gives them those jobs?

The Clayton Act ⁴⁵ makes the public right to have commerce free from collective restraints subject to that of workmen to combine, by lawful means, to enforce their right to better themselves, but gives them no license whatever to use unlawful methods. Similarly, the Labor Act subjects the former right of the employer to refuse to deal

45. 38 STAT. 730 (1914), 15 U. S. C. A. §§ 12-27 (1927).

with them collectively, to their now recognized right so to act, but adds no right on their part to act together in any way in which they could not formerly act singly. Just as a single employee is subject to discharge for inefficiency, for carelessness, for deliberate injury to the employer's property, or for deliberately neglecting his work, so is a group of employees subject to similar discharge, despite the fact that their violation of duty is part of a collective activity on their part designed and calculated to improve their wages or working conditions.

It remains to consider to what extent the principles above discussed have come up for decision and how they have been dealt with.⁴⁶

III. THE COURTS

A. Policy, Purpose, and Scope of the Act

In the case of *N. L. R. B. v. Pennsylvania Greyhound Lines, Inc.*,⁴⁷ Justice Stone said for the Court:

" . . . we look to the Act itself, read in the light of its history, to ascertain its policy. . . ."

The determination as to what is the policy of the Act is primarily for the courts and not for the Board. Although the court has thus far not said so in so many words, it would seem that the principal difficulty with some of the reversed or modified decisions of the Board has been that the Board took it upon itself to "interpret" the policy of the Act, and to extend its scope, in furtherance of what the Board conceived to be the interests of the employees, far beyond what Congress intended to provide.

"We repeat that the fundamental policy of the Act is to safeguard the rights of self-organization and collective bargaining, and thus by the promotion of industrial peace to remove obstructions to the free flow of commerce as defined by the Act."⁴⁸

46. The following summary does not purport to be a digest. It refers only to such Supreme Court decisions as cover the disputed points above discussed and to such lower court and Board decisions as are believed to be of particular interest in connection therewith. While many of the decisions by the Board and a number of the decisions and dicta by the circuit courts are irreconcilable with certain of the conclusions above suggested, it is believed that nothing which to date has been decided or said by the Supreme Court is in real conflict therewith.

47. 303 U. S. 261, 265 (1938).

48. *N. L. R. B. v. Fansteel Metallurgical Corp.*, 306 U. S. 240, 257 (1939). See also *Consolidated Edison Co. et al. v. N. L. R. B.*, 305 U. S. 197, 238, 245 (1938); *N. L. R. B. v. Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261 (1938). In the latter case, Justice Stone said:

"The history of the Act and its language show that its ruling purpose was to protect interstate commerce by securing to employees the rights established by § 7 to organize, to bargain collectively through representatives of their own choosing, and to engage in concerted activities *for that and other purposes*." *Id.* at 265-266 (italics supplied).

From his concurrence in the *Fansteel*, *Columbian*, and *Sands* cases [306 U. S. 240, 292 and 332 (1939)], it would seem that by "other purposes" Justice Stone meant other

"The Act does not compel the petitioner to employ any one; it does not require that the petitioner retain in its employ an incompetent editor or one who fails faithfully to edit the news to reflect the facts without bias or prejudice. The Act permits a discharge for any reason other than union activity or agitation for collective bargaining with employees. The restoration of Watson to his former position in no sense guarantees his continuance in petitioner's employ. The petitioner is at liberty, whenever occasion may arise, to exercise its undoubted right to sever his relationship for any cause that seems to it proper save only as a punishment for, or discouragement of, such activities as the Act declares permissible."⁴⁹

". . . the statute goes no further than to safeguard the right of employees to self-organization and to select representatives of their own choosing for collective bargaining or other mutual protection without restraint or coercion by their employer. . . . *union was essential to give laborers opportunity to deal on an equality with their employer.* . . . Fully recognizing the legality of collective action on the part of the employees in order to safeguard their proper interests, we said that Congress was not required to ignore this right but could safeguard it. Congress could seek to make *appropriate* collective action of employees *an instrument of peace rather than of strife.*"⁵⁰

B. Definition of "Employees" and Reservation of Right to Strike

In his concurring opinion in the *Fansteel* case,⁵¹ Justice Stone quoted from the Senate Committee Report, which declared:

"The bill thus observes the principle that men do not lose their right to be considered as employees for the purposes of this bill *merely* by collectively refraining from work during the course of a labor controversy. . . . And to hold that a worker who, because of an unfair labor practice, has been discharged or locked out or gone on strike is no longer an employee, would be to give legal sanction to an illegal act and to deny redress to the individual injured thereby."⁵²

From the recent decisions of the United States Supreme Court, it is believed to be demonstrable that, as now construed by the Court, the definition of "employees" in Section 2 preserves their status when on strike against an employer who has committed no unfair labor

purposes related to collective bargaining and the choice of representatives; not that the Act gave the employees a statutory right to engage in concerted activities for *any purpose* they considered to their advantage. Justice Stone concurred in that part of the majority opinion in the *Fansteel* case holding that the conduct protected to employees was "lawful conduct" and that Section 13 contemplates a "lawful strike".

