Federal Labor Laws

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XXV. Work Stoppages Classified According to Causal Factors – Economic and Unfair Labor Practice Strikes, Sympathy Strikes, Safety Disputes, and Lockouts

A. Classification

1. The legal status of many labor disputes depends upon an analysis of the cause of the work stoppage. Most strikes can be characterized as either economic strikes or unfair labor practice strikes, depending on the factors which lead to the walkout. The rights of the parties to a dispute which depend on this distinction are discussed in Section B of this outline.

2. A refusal to work by one worker or group of workers to support the efforts of another group of strikers is a sympathy strike. Honoring a picket line is the most common form of sympathy strike. Limitations on the rights of sympathy strikers are discussed in Section C of this outline.

3. Work stoppages may also be caused by the employer's efforts to apply economic pressure on the union through the use of the lockout as either an offensive or defensive weapon. The legal issues raised by the lockout as an economic weapon are discussed in Section D of this outline.

4. Under Section 502 of Taft-Hartley, work stoppages which result from the good faith belief of workers that conditions of work are abnormally dangerous are accorded special treatment. Similarly, the Occupational Safety and Health Administration recognizes a limited right of workers to refuse to perform extremely hazardous jobs. The unique issues raised by safety dispute walkouts are discussed in Section E, *below*.

B. Economic and Unfair Labor Practice Strikes.

1. A strike which is caused in whole or in part by the unfair labor practices of the employer is classified as an unfair labor practice strike, while a strike resulting from a dispute over wages and working conditions is an economic strike.[1]

   a. If a strike begins over economic issues but is prolonged by the unfair labor practices of the employer, it may be

[1] Citizens National Bank of Willmar, 245 NLRB 389, 102 LRRM 1467.

converted from an economic to an unfair labor practice strike.[2]

b. While the severity of the unfair labor practices will not determine the classification of a strike, there must be a causal connection between those unfair labor practices and the decision to strike.[3]

b. The distinction between economic and unfair labor practice strikes is important for determining the right of the employer to hire replacements, the right of workers to vote in NLRB representation elections, and the right of workers to be reinstated at the end of the strike.

2. The most important distinction between economic and unfair labor practice strikes concerns the right of the employer to hire replacements. Although the employer has a general right to continue operating its business during a strike, the nature of the strike determines whether replacement workers may be hired on a permanent or temporary basis.

   a. During an economic strike, the employer may hire permanent replacements for the striking workers.[4] The strikers cannot be terminated because they strike, but they can be replaced. The distinction concerns future reinstatement rights and the right to vote in a Board election.

   b. If replacements are hired for unfair labor practice strikers, they may be hired on a temporary basis only. At the end of the strike, the unfair labor practice strikers must be reinstated and the replacements released.

   c. If a strike is converted from an economic to an unfair labor practice strike, the status of replacements depends on when they were hired. Anyone hired as a replacement after conversion must be treated as a temporary replacement.

3. At the conclusion of a strike, workers who have made an unconditional offer to return to work must be reinstated unless:

   a. They have been permanently replaced,

   b. Their jobs has been eliminated,

   c. They have accepted permanent and substantial employment elsewhere, or

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[2] *See*, American Cyanamid Co., 592 F2d 356, 100 LRRM 2640 (7th Cir. 1979).

[3] Golden Stevedoring Co., 335 NLRB 410, 169 LRRM 1173 (2001).

