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NEYHART, ANDERSON, NUSSBAUM, REILLY & FREITAS
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
100 BUSH STREET, SUITE 2600
SAN FRANCISCO, CALIFORNIA 94104
(415) 986-1980

JOHN L. ANDERSON
PETER D. NUSSBAUM
FRANK J. REILLY
JOSEPH FREITAS, JR.
RONALD YANK
SANFORD N. NATHAN
MATTHEW D. ROSS
LYNN C. ROSSMAN
WILLIAM J. FLYNN
ELAINE B. FEINGOLD
VICTORIA CHIN
RICHARD K. GROSBOLL
RICHARD F. O'CONNOR

STANLEY H. NEYHART
OF COUNSEL

February 12, 1985

MEMORANDUM

TO: ALL CLIENTS

FROM: Peter D. Nussbaum PDN.

RE: Recent NLRB Decision

The NLRB recently ruled in Indianapolis Power & Light Company, 273 NLRB No. 211 (1985) that a general no-strike clause includes a pledge not to engage in sympathy strikes. The Board stated in part:

> "If a collective bargaining agreement prohibits strikes, we shall read the prohibition plainly and literally as prohibiting all strikes, including sympathy strikes. If, however, the contract or extrinsic evidence demonstrates that the parties intended to exempt sympathy strikes, we shall give the parties' intent controlling weight."

The decision overrules previous cases by the NLRB. The case is important because many if not most no-strike clauses do not contain exceptions for sympathy strikes. If an employee honors a picket line despite a broad no-strike clause, his conduct is not protected under the Act and he can be threatened with discipline or discharge or actually disciplined or discharged.

/yf

INDIANAPOLIS POWER & LIGHT CO. —

INDIANAPOLIS POWER & LIGHT COMPANY, Indianapolis, Ind. and ELECTRICAL WORKERS (IBEW), LOCAL 1395, AFL-CIO, Case No. 25-CA-15784, January 31, 1985, 273 NLRB No. 211

M. Julia McKenzie, for General Counsel; Bruce W. Sumner, for union; Herbert C. Snyder, Jr. and Alan K. Mills, for employer; Administrative Law Judge Frank H. Itkin.

Before NLRB: Dotson, Chairman; Hunter and Dennis, Members.

DISCRIMINATION Sec. 8(a)(3)

— Sympathy strike — Waiver ▸52.344 ▸52.358 ▸38.52

A collective bargaining contract that prohibits strikes shall be read plainly and literally as prohibiting all strikes, including sympathy strikes, unless contract or extrinsic evidence demonstrates that parties intended to exempt sympathy strikes. There is no logical or practical basis for proposition that prohibition of all "strikes" does not include sympathy strikes merely because word "sympathy" is not used. Such cases as U.S. Steel Corp. (111 LRRM 1200) and W-I Canteen Service (99 LRRM 1571) are overruled to extent that standard applied there is inconsistent.

DISCRIMINATION Sec. 8(a)(3) INTERFERENCE Sec. 8(a)(1)

— Suspension — Threat — Sympathy strike — Waiver ▸52.358 ▸52.344 ▸36.67 ▸50.933 ▸50.769

Employer whose collective bargaining contract prohibits "any strike, picketing . . . or other curtailment of work" did not violate LMRA when it suspended employee and threatened to discharge him because he refused to cross picket line at its customer's premises to carry out his job assignment there. No-strike provision clearly and unmistakenly waived employees' right to engage in sympathy strikes, where nothing in provision suggests intent to create exception for sympathy strikes, nor is there sufficient evidence to establish such intent.

[*Text*] The judge concluded that the Respondent violated the Act by suspending and threatening to discharge employee Herbert King because he refused to cross a stranger picket line to perform assigned work at the premises of the Respondent's customer. We reverse.

On 17 August 1983 the Respondent assigned King to read a meter and change a tape at Indiana Bell Telephone Company. Bell employees were picketing the premises when King arrived, and he refused to cross the picket line. The Respondent suspended him for two and one-half days and warned that refusal to cross a picket line to carry out a job assignment was cause for immediate termination.

The Respondent claimed, inter alia, that its actions did not violate the Act because the following contractual provision waived employees' right to engage in sympathy strikes:

"[T]he Union and each employee covered by the agreement agree not to cause, encourage, permit, or take part in any strike, picketing, sit-down, stay-in, slow-down, or other curtailment of work or interference with the operation of the Company's business, and the Company agrees not to engage in a lock-out."