49. *Associated Press v. N. L. R. B.*, 301 U. S. 103, 132 (1937).

50. *N. L. R. B. v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 34 (1937) (italics supplied).

51. *N. L. R. B. v. Fansteel Metallurgical Corp.*, 306 U. S. 240, 263 (1939).

52. Senate Committee, 6-7. Report No. 573, *Senate Committee on Education and Labor*, 74th Cong., 1st Sess.

practice, only until the employer permanently discharges them for a reason other than a purpose to discourage union membership, and does not operate to insulate them against discharge for any other reason.⁵³

1. The *Mackay* Case

In *N. L. R. B. v. Mackay Radio & Tel. Co.*,⁵⁴ the sixty-nine telegraph operators in respondent's San Francisco office were most of them members of a national labor union, the five whose discharge formed the basis for the complaint being the "most active" union leaders and committeemen. Dissatisfied with the progress of the negotiations for a new union agreement, the operators went out on strike at midnight on Friday, October 4th, the employer having committed no unfair labor practice. On Monday evening, October 7th, believing that the strike would fail, they applied to be taken back. Meanwhile, the company had brought in eleven men from its Los Angeles office, with promises of permanent jobs. It took back all but eleven of the strikers, but placed the eleven, including the five union leaders, on a list of those who would have to file applications for reinstatement. Six of the eleven Los Angeles substitutes not wishing to remain, the Company at once took back six of the eleven strikers, choosing those who were less able operators than the five union leaders,⁵⁵ but refusing to re-

53. In the majority opinion in *N. L. R. B. v. Fansteel Metallurgical Corp.*, 306 U. S. 240 (1939), Chief Justice Hughes said:

"But the Board, in exercising its authority under § 10 (c) . . . to reinstate 'employees', insists that here the status of the employees was continued, despite discharge for unlawful conduct, by virtue of the definition of the term 'employee' in § 2 (3). . . . By that definition the term includes 'any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment. . . .'

"We think that the argument misconstrues the statute. We are unable to conclude that Congress intended to compel employers to retain persons in their employ regardless of their unlawful conduct,—to invest those who go on strike with an immunity from discharge for acts of trespass or violence against the employer's property, which they would not have enjoyed had they remained at work. Apart from the question of the constitutional validity of an enactment of that sort, it is enough to say that such a legislative intention should be found in some definite and unmistakable expression. We find no such expression in the cited provision." *Id.* at 255.

In his concurring opinion, Justice Stone said:

"But it does not follow because the section preserves this right to employees where they have ceased work by reason of a labor dispute or unfair labor practice, that its language is to be read as depriving the employer of his right, which the statute does not purport to withdraw, to terminate the employer-employee relationship for reasons dissociated with the stoppage of work because of unfair labor practices. The language which saves the employee status for those who have ceased work because of unfair labor practices does not embrace also those who have lost their status for a wholly different reason—their discharge for unlawful practices which the Act does not countenance." *Id.* at 264.

54. 304 U. S. 333 (1938).

55. See Judge Wilbur's majority opinion in the circuit court. *N. L. R. B. v. Mackay Radio Tel. Co.*, 87 F. (2d) 611, 627 (C. C. A. 9th, 1937):

"It is conceded that six of these [eleven] employees were less competent and less desirable than the main body returning to work and less desirable than the five ordered reinstated by the Board in its order now under consideration. These five employees, although active in advancing the cause of the union and in promoting the strike, were

employ the latter. The Board found that the real reason for this was the company's desire to use this opportunity to rid itself of the union leaders.⁵⁶

The Supreme Court, reversing the lower court, which in a 2 to 1 decision had refused to sustain the Board's order requiring reinstatement of the five union leaders, held that there was no unfair labor practice prior to the strike; that the company was justified in bringing in men to replace the strikers, with valid assurance of permanent employment, and that it need not displace these men to provide places for the strikers;⁵⁷ that the refusal to reemploy the five amounted to a discharge;⁵⁸ but that there was substantial evidence to support the Board's finding that the discharge of the five was for the purpose and with the effect of discouraging union membership and hence constituted an unfair labor practice which required and warranted their reinstatement.⁵⁹

2. The *Fansteel* Case⁶⁰

Here, the company had clearly been guilty of a number of unfair practices, some of which had obviously been indulged in for the pur-

concededly very efficient in the performance of their duties. The employer contends that these five, although remarkably competent operators, were inclined to disregard reasonable rules governing their employment, and predicates the discriminatory order against them upon the ground of inattention and insubordination, rather than upon their union activities."

56. In his dissenting opinion in the court below, 87 F. (2d) 611, 632 (C. C. A. 9th, 1937), Judge Garrecht said:

"The evidence further shows that these five operators were all members of the San Francisco Local of the American Radio Telegraphists' Association, and active in organization work. Most of them were members of the grievance or relations committee which had conducted the first negotiations with respect to a proposed general agreement with the Mackay Company relating to wages and conditions of employment. Some were active leaders in the strike and some were on the administrative committee which contacted all the Mackay employees. In fact, the San Francisco Local, by reason of its strength and active leadership, was the dominant unit and the center of A. R. T. A. activity. In eliminating these leaders, the company delivered an effective blow at the whole national organization." *Id.* at 633.

