

**The Extent to Which the NLRA Protects Violent Conduct
by Employees and/or Union Representatives During the Course
of Collective Bargaining or Grievance Processing – A Union Lawyer’s Perspective**

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I. THE NATIONAL LABOR RELATIONS ACT (NLRA)

A. SELECTED NLRA RULINGS PERTAINING TO ACTIONS
CONSTITUTING VIOLENT CONDUCT BY EMPLOYEES
AND/OR UNION REPRESENTATIVES DURING
COLLECTIVE BARGAINING OR GRIEVANCE PROCESSING.

1. Status During Negotiations

Under the National Labor Relations Act, from its inception, Congress mandated in Section 13 that:

“Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualification on that right.”

As with any other statute enacted into law in our common law system, the meaning and scope of that law can and did become the subject of judicial and administrative interpretation within a short time after it was enacted.

(a) Thus, in NLRB v. Fansteel Metallurgical Corporation, 306 U.S. 240 (1939), the Supreme Court of the United States found that the NLRB’s order reinstating terminated sit-down strikers was not

valid since the power to take such affirmative action as was necessary to effectuate the purposes of the Act “is broad but not unlimited.”

Nor did the Board have the power to order the employer to reinstate other strikers who aided and abetted sit-down strikers and were guilty of unlawful conduct.

The strikers who remained on the employer’s premises after an impasse in negotiations had been enjoined to vacate the struck employer’s premises, and they refused to vacate the premises and were provided food, blankets, stoves, and supplies. As a result, they were served with contempt citations. Upon their refusal to vacate:

“... a pitched battle ensued and the men successfully resisted the attempt by the sheriff to evict and arrest them.”

306 U.S. 240, 4 LRRM at 517 (1939).

Approximately one week later, the sheriff, with an increased force of deputies, made a further attempt, and this time, after another battle, the men were ousted and placed under arrest. Most of the

striking workers who remained in the plant were eventually fined and given jail sentences.

The employer helped form another union to rid itself of the sit-in workers union and the NLRB subsequently found the newly formed union was dominated by the Company which had interfered with its formation and administration.

As a result, the Board ultimately concluded that the employer should cease and desist from interfering with the right of its employees to self-organization and to bargain collectively through representatives of their own choosing, free from domination, or interfering with the formation or administration of any of the labor organizations involved, and from refusing to bargain collectively with the exclusive bargaining representatives of the employees described *supra*.

Further remedies were ordered which parallel those ordered by the Board today in similar situations including reinstatement of the striking employees with back pay, dismissal of strike replacements, and disestablishment of the Company union with posting of compliance notices.

Ultimately, however, the Supreme Court in Fansteel, *supra*, refused enforcement of the Board's orders in this case.

(b) A more recent example of the application of the same philosophy of the NLRB can be found in its decision in Johns-Manville Corporation and OCAW, AFL-CIO, Case No. 15-CA 5238, 223 NLRB No. 189, 92 LRRM 1103 (1976). In Johns-Manville, the parties had reached an impasse in negotiations, and the employer initially stated its production facilities covered by the impasse would remain closed until a contract was reached. A mere two weeks later, the employer, contrary to its representations, resumed production using salaried personnel from other plants, supervisors, and temporary employees as scabs. This resumption continued for approximately five months. The employer then considered hiring permanent replacements and met with the striking union leadership to try and settle the strike, but the meeting was unsuccessful. Thereafter, the employer proceeded to hire permanent replacements but refused to hire former employees in view of the history of sabotage and disruptions during the earlier periods of negotiations and its temporary replacements were not producing efficiently. Within three months, the entire workforce was permanently replaced.

The displaced union filed § 8(a)(3) and § 8(a)(5) charges, and the ALJ and NLRB concluded there were no violations of the Act by the employer involved. The NLRB agreed with the rationale of the ALJ since the employer had demonstrated that the lockout was not based on antiunion considerations but rather on legitimate business reasons. The employer was found to have a reasonable apprehension that if it resumed normal business production with its own employees, substantial disruptions in its production process would soon take place against its substantial economic interest and those of its customers to the detriment of the New Orleans operation of the employer.

Despite the threat of continued violence by returning strikers, the NLRB majority (member Jenkins dissenting) adopted the rationale of the ALJ, who had held that “the evidence in this record is insufficient to support a conclusion and finding that [the Company’s] employees engaged in an in-plant strike or in concerted improper conduct so as to enable it to replace or discharge its entire implement of production employees.” 96 LRRM at 2015. However, the 5th Circuit refused to enforce the Board’s order. Johns-Manville Products Corp. v. NLRB, 96 LRRM at 2015, 2016; 557 F.2d 1126 (5th Cir. 1977) cert. denied

sub. nom., Orl. Chem. & Atomic Workers v. NLRB, 436 U.S. 956;
98 LRRM 2617 (1978).

The Fifth Circuit found a continuing pattern of in-plant sabotage and production disruptions by employees during the negotiations for a new agreement amounted to an in-plant “strike,” thereby making permanent replacements permissible. 557 F.2d 1126 at _____, 96 LRRM at 2016.

2. Plant Rules and Discipline

Another context in which violent conduct of employees has been considered by the NLRB is found in bargaining issues leading to § 8(a)(5) refusal to bargain charges. In that context, the Board has ruled that plant rules pertaining to violent conduct are considered subjects of mandatory bargaining and an employer cannot unilaterally implement or change such rules. These include rules pertaining to fighting and safety. Exceptions to the general rule have occurred in cases where a change in a plant rule had little or no impact on the employees as a group or on their working conditions.