[4] NLRB v. Mackay Radio and Telegraph Co., 304 U.S. 333, 2 LRRM 610 (1938).

d. They are guilty of serious strike misconduct.[5]

Failure to reinstate must be based on a legitimate and substantial business justification.[6]

5. Permanently replaced workers remain employees. While they may not be reinstated immediately, they retain reinstatement rights for future openings with the company. At the termination of the strike, the workers are placed on a reinstatement list and must be offered jobs as they become available. The employer must take back the replaced strikers before hiring new workers after the strike.

   a. Seniority rights which the replaced worker had accumulated before the strike may be retained. However, if the employer recalls workers in a rational manner based on factors other than seniority, the recall procedure is not necessarily unlawful. For example, the right of an employer to recall workers in the order in which they apply for reinstatement has been upheld by the Board. The Sixth Circuit Court of Appeals has rejected this argument.[7]

   b. The employer may not grant unusual incentives to the replacements as inducements to take the struck jobs. Superseniority for replacements is unlawful.[8]

5. If an election is conducted by the NLRB during or after a strike in which replacements are hired, the right of the strikers and replacements to vote is also affected by the classification of the strike.

   a. Temporary replacements do not have the right to vote in a Board election.[9]

   b. Strikers retain the right to vote unless they have lost reinstatement rights for the reasons listed in Subsection 3, *above*.[10]

   c. Permanent replacements have the right to vote.[11]

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[5] Laidlaw Corp., 171 NLRB 1366, 68 LRRM 1252 (1968).

[6] NLRB v. Fleetwood Trailer Co., 389 U.S. 375, 66 LRRM 2737 (1967).

[7] NLRB v. American Olean Title Co., 826 F.2d 1496, 126 LRRM 2001 (6th Cir. 1987).

[8] NLRB v. Erie Resistor Corp., 373 U.S. 221, 53 LRRM 2121 (1963).

[9] *See, e.g.*, Larand Leisurelies, Inc., 222 NLRB 838, 91 LRRM 1305 (1976).

[10] *See also*, W. Wilton Wood, Inc., 127 0NLRB 1675, 46 LRRM 1240 (1960).

[11] Pacific Tile & Porcelain Co., 137 NLRB 1358, 50 LRRM 1394 (1962).

d. Permanently replaced workers with future reinstatement rights have the right to vote for one year.[12] If they have not been recalled within that one year, they lose the right to vote.

e. Construction employees voting rights have been articulated in *Daniel Construction Co*.[13]

1) In addition to the Board's standard eligibility criteria stated above, construction employees can vote when they have been employed a total of thirty days in the preceding 12 months by the same employer, or if they fail the above test, they may qualify if they have worked a total of 45 days for the same employer within the past 24 months.

2) Those who quit or are discharged for cause are ineligible.

6. In unusual cases involving very serious unfair labor practices, the Board has ruled that the no-strike clause of a contract is not applicable. A no-strike clause can serve as a waiver of the right to engage in an economic strike but will not necessarily waive the right to engage in an unfair labor practice strike.[14]

C. Sympathy Strikes

1. Workers who honor a picket line are classified as sympathy strikers because their refusal to work is motivated by their support of the other workers. As a general rule, the rights of sympathy strikers is determined by the classification of the strike underlying the honored picket line. However, the Board distinguishes between picket lines at the sympathy strikers' place of employment and "stranger" picket lines.

2. A worker who honors a picket line at his or her primary place of employment has the same rights as the pickets.[15]

a. A worker who honors an illegal picket line is engaged in unprotected activity and may be subject to discipline by the employer.[16]

b. Workers who honor legal primary pickets at their place of employment may be replaced but not disciplined. A worker

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[12] *See, e.g.*, Kellburn Manufacturing Co., 45 NLRB 322, 11 LRRM 142 (1942).

[13] 133 NLRB 264, 48 LRRM 1636 (1961), *as modified in* 167 NLRB 1078, 66 LRRM 1220 (1967).

[14] Mastro Plastics Corp. v. NLRB, 350 U.S. 250, 37 LRRM 2587 (1956).

[15] Newberry Energy Corp., 227 NLRB 436, 94 LRRM 1307 (1976).