57. "Nor was it an unfair labor practice to replace the striking employes with others in an effort to carry on the business. Although § 13 provides, 'Nothing in this Act (chapter) shall be construed so as to interfere with or impede or diminish in any way the right to strike,' it does not follow that an employer, guilty of no act denounced by the statute, has lost the right to protect and continue his business by supplying places left vacant by strikers. And he is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them. The assurance by respondent to those who accepted employment during the strike that if they so desired their places might be permanent was not an unfair labor practice nor was it such to reinstate only so many of the strikers as there were vacant places to be filled. . . ." *N. L. R. B. v. Mackay Radio & Tel. Co.*, 304 U. S. 333, 345-346 (1938) (italics supplied).

58. ". . . the refusal to let them work was a discharge." *Id.* at 349. Where, as here, the very act which constitutes the discharge is in itself an unfair labor practice, the Statute preserves the employee's status for the purpose of reinstatement.

59. ". . . The Board found, and we cannot say that its finding is unsupported, that, in taking back six of the eleven men and excluding five who were active union men, the respondent's officials discriminated against the latter on account of their union activities and that the excuse given that they did not apply until after the quota was full was an afterthought and not the true reason for the discrimination against them." *Id.* at 347.

60. *N. L. R. B. v. Fansteel Metallurgical Corp.*, 306 U. S. 240 (1939).

pose and with the effect of discouraging union membership. Ninety-five union men, in a sit-down strike, took possession of two of the company's buildings and were all promptly and formally discharged for this reason. Fifteen others, while not engaging in the sit-down, aided and abetted the strikers. These men were not formally discharged. A number of the strikers were convicted of various offenses involving violence; some of these were later reemployed, as were a number of the sit-down strikers. The basis of the complaint was the company's refusal to reinstate the balance of the sit-downers and abettors. The Board held that Section 2(3) preserved their status as employees, that the company had precipitated the strike by its unfair labor practices, in setting up a "company union", in refusing to bargain with the union although, counting the sit-downers, they represented a majority, and in discriminating by hiring part of the sit-downers and discharging the rest; and that their reinstatement with back pay was necessary to effectuate the policies of the Act. The Board further held that the Act preserved the status of the employees for the purpose of giving them redress despite their subsequent unlawful trespass which could be redressed in the local courts, the seriousness of the respective offenses being addressed to the discretion of the Board and not to its power. The circuit court (2 to 1) refused to sustain the Board and was affirmed by the Supreme Court. In the course of the opinion, Chief Justice Hughes said:

"For the unfair labor practices of respondent the Act provided a remedy. Interference in the summer and fall of 1936 with the right of self-organization could at once have been the subject of complaint to the Board. The same remedy was available to the employees when collective bargaining was refused on February 17, 1937. But reprehensible as was that conduct of the respondent, there is no ground for saying that it made respondent an outlaw or deprived it of its legal rights to the possession and protection of its property. The employees had the right to strike but they had no license to commit acts of violence or to seize their employer's plant. . . . The seizure and holding of the buildings was itself a wrong apart from any acts of sabotage. . . . To justify such conduct because of the existence of a labor dispute or of an unfair labor practice would be to put a premium on resort to force instead of legal remedies and to subvert the principles of law and order which lie at the foundations of society." ⁶¹
". . . This was not the exercise of 'the right to strike' to which the Act referred. It was not a mere quitting of work and statement of grievances in the exercise of pressure recognized as lawful. It was an illegal seizure of the buildings in order to prevent their use by the employer in a lawful manner and thus by acts of force

61. *Id.* at 253.

and violence to compel the employer to submit. *When the employees resorted to that sort of compulsion they took a position outside the protection of the statute and accepted the risk of the termination of their employment upon grounds aside from the exercise of the legal rights which the statute was designed to conserve.*"⁶²

"We are of the opinion that to provide for the reinstatement or reemployment of employees guilty of the acts which the Board finds to have been committed in this instance would not only not effectuate any policy of the Act but would directly tend to make abortive its plan for peaceable procedure."⁶³

In answer to the Board's argument that the company had committed an unfair labor practice in discriminating against the union leaders by refusing to rehire those really guilty of promoting the sit-down while rehiring a number whom it believed their reluctant followers, the Court said:

" . . . The important point is that respondent stood absolved by the conduct of those engaged in the 'sit-down' from any duty to reemploy them, but respondent was nevertheless free to consider the exigencies of its business and to offer reemployment if it chose. In so doing it was simply exercising *its normal right to select its employees.*"⁶⁴

It is submitted that to have discharged the real inciters of the sit-down while retaining their unwilling dupes was not an improper discrimination nor one calculated to discourage union membership. Indeed, to uphold radical union enthusiasts in causing a sit-down strike might of itself well discourage orderly-minded employees from joining such an organization. What the Act precludes is not discharge for union activities,⁶⁵ but discrimination calculated to discourage union membership.

62. *Id.* at 256-257 (italics supplied).

63. *Id.* at 258 (italics supplied).