Thus, in regard to fighting in the workplace, in National Football Players Association v. NLRB, 503 F. 2d 12, 87 LRRM 2118 (8th Cir. 1974), the court found that the NLRB had erred in refusing to find that club owners

of the NFL violated § 8(a)(5) of the Act when they unilaterally promulgated and implemented a rule providing for an automatic fine to be levied against any football player who leaves his team's bench while a fight or altercation is in progress on the playing field, no merit being found in the contention that promulgation of the rule by the league commissioner negated the need to first bargain regarding same.

See also Boland Marine & Manufacturing Co., Inc., 225 NLRB No. 113, 93 LRRM 1346 (1976), aff'd, 562 F.2d 1259, 96 LRRM 3239 (5th Cir. 1977), wherein the Board's ruling that the employer violated § 8(a)(5) by failing to bargain with the recognized bargaining representative by unilaterally promulgating and implementing rules governing employee conduct and safety rules was affirmed.

Another NLRB ruling in this area can be found in the Board's decision, Pak. Mo. Mfg. Co., 241 NLRB 801, 100 LRRM 1630 (1979), involving a refusal of the employer to bargain over unilateral announcement of a new policy of strict enforcement of safety rules.

3. Violent Conduct by Employees or Union Representatives which would not be protected by the NLRA

In contrast with the discussion at paragraphs 1 and 2, *supra*, it should be noted that violent conduct involving union employees or union representatives which is not protected by the NLRA includes, but is not

limited to, RICO violations, 18 U.S.C. § 1961, Taft-Hartley violations (29 U.S.C. § 186), Landrum-Griffin violations (29 U.S.C. § 501(c)), and violations of federal, state, or local criminal laws and are outside of the ambit of the topics to be included in this panel discussion.

II. LABOR ARBITRATION CONSIDERATION OF ACTS OF VIOLENCE OF EMPLOYEES AND/OR UNION REPRESENTATIVES

Obviously, many labor arbitration issues pertaining to violence of employees and/or union representatives have arisen under collective agreement in the context of pursuit of grievances and in the course of collective bargaining.¹

- A. Zero Tolerance Policies in the Workplace. Under OSHA², the Secretary of Labor is empowered to promulgate standards that are reasonably necessary or appropriate to provide safe or healthful employment and places of employment.

Employers have increasingly relied on OSHA to institute zero tolerance policies concerning workplace violence which have been upheld. See, e.g. Mason Hargan Corp., 111 LA 469, 472 (Barrow, 1998), wherein the arbitrator ruled that the employer had just cause to discharge a guard who tried to provoke a fight with another guard even though other employees

¹ For a comprehensive review of this subject, see Elkouri & Elkouri, How Arbitration Works, Ch. 16, 6th Edition (BNA Books 2003).

² See “Guidelines For Preventing Workplace Violence for Health Care & Social Service Workers,” U.S. Department of Labor, Occupational Safety and Health Administration, OSHA 3148-01R (2004), annexed hereto as Attachment 1.

were not terminated for similar offenses in the past where the employer properly had adopted a zero tolerance policy. The arbitrator emphasized that adoption of such a policy was one of the most effective way for employers to deal with increases in violence.

B. Prior Notice To Employees. The trend is to find that prior notice to all employees is not a prerequisite to enforcement of the policy pertaining to work place violence. Snap-On Tools Corp., 104 LA 180 (Cipolla, 1995).

C. Public and Employer Concern. In recent years, workplace violence issues have come to the forefront of public and employer concerns.³ The disturbing accounts of violence in the workplace have contributed to the view that there is an employer's obligation to provide a safe working environment which requires:

- (1) zero tolerance for violence policies, and
- (2) the discipline or removal of employees who threaten violence or engage in violence. USS Div. of USX Corp., 114 LA 948 (DAS, 2000).

³ See attached article, "The New York State Workplace Violence Prevention Act," by Sharon N. Berlin of the Melville, New York law firm of Lamb & Barnosky, LLP, which appeared in the NY State Bar Association *L&E Newsletter*, Summer 2007, Vol. 32, N. 2, pp. 16-17, and previously appeared in the Spring 2007 issue of *Municipal Lawyer*, Vol. 21, No. 2, published by the Municipal Law Section of the NY State Bar Association. Attachment 3.

- D. The trend by arbitrators is to treat threats of violence in the workplace in the same fashion as actual violence. Butter Restoration, inc., 109 LA 614 (Kanner, 1997).

III. ROLE OF THE UNION IN DEALING WITH VIOLENCE IN THE UNIONIZED WORKPLACE

Obviously, the union that serves as collective bargaining agent in the workplace where a collective bargaining agreement is in place or where the union is certified or otherwise recognized as the bargaining agent has duties imposed by statutory or common law concerning violence in the workplace including:

1. the duty to fairly represent employee(s) involved in violence leading to discipline or discharge under the collective agreement, including conducting investigations, and deciding who will be represented by the union where two or more unit employees were engaged in the same or related acts of violence;
2. the duty to bargain in good faith in negotiating provisions in the collective agreement pertaining to violence, prevention of violence, adoption or implementation of employer policies or regulations pertaining to same;
and

3. the duty to act on behalf of the bargaining unit and its members affected by government investigation or prosecution as a result of violence committed in the workplace during a strike or lockout.

IV. CONCLUSION

The NLRA has, from its inception, provided some protection to labor unions and their members where they are engaged in violent conduct during the course of collective bargaining or grievance arbitration, so long as such actions do not give rise to imminent threats of or actual injury, death, or property damage.