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Labor Law: Discrimination by Employer because of Union Activity

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individual obligations. Critics of the union shop would do well to remember that federal law compels every union that legally represents the majority of the employees in a valid bargaining unit to expend its time and money to obtain and retain rates of pay, wages, hours of employment and conditions of work for employees working under the contract who will not join the union in equality with those who have joined the union. Why can it be said that it is unjust or inequitable to legally force and compel those same non-union employees to at least offer to bear a fair share of the cost of maintenance of the union that must work for all alike?

In the last analysis, the controversy centering around right-to-work legislation resolves itself into the problem of balancing conflicting rights. Those reasonable restraints on the rights of liberty and property that the common weal and general welfare demand include the union shop. The author submits that the right-to-work legislation is a wholly arbitrary and ineffective deterrant to whatever monopolistic activities that organized labor may be guilty of practicing. The author further submits that unions should not be compelled to expend their time and money for the benefit of non-union employees without the correlative right of contribution from those who refuse to join their ranks through either justifiable principle or dogged recalcitrance.

The unalienable right to work cannot be found in either the natural law of our social, economic, and political web or the constitutional and legislative canons that theoretically reflect the mores of the citizenry. Some who in the not so distant past were quick to tread upon the hand and spirit of the laboring man suddenly feel the clarion call to rescue him from the tentacles of the one institution that has so effectively espoused his cause. Some more cynical than the author might suspect that their motives are not entirely charitable.

CASE COMMENTS

LABOR LAW: DISCRIMINATION BY EMPLOYER BECAUSE OF UNION ACTIVITY—The ruling of the Colorado Industrial Commission, which was upheld by the district court, was affirmed by the Supreme Court when it ordered Bennett's Restaurant to offer reemployment and compensation for financial loss to four waitresses who were discharged in violation of the Colorado Labor Peace act.[1] The court ruled that the waitresses were selected for discharge because of their union activity and to intimidate other employees from joining the union.

[1] Bennett's Restaurant v. Industrial Commission, (March 23, 1953) Colorado Bar Association Advance Sheet for March 28, 1953.

Petitioner claimed his reason for discontinuing the breakfast shift and firing four waitresses was to reduce business expense. The Industrial Commission did not decide on this issue, but the Supreme Court accepted it as true. The primary question decided was whether petitioner selected the four waitresses to be discharged on some legitimate ground, such as incompetence, or because they joined the Hotel and Restaurant Employees union, A. F. of L.

The facts of the case make it fairly obvious that the four waitresses were discharged for their union activity. They were the only four who signed union cards when the union organizer visited the restaurant, and they talked to other employees urging them to join. The manager's assertion that they were discharged because of discontinuance of the breakfast shift was refuted by a showing that one of the women fired was on the afternoon shift; two women on the breakfast shift were retained, and other waitresses were hired before and after the firing.

Petitioner also claimed that a list was made of "outstanding" waitresses and none of the waitresses fired was on that list. However, this claim lost weight when the manager admitted that some waitresses who were on the "outstanding" list had been working for Bennett's less than a week, before their competence could be determined.

The Colorado Labor Peace act [2] provides:

> It shall be an unfair labor practice for an employer individually or in concert with others: to encourage or discourage membership in any labor organization, employee agency, committee, association or representation plan by discrimination in regard to hiring, tenure or other terms or conditions of employment. . . .

Subsections 7 and 8 of Section 8 provide that when the commission's order is reviewed by a district court "The findings of fact made by the Commission, if supported by creditable and competent evidence in the record, shall be conclusive." It is the province of the commission and not of the court to determine the weight to be accorded to the evidence.

For the rule of evidence to be applied in labor cases heard before commissions, the Supreme Court cites 56 C.J.S. 307, Section 28 (100):

> In ascertaining whether an employee was discharged because of union activities the board may consider circumstantial, as well as direct, evidence, but when circumstantial evidence is relied on there must be evidence of circumstances from which the board may conclude with reasonable certainty that the employee was discharged because of union activity. The board may draw infer-

[2] Colo. Laws, chap. 131, sec. 6, p. 400 (1943).

> ences from the facts proved. The fact that some of the evidence relating to a discriminatory discharge was hearsay affords no basis for objecting to the finding of the board. However, mere suspicions or conjecture alone is not sufficient on which to base a finding of discriminatory discharge.

The district and Supreme Courts held that the findings of the commission, that petitioner discriminated against employees who sought unionization for the restaurant, were supported by "creditable and competent evidence" even though it was circumstantial.

Interpreting the Colorado Labor Peace act, the court quotes language from *N. L. R. B. v. Jones & Laughlin Steel Corporation*:[3]

> The act (NLRA) 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.

This case appears to be the first decision by the Colorado Supreme Court interpreting the Colorado Labor Peace Act on the issue of whether circumstantial evidence is admissible to prove that an employee was discharged for his union activity.

The case points up how far labor unions have progressed in Colorado in their efforts to win recognition since the early 1900's when violence dominated the coal fields of Southern Colorado when the United Mine Workers sought to unionize the mines. The unions first achieved recognition after the strikes of 1914 when the Rockefeller plan was put into effect in all Colorado Fuel and Iron Company mines. The company reserved the right to hire and fire "with fairness of the action subject to review," but it was agreed that union membership was not a reason for refusing a miner employment or discharging him.[4]

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[3] 301 U.S. 1 (1937).
[4] Out of the Depths by Barron B. Beshoar (1942).