64. *Id.* at 259 (italics supplied). In *N. L. R. B. v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 45-46 (1937), Chief Justice Hughes said:

" . . . The Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them. The employer may not, under cover of that right, intimidate or coerce its employees with respect to their self-organization and representation, and, on the other hand, the Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than such intimidation and coercion. The true purpose is the subject of investigation with full opportunity to show the facts. It would seem that when employers freely organize the right of their employees to their own organizations and their unrestricted right of representation there will be much less occasion for controversy in respect to the free and appropriate exercise of the right of selection and discharge."

65. In a number of instances the courts have referred to the Act as if it forbade discrimination for union activity instead of discrimination in discouragement of union membership. See, for example, the statement of Justice Black in the recent case of *N. L. R. B. v. Waterman Steamship Corp.*, 60 Sup. Ct. 493, 500 (1940): "In the words

With regard to those who aided and abetted the sit-downers and who were not formally discharged but merely refused reinstatement, the Court held that, even assuming that Section 2(3) preserved their status, they were "likewise guilty of unlawful conduct" and not proper subjects for reinstatement. Finally, the Court held that there was no unlawful refusal to bargain because, without counting the sit-downers, the union no longer had a majority.

Justice Stone concurred as to the sit-downers, but dissented as to the abettors on the ground that the latter had not been discharged.⁶⁶ Justices Reed and Black dissented on the ground that Section 2(3) insulated the employees from discharge, and that the policy of the Act to protect employees against unfair labor practices required that the *status quo* be restored, regardless of their intervening lawlessness. Justice Reed declined to express any opinion as to how long the right to discharge would be so suspended.

3. The *Columbian Stamping Co.* Case

In *N. L. R. B. v. Columbian Enameling & Stamping Co.*,⁶⁷ the company had dealt with the union prior to the passage of the Act, and in July 1934 had made a union contract providing that "there shall be no stoppage of work by either party to this contract, pending decision by the Committee of Arbitration". In March 1935 the employees, after demanding a closed shop, went out on strike, and respondent closed its plant; they were still out and picketing when the Act became effective on July 5, 1935. Respondent resumed operations on July 23, by August 19 had 3000 applications, and by the middle of September was running full force. On July 23 two conciliators from the Department had conferred with respondent's president. The Board contended that on behalf of the union they had requested the company to bargain further, while the company claimed that no real request to bargain had

of the Act, an employer cannot terminate his employees' 'tenure of employment or any term or condition of employment' *because of union activity or affiliation*" (italics supplied). The provision, however, which Justice Black quotes from the Act does not read "union activity" but "to encourage or discourage membership in any labor organization". See also, *North Whittier Heights Citrus Ass'n v. N. L. R. B.*, 109 F. (2d) 76 (C. C. A. 9th, 1940); *N. L. R. B. v. Planters Mfg. Co.*, 105 F. (2d) 750, 754 (C. C. A. 4th, 1939); *Jefferson Electric Co. v. N. L. R. B.*, 102 F. (2d) 949, 957 (C. C. A. 7th, 1939); *N. L. R. B. v. Louisville Refining Co.*, 102 F. (2d) 678, 681 (C. C. A. 6th, 1939); *N. L. R. B. v. Kentucky Fire Brick Co.*, 99 F. (2d) 89, 92 (C. C. A. 6th, 1938). That an extension of the scope of the prohibition was not intended is apparent from a consideration of the fact that the sit-down strike in the *Fansteel* case was clearly a union "activity". It is submitted that the correct answer is found not by inserting "lawful", so as to read "lawful union activity" but by observing that what is forbidden is not the interference with union *activity* at all but with the right to organize and bargain collectively and discrimination to discourage union membership.

66. He had apparently concurred in Justice Roberts' dictum in the *Mackay* case that "the refusal to let them work was a discharge". *N. L. R. B. v. Mackay Radio & Tel. Co.*, 304 U. S. 333, 349 (1938).

67. 306 U. S. 292 (1939).

been made by the union until September, when the plant was running normally. The Board found a violation of Section 8(5) in respondent's refusal to bargain, and ordered the reinstatement of the strikers and the continuance of collective bargaining with their representatives. The Circuit Court of Appeals for the 7th Circuit refused to enforce the Board's order on the ground that the employees had struck before the enactment of the National Labor Relations Act in violation of their contract not to strike and to submit differences to arbitration, and that they therefore did not retain and were not entitled to protection of their status as employees under Section 2(3).⁶⁸ The Supreme Court held that no demand by the union to bargain had been proved, and that there was therefore no basis for a finding of refusal to bargain.

Justices Black and Reed dissented on the ground that there was substantial evidence to support the Board's finding that the company's rebuff to the conciliators had constituted a refusal to bargain, that there was no breach of contract by the employees, since the agreement not to strike was only pending an arbitration; that the company had refused to arbitrate, and that, even if the men had broken their contract, they were still "employees" who had to be recognized, at least until the plant was running normally.⁶⁹

It is respectfully suggested that the majority decision in the *Columbian* case cannot be sustained on the ground that the union broke its contract. The contract, even if in force, did not, under the circumstances presented, preclude a strike. The Board expressly found that it had been terminated "months before", pursuant to a 30-day termination clause.⁷⁰ Entirely irrespective of whether or not the men broke the contract, they went on strike, not as a protest against any unfair labor practice by the employer, but in an effort to use their collective power of coercion to force the employer to *change* the contract in their favor. The employer, having done them no wrong, had the clear right to discharge them all and to hire others in their places.