[16] American Telephone & Telegraph Co., 231 NLRB 556, 96 LRRM 1144 (1977).

who honors a primary, economic picket may be permanently replaced.[17]

3. The rights of workers who honor "stranger" picket lines are not as clearly defined. Refusal to cross a legal picket line at a facility other than that of the worker is recognized as protected activity by the Board and courts.

   a. Disciplining a worker in retaliation for honoring a stranger picket line is an unfair labor practice. However, disciplinary action against a stranger sympathy striker may be upheld if the employer establishes a legitimate or compelling business justification for taking such disciplinary action.[18]

   b. Workers covered by the Taft-Hartley Act who honor a picket line of exempted workers are engaged in unprotected activity. The logic of the Board is that the sympathy strikers are honoring a picket line of persons who are not "employees" for purposes of the Act. For example, a truck driver who refuses to cross the picket line of public sector workers is engaged in unprotected activity, irrespective of the legality of the picket.

   c. The right of railroad workers to honor a picket line is regulated by the Railway Labor Act, not Taft-Hartley.

4. In an important decision, the National Labor Relations Board ruled in 1985 that the right to engage in a sympathy strike can be waived by a general no-strike clause in a collective bargaining agreement.[19] After the Board's position was rejected by the Circuit Court of Appeals for the District of Columbia,[20] the Board adopted a case-by-case test requiring a more specific analysis of the no-strike clause, its relationship to the contractual arbitration clause, and the past practices of the parties to determine whether the no-strike clause protects or prohibits sympathy strikes.[21]

5. Although an employer may generally obtain an injunction against a wildcat strike if it is willing and obligated to arbitrate the dispute underlying the wildcat, the same rule does not apply to workers who honor the picket line of wildcat strikers. While the sympathy

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[17] Butterworth-Manning-Ashmore Mortuary, 270 NLRB 1014, 116 LRRM 1193 (1989).

[18] Business Services by Manpower, Inc. v. NLRB, 784 F.2d 442, 121 LRRM 2827 (2d Cir. 1986), *denying enforcement of* Business Services by Manpower Inc., 272 NLRB 827, 117 LRRM 1345 (1984).

[19] Indianapolis Power and Light Co., 273 NLRB 1715, 118 LRRM 1201 (1985).

[20] IBEW Local 1395 v. NLRB, 797 F.2d 1027, 122 LRRM 3265 (D.C. Cir. 1986).

[21] 291 NLRB 1039, 130 LRRM 1001 (1988).

strikers may be engaged in unprotected activity, the employer may not obtain an injunction because there is no arbitrable dispute.[22]

D. Lockouts

1. The use of lockouts by employers is subject to restrictions which are similar to the legal treatment of strikes. The Board and courts distinguish between offensive and defensive lockouts to determine the legality of the action and the right of the employer to hire replacements after locking out union members.

2. The right of employers to use the lockout for defensive purposes has been recognized for many years. A defensive lockout is one in which the employer uses the lockout as a response to threatened or real disruption by a strike.

   a. If a union strikes some employers of a multi-employer bargaining unit, the remaining employers may lockout their workers defensively and continue operating the business with temporary replacements.[23]

   b. Defensive lockouts also includes lockouts which are designed to protect the employer against threatened sitdown strikes and other major disruptions of integrated production operations.

   c. The right of the employer to hire temporary replacement for workers locked out defensively has been upheld by the Board and the courts.

3. An offensive lockout is one in which the objective of the employer is to pressure the employer to accept the bargaining position of the employer. Offensive lockouts are legal as long as they are not motivated by anti-union reasons.[24]

4. The Board now recognizes the right of the employer to continue operating its business after locking workers out offensively. The position of the Board is that the impact of hiring temporary replacements is comparatively slight and is therefore legal as long as there is no evidence of actual anti-union motive.[25]

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[22] Buffalo Forge Co. v. United Steelworkers of America, 428 U.S. 397, 92 LRRM 3032 (1976), but also see Westmoreland Coal Co., 910 F2d 130, 134 LRRM 3192 (4th Cir. 1990).