68. *N. L. R. B. v. Columbian Enameling & Stamping Co., Inc.*, 96 F. (2d) 948 (C. C. A. 7th, 1938).

69. The intimation from Justice Black's opinion might be that when the plant was again running normally, the dispute was no longer "current", and the strikers' right to be counted in the bargaining unit gone.

70. "The respondent maintains that the strike was in violation of the Indianapolis agreement and so illegal; and therefore the employees lost their status as such by striking. The agreement contains no provision against a strike except when a dispute under the agreement is being arbitrated, and the respondent has at all times maintained that the dispute was not arbitrable under the agreement. Furthermore, the union had many months before given 30 days notice of termination in accordance with the agreement." 1 *N. L. R. B.* 181, 194 (1936).

The majority of the Circuit Court held that the contract was in force and broken by the employees in 96 F. (2d) 948, 954 (C. C. A. 7th, 1938). See, however, the dissent of Treanor, J., *id.* at 955.

4. The *Sands* Case⁷¹

Just as in the *Columbian* case, so here, the company, which employed thirty-two men, had a clean record for union recognition and collective bargaining prior to the Act. It had a contract with the Mechanics Educational Society of America, (an independent union, neither the CIO nor AFL), which provided specifically for rehiring according to departmental seniority only—that is to say, after a lay-off the men were to be rehired according to seniority in the respective departments, the company not being precluded from bringing new men into any department without first offering the jobs to old men laid off in other departments.

On August 21, 1935, the union committee insisted that preference in rehiring be plant-wide instead of by departments, and told the company so to "interpret" the contract or close the plant. The company adopted the latter alternative, and on September 3 made a new agreement with a local of the AFL, and opened with the latter's members, offering several of the old MESA men jobs as foremen at lower hourly wages than formerly. On September 4 a representative of the MESA demanded a conference, which was refused on the ground that all the MESA men had been discharged. The Board held that such refusal was an unfair labor practice, and ordered the reinstatement of the MESA men with back pay and its recognition as the bargaining agency.⁷² The circuit court, in an opinion by Judge Allen, refused to enforce the order on the ground that the men, having violated their contract, were properly the subjects of discharge by their employer, who had himself committed no unfair labor practice.⁷³ The Supreme Court affirmed, holding that there was no ambiguity in the contract and that since the men had flatly refused to abide by it, the company was justified in discharging them:

" . . . The Act does not prohibit an effective discharge for repudiation by the employee of his agreement, any more than it prohibits such discharge for a tort committed against the employer. As the respondent had lawfully secured others to fill the places of the former employees and recognized a new union, which, so far as appears, represented a majority of its employees, the old union and its shop committee were no longer in a position on

71. *N. L. R. B. v. Sands Mfg. Co.*, 306 U. S. 332 (1939).

72. The Board said: "Instead of bargaining with the MESA, however, the respondent entered into an agreement with a union which did not represent its employees, and thereupon discharged the members of the MESA." 1 *N. L. R. B.* 546, 556 (1936).

73. "The controversy over seniority rights was a current labor dispute within the definition of title 29, section 152 (9), 49 STAT. 449, 29 U. S. C. A. § 152 (9). But the statute does not provide that the relationship held in statu quo under title 29, section 152 (3) . . . shall continue in absence of wrongful conduct on the part of the employer and of rightful conduct on the part of the employees." *N. L. R. B. v. Sands Mfg. Co.*, 96 F. (2d) 721, 726 (C. C. A. 2d, 1938).

September 4th to demand collective bargaining on behalf of the company's employees." ⁷⁴

The Court reiterated its holding in the *Mackay* case that, in the absence of an unfair labor practice by the employer, it was not an unfair labor practice to bring in new men to take the places of the strikers. It further held that no discrimination could be predicated on the offer of reemployment to four of the old MESA men since

"... if the whole body of employees had been lawfully discharged the law does not prohibit the making of individual contracts with men whose prior relations had thereby been severed." ⁷⁵

Justices Black and Reed dissented, but gave no reasons. From their dissent in the *Columbian* case it is possible to infer that they did not regard the breach of contract as relevant, and considered the strikers secure against discharge for an apparently indefinite period, with the right to continue as exclusive bargaining agents with an employer who had done them no wrong and for all the new employees, none of whom had chosen or wanted them.

In the *Sands* case the Board had found that the MESA men had been discharged "... because they ... had engaged in concerted activities for the purpose of collective bargaining" (a strike) and because the company "... would rather have the International Association of Machinists than the MESA because the former was more conservative and did not call strikes often." ⁷⁶ While both the circuit court and the Supreme Court neglected to discuss this point, it is submitted that it represented an entirely valid basis of discharge.

5. The *Waterman Steamship* Case

In *N. L. R. B. v. Waterman Steamship Corp.*,⁷⁷ which was decided without dissent by the Supreme Court on February 12th, the Court found, as it did in the *Mackay* case, that there was substantial evidence to support the finding of the Board that the company had discriminated against the discharged employees because of their union membership, in that it had discharged the entire crews of two vessels, at the end of their respective voyages, for the reason that, during the voyages, they had left the AFL, with which the company had a union contract, and joined the CIO. They were found to have been discharged "because of their affiliation with a particular Union" and "in order to favor one union over another." Clearly, as found by the

74. *N. L. R. B. v. Sands Mfg. Co.*, 306 U. S. 332, 344 (1939).

75. *Id.* at 345.

76. 1 *N. L. R. B.* 546, 558 (1936).

77. 60 Sup. Ct. 493 (1940).

Board, the men all wanted the CIO as their bargaining representative, while the company preferred the AFL. The company's contention that its contract with the AFL required it to discharge the men when they ceased to be members thereof was shown to be invalid, since all that the contract required was preferential treatment of the AFL in filling vacancies and since it was shown that, under maritime practice, the seamen's employment did not automatically end with each voyage any more than that of workmen hired at will ends at the end of each day. It followed that the seamen were still employees and protected by the Section 8(3) of the Act from discrimination in tenure of employment designed and calculated to discourage membership in the CIO, obviously interfering with their right to secure recognition of their chosen bargaining representative.

Although Justice Black refers to a "recognition" by the employer "of their preferential claims to their jobs", "when such employees are customarily continued in their employment", this, it is submitted, is merely for the purpose of protecting them, while retained in such jobs, against discrimination intended to discourage membership in the union of their choice, by refusal to recognize it as their chosen bargaining representative. The opinion specifically recognizes ". . . the employer's right to terminate employment for normal reasons."⁷⁸

It is believed that there is nothing in any of the decisions by the majority of the Supreme Court in any of these cases in conflict with the principle here contended for: that an employer, who has in good faith observed the mandates of the Act and has committed no unfair labor practice in violation thereof, is justified, when his employees resort to coercion by collectively exercising their reserved right to strike, in defending himself by exercising his own reserved right to operate his plant efficiently and accordingly to discharge them for the sole reason that he prefers employees not so prone to strike.

C. *Decisions of the Circuit Courts*

Although the basic problem has been involved in several of the circuit court cases, it has not as yet been presented in one where it could be stripped of confusing complications.⁷⁹ The attitude of cer-

78. *Id.* at 500. The court cited *N. L. R. B. v. Jones & Laughlin Steel Corp.*, 301 U. S. 1 (1936). See p. 826 *supra*. In *National Licorice Co. v. N. L. R. B.*, 60 Sup. Ct. 569 (1940), it appeared that the employer had committed an unfair labor practice before the strike, which strike the Board found resulted from such practice. The main question presented was merely as to the power of the Board to order non-recognition of a union found to have been organized under the influence of the company. The question herein discussed was not there involved nor discussed.

79. See *N. L. R. B. v. Remington Rand, Inc.*, 94 F. (2d) 862 (C. C. A. 2d, 1938), where the employees ordered reinstated had struck and been discharged prior to the effective date of the Act because of what thereafter would have been an unfair labor practice; *N. L. R. B. v. Carlisle Lumber Co.*, 94 F. (2d) 138 (C. C. A. 9th, 1937).

tain of the courts would, however, appear to be contrary to the principles here suggested.⁸⁰

One of the perplexing problems which confront one in analyzing the decisions in discharge cases is the difficulty of determining, readily and satisfactorily, from the findings and opinion of the Board and the court,

- (1) what was the real moving reason for the strike?
- (2) did the employer actually intend permanently to discharge the employee in question?
- (3) if so, what was the basic reason for the discharge?

Obviously, each of these essential questions should be covered by a specific finding by the Board, based on substantial evidence.

As to the first, there are usually several reasons for a strike, in some of which the employees may be justified, in others not. In order to entitle them to a remedy under the Act, it should appear that an unfair labor practice was at least a sufficient and actually motivating cause.⁸¹ For example, employees who strike for a closed shop, a wage increase, or recognition as an exclusive bargaining agent when they lack a majority, should not be able to rely on the subsequent discovery that the employer had made undisclosed anti-union statements to his colleagues or on the undisclosed employment of a "labor spy".⁸² Obviously, however, an employer who has clearly committed a serious unfair labor practice, might have the burden of showing that this was not what caused the strike.⁸³ As Judge Augustus Hand said:

"From the date of respondent's first unfair practice, its ordinary right to select its employees became vulnerable."⁸⁴

In connection with the question as to whether the employee in question was actually discharged and for what reason, an employer

80. See *Standard Lime & Stone Co. v. N. L. R. B.*, 97 F. (2d) 531, 534 (C. C. A. 4th, 1938); *Jeffery-DeWitt Insulator Co. v. N. L. R. B.*, 91 F. (2d) 134 (C. C. A. 4th, 1937); *N. L. R. B. v. Good Coal Co.* (C. C. A. 6th, March 8, 1940) (as to the effect of the Act in the absence of an unfair labor practice, in leaving each party "to use its own economic strength in all lawful ways to promote its advantage"). But see *Black Diamond S. S. Corp. v. N. L. R. B.*, 94 F. (2d) 875, 879 (C. C. A. 2d, 1938); *N. L. R. B. v. Remington Rand, Inc.*, 94 F. (2d) 862 (C. C. A. 2d, 1938).