[23] NLRB v. Truck Drivers Local 449, International Brotherhood of Teamsters [Buffalo Linen], 353 U.S. 87, 39 LRRM 2603 (1957), NLRB v. Brown, 380 U.S. 278, 58 LRRM 2663 (1965).

[24] American Ship Building v. NLRB, 380 U.S. 300, 58 LRRM 2672 (1964).

[25] Harter Equipment, Inc., 280 NLRB 597, 122 LRRM 1219 (1986), *aff'd*, IUOE Local 825 v. NLRB, 829 F.2d 458, 126 LRRM 2337 (3d Cir. 1987).

5. If an employer refuses to reinstate strikers after they have made an unconditional offer to return to work, the employer must reinstate the strikers unless the failure to reinstate is based on a legitimate and substantial business justification. A failure to reinstate may be considered a lockout. Under these circumstances, the lockout is justifiable only if the employer notifies the employees that they are being locked out and the conditions for settling the underlying bargaining dispute are disclosed.[26]

E. Walkouts in Protest of Safety Hazards

1. Section 502 of Taft-Hartley states, in part:

   . . . [Nor] shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment . . . be deemed a strike under this Act.[27]

2. The safety dispute provision of Section 502 is a potentially important source of workers' right to refuse to perform abnormally dangerous work assignments. The rights under this section are different in substantial ways from the right of workers to refuse unsafe work under the Occupational Safety and Health Act and under Section 7.

   a. Protests over conditions of work, including health and safety concerns, are protected activity. However, if the form of the protest is a strike, it will be subject to a negotiated no-strike clause, under normal circumstances.

      1) Nonunion workers walking out in protest of safety hazards may be protected, because of the absence of a no-strike clause.[28]

      2) Union members covered by a no-strike clause would not have the same right to walkout in protest of the general safety conditions.[29]

   b. Under the regulations of the Occupational Safety and Health Administration, there is a limited recognition of the right of a worker to refuse to perform jobs which present an immediate threat of death or serious physical harm.[30]

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[26] Eads Transfer, 304 NLRB 711, 138 LRRM 1168 (1991).

[27] 29 USC § 143.

[28] NLRB v. Washington Aluminum Co., 370 U.S. 9, 50 LRRM 2235 (1962).

[29] Boys Market, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, 74 LRRM 2257 (1970).

[30] 29 CFR § 1977.12(b)(2).

1) The OSHA regulation applies to hazards which present an immediate risk of death or serious physical harm. This is a different standard than is required under Section 502.

2) The work condition must be such "that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels." Additionally, the employee must seek and been unable to get the employer to eliminate the hazard.

3. The standards for determining whether a worker is acting in a manner consistent with Section 502 were defined in *Gateway Coal v. United Mine Workers*.[31]

   a. For a refusal to work to qualify under Section 502 the worker or workers involved must have a good faith belief that conditions are abnormally dangerous. Section 502 does not cover the routine hazards of dangerous work.

   b. In interpreting the breadth of Section 502, the Supreme Court required in *Gateway Coal* that the good faith belief that conditions are abnormally dangerous must be supported by "reasonably ascertainable objective evidence" of the existence of the hazard.

4. Section 502 applies both to cases in which the worker believes that the risk of harm is immediate and when the risk is one that could lead to gradual harm, as in the case of exposure to radiation or toxic substances. In either situation, the workers involved must have a good faith belief that conditions are abnormally dangerous, that belief must be a contributing cause of the walkout, the belief must be supported by reasonably ascertainable objective evidence, and the perceived danger must pose an immediate risk to health or safety.[32]

5. Refusals of hazardous work may also lead to defenses against charges of insubordination in the grievance and arbitration provisions of a collective bargaining agreement.

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[31] 414 U.S. 368, 85 LRRM 2049 (1974).

[32] TNS, Inc., 329 NLRB 602, 166 LRRM 1018 (1999).