81. It is suggested that the criterion applied by the courts in determining the motive intended by the statute in cases involving gifts alleged to be "in contemplation of death, be here adopted. In those cases "contemplation of death" must not only be one motive for the donor's action, but it must be the "effective motive", the "dominant motive", the "impelling cause": *Colorado Bank v. Commonwealth*, 305 U. S. 23 (1938); *United States v. Wells*, 283 U. S. 102, 118, 119 (1930).

82. See *N. L. R. B. v. National Motor Bearing Co.*, 105 F. (2d) 652, 657, 663, 665 (C. C. A. 9th, 1939).

83. See *N. L. R. B. v. Stackpole Carbon Co.*, 105 F. (2d) 167, 176 (C. C. A. 3d, 1939).

84. *Black Diamond S. S. Corp. v. N. L. R. B.*, 94 F. (2d) 875, 879 (C. C. A. 2d, 1938).

who has a valid ground to discharge an employee should do this promptly and unequivocally, clearly specifying the reason; otherwise it may be held that he really did not mean to discharge him; or that his true reason was a subterfuge or afterthought.⁸⁵

IV. DECISIONS BY THE LABOR BOARD

In its decisions to date, the Board has apparently taken a stand flatly contrary to the construction of the Act above suggested. Its position is well illustrated by its decision in *Matter of Birge & Sons*.⁸⁶

Birge was a Buffalo wallpaper manufacturer, having some 200 employees. Of these, 17 were machine printers and color mixers, and 8 were print cutters. These employees comprised a separate bargaining unit, and had for years worked under a closed shop union contract, negotiated each year by their national organization with a group of manufacturers, of which respondent was one. The agreement became effective each year at the end of the annual August shut-down. After such a shut-down, the machine printers necessarily worked alone for several weeks to prepare the work for the others, and so were in a position to hold up the whole plant. Respondent, which had thus for years fully recognized and bargained with the union, participated in the 1935 negotiations, until they reached an impasse on the question of wages, when, in answer to an ultimatum strike threat and strike by the union, he countered with a threat that, unless the men return in three days, he would fill their places. This he proceeded to do, promising at least three new non-union men jobs for a year, which obviously precluded the union men from coming back, at least on a renewal of the closed shop contract.

85. In *N. L. R. B. v. National Casket Co.*, 107 F. (2d) 992, 998 (C. C. A. 2d, 1939), Judge Swan said:

"When an employee admits that he has been derelict in complying with the employer's rule, the Board ought not lightly to infer that such dereliction was not the cause of his discharge."

In *N. L. R. B. v. Thompson Products, Inc.*, 97 F. (2d) 13, 16, 17 (C. C. A. 6th, 1938), the court said:

"An employer may properly refuse to continue in his employ any person who has shown himself to be dishonest, incompetent, inefficient, negligent or unfaithful to his employer's interest or otherwise unfit for the service in which he is engaged. The National Labor Relations Act does not abrogate any of these prerogatives, nor can employees use it as use it as a shield for dishonesty or incompetent and inefficient service.

"Interference with the right of an employer to determine when an employee is inefficient should not be lightly indulged in when applying the Labor Relations Act and, where the employee admits he is performing his work negligently, the evidence should be strong and convincing that he was discharged for union activities before reinstatement by an administrative board.

"There is a scintilla of evidence in this case that the union activities of the three employees were factors in their discharge but, from their own testimony, the employer would have been justified in discharging them had there been no effort to organize its employees in a union. The Board's finding in this case tends to destroy the purpose of the Labor Relations Act and to promote discord between employer and employee instead of harmonious and joint discussion of their difficulties, and is not sustained by substantial evidence."

86. 1 N. L. R. B. 731 (May 14, 1936).

The Board (relying largely on its decisions in the *Columbian* and *Sands* cases) held that respondent's refusal to deal thereafter with the union was an unfair labor practice, and ordered reinstatement of the union men, with back pay, and a discharge of the new ones. Chairman Madden, however, dissented. His opinion is an admirably clear and terse statement of what are believed to be the applicable principles.⁸⁷

CONCLUSION

The purpose of the Act was to eliminate interruptions of commerce by strikes, resulting from the lack of equality in bargaining

87. *Id.* at 747, 748.

"I think the evidence in this case does not show that the despondent committed the unfair labor practices charged in the complaint. It is conceded that the respondent's conduct was beyond criticism down to the time of the strike on September 1st. The strike was the Union's ultimatum that, unless the respondent acceded to its terms, the men would not work. Such an ultimatum was well within the Union's legal privileges. The respondent countered on September 3d with an ultimatum that unless the men acceded to respondent's terms, it would fill their jobs with other men. That was the respondent's privilege.

"The statute which we administer forbids certain unfair tactics of employers which when practiced have made the economic contest between them and their workmen an unequal contest productive of the resentment which always accompanies a defeat accomplished by unfair means. It further requires that the employer bargain collectively with his workmen. But, having created this nearer approximation to equality in bargaining power, it leaves the parties to depend upon their economic power. It does not require that either side be kind, or even considerate and mindful of former happier relations. Good morals might teach such conduct, but the law has not undertaken to enforce it.

"The respondent, then, having in no way interfered with the development by the Union of its full organized strength, and having bargained with it in good faith to the time of the strike, secured men to fill some of the places left vacant by the strikers, by guaranteeing to three of the men that they should have work for a year. No Union man could have taken such a place without forfeiting his union standing. Non-union men such as did take the jobs were prudent in insisting upon a guaranteed period of work, lest they, having brought upon themselves the odium of becoming strike-breakers, should also find themselves out of jobs within a short time. The evidence is that the three who insisted upon guaranties left other steady jobs which did not pay so well, to take the jobs which respondent offered.

"Thereafter the respondent was not free to make an agreement with the Union for the return of the Union men in a body. It did not have places for all of them and could not make places for them except by forfeiting its guaranty of a year's wages to three of the strike-breakers. The respondent continued to offer to the Union all that it still had to offer, viz., places for some men and a preference for the others in the filling of any vacancies which might occur. Quite naturally, the Union refused such an offer.

"I think the decision amounts to a holding that an employer whose employees have struck, not as a result of any unfair labor practice on the part of the employer, is legally obliged to close his plant for an indefinite time while he negotiates with the strikers for their return to work. I see no such provision in the statute. If it is successfully read into the statute it will have the effect of inducing unions to call strikes without first taking careful stock as to whether their economic power is sufficient to bring the employer to their terms. Labor unions will gain no permanent advantage from such a doctrine. Employers and the public will properly insist that such a rule is unfair unless it is accompanied by compulsory arbitration."

See also the recent decision by the Board in *Lone Star Company*, release of December 19, 1939, holding that a discharge, predicated on a refusal to return to work by men striking in breach of an agreement and not as a result of an unfair labor practice, constitutes discrimination forbidden by the Act. See also *Matter of Easton Publishing Co.*, 19 N. L. R. B. No. 43 (Board Member Leiserson dissenting); *Matter of Sartorius & Co., Inc.*, 9 N. L. R. B. 19 (Oct. 4, 1937), 10 N. L. R. B. 493 (Dec. 12, 1938); see note 39 *supra*.

status on the part of unorganized employees, frustrated in their efforts to organize by an organized employer. The aim of the statute was to eliminate the cause of such strikes by recognizing in the employees the right to act collectively in bargaining with their employer and by compelling him to recognize this right, thus bringing the employees up to an approximation of the employer's bargaining status. Once this has been accomplished, and the employees, having organized as they saw fit, have chosen their representatives, who have in good faith been recognized by the employer, the law leaves the parties to make their bargain or not to make it, as they will, in the exercise of their relative economic strength. The sole restriction on the employer is that he may not do anything intending to interfere with or undermine the employee organization, and may not refuse to bargain with them.

It is entirely true that a faithful and efficient employee has a moral right to retain his job, which moral right public opinion more and more recognizes. The law, however, has not so far recognized this right,⁸⁸ but only that to choose representatives and to bargain collectively without interference by the employer. When men strike, they say to the employer, "If you will not agree to our terms, we will not work for you". If this threat coerces the employer into agreeing, the men may win. If, however, the employer, calling their bluff, discharges them and hires others, they may lose. But they may not both have their cake and eat it. When they choose to employ the uncivilized weapon of the strike, they must accept the risk of losing their jobs which a strike, not based on an unfair practice, always entails.

It is equally true that the employer may not act equivocally. When the men thus strike, they remain "employees" until the employer chooses to discharge them, which he may do either expressly or by an unequivocal and non-discriminatory refusal to reinstate. Until he does this, however, they have the right still to consider themselves "employees" and to refrain from seeking other employment. But if, having previously committed no unfair practice, he discharges them, they are no longer "employees" for any purpose whatever.

88. What employees really need is not the mere recognition by the employers of their right to organize and to bargain collectively, but the more basic recognition that the modern business executive is working not only for his stockholders, but also for his employees and consumers and that, when operating costs are reduced by a dollar, the dollar thus saved does not all belong to the stockholders, but only such part of it as is determined with due regard to the rights of employees and consumers. While the compulsory recognition of such a right in a private corporation presents great constitutional difficulties, its general voluntary and wholehearted recognition would eliminate a great part of the necessity for arms' length bargaining. The principal difficulty in such cases is to get the employees' representatives to understand that where a saving in cost is necessary to meet competition, it must all go to the customer, with nothing left to divide between stockholders and employees.

There is nothing in the Act which gives the employee the right to do anything collectively which he did not before have the right to do individually, or which deprives the employer of his right to discipline the employee for conduct which, if done as an individual, would warrant such discipline, merely because the employee is acting with others. The right of the employees to strike collectively, like that of each of them to quit work individually, remains, unaffected by the Act, exactly as it was before its passage. They may still strike whenever they choose, however seriously this may interfere with commerce; but if they do so in the absence of an unfair labor practice by the employer, they run the risk that, if they cannot by the strike coerce the employer into complying with their demands, they may lose their jobs.