Following Board precedent,[1] the judge reasoned that, because the contractual no-strike language did not expressly mention sympathy strikes, the contract would not bar them unless extrinsic evidence clearly showed the parties' intent to do so. He found the parties' bargaining history and past practice regarding sympathy strikes equivocal and uncertain, and thus insufficient to establish a sympathy-strike waiver.

We conclude that the broad no-strike clause bars employees from honoring stranger picket lines. We agree with former Member Penello, concurring in Operating Engineers Local 18 (Davis-McKee), 238 NLRB 652, 661, 99 LRRM 1307 (1978), that a broad no-strike prohibition encompasses direct and indirect work stoppages, including sympathy strikes: "Where the parties to a collective-bargaining contract embody in the agreement a clause stating essentially that there shall be no strikes during the term of the agreement, it means that there shall be no strikes during the terms of the agreement — unless extrinsic evidence indicates that the parties intended otherwise." Although previous Board decisions have held that sympathy strikes lie outside the scope of broad no-strike clauses, we can discern no logical or practical basis for the proposition that the prohibition of all "strikes" does not include sympathy strikes merely because the word "sympathy" is not used. As the District of Columbia Circuit stated," [T]he practical relationship between work stoppages and the honoring of picket lines is so well understood in the industrial climate that we think that a clause of this kind using only the word 'strike' includes plant suspensions resulting from refusals to report for work across picket lines." News Union of Baltimore v. NLRB, 393 F.2d 673, 676 — 677, 67 LRRM 2487 (1968). See also the Seventh Circuit's opinion in United States Steel, supra.

We consider former Member Penello's Davis-McKee concurrence a sound and straightforward guide to construing no-strike provisions. If a collective-bargaining

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[1] United States Steel Corp., 264 NLRB 76, 111 LRRM 1200 (1982) (former Chairman Van de Water and Member Hunter dissenting), enf. denied 711 F.2d 772 113 LRRM 3227 (7th Cir. 1983); W-I Canteen Service, 238 NLRB 609, 99 LRRM 1571 (1978), enf. denied 606 F.2d 738, 102 LRRM 2447 (7th Cir. 1979).

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agreement prohibits strikes, we shall read the prohibition plainly and literally as prohibiting all strikes, including sympathy strikes. If, however, the contract or extrinsic evidence demonstrate that the parties intended to exempt sympathy strikes, we shall give the parties' intent controlling weight. We therefore overrule such cases as United States Steel and W-I Canteen Service to the extent that the standard applied there is inconsistent with this holding.

The instant no-strike provision prohibits "strike[s], picketing . . . or other curtailment of work." Nothing in it suggests an intent to create an exception for sympathy strikes. Further, based on the judge's discussion of the bargaining history and parties' conduct, we find there is insufficient extrinsic evidence establishing the parties' intent to exclude sympathy strikes from the no-strike provision's scope.

We therefore conclude that the no-strike provision "clearly and unmistakably" waived the employees' right to engage in sympathy strikes. See Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 112 LRRM 3265 (1983). Accordingly, employee King was not privileged to refuse to cross the picket line established at the premises of the Respondent's customer, and the Respondent was therefore free to suspend King and threaten him with discharge for refusing to cross the picket line.

ALPHA BETA CO. —

ALPHA BETA COMPANY and RALPH'S GROCERY COMPANY, San Jose, Calif. and ELIZABETH MAHON, et al., Case No. 32-CA-1275, etc., January 23, 1985, 273 NLRB No. 194

Mary E. McDonald, Oakland, Calif., for General Counsel; McLaughlin and Irvin, by Patrick W. Jordan, San Francisco, Calif., for employers; Administrative Law Judge Russell L. Stevens.

Before NLRB: Dotson, Chairman; Hunter and Dennis, Members.

PROCEDURE Sec. 10(b)

— Deferring to arbitration ▸40.30

Deferral-to-arbitration principles that NLRB set forth in Spielberg Mfg. Co. (36 LRRM 1152), Collyer Insulated Wire (77 LRRM 1931), and other cases apply equally to settlements arising from parties' contractual grievance-arbitration procedures.

DISCRIMINATION Sec. 8(a)(3) PROCEDURE Sec. 10(b)

— Discharge — Grievance settlement ▸40.40 ▸52.3616

NLRB defers to employer-union settlement that was intended to resolve dispute over discharge of employees who failed to report for work in connection with sympathy strike, where employees voted to authorize unions to accept settlement on their behalf, but because they were dissatisfied with failure of settlement to provide back pay, they also decided among themselves — without expressing any dissatisfaction to employers or unions — to seek back pay through unfair labor practice procedures of NLRB.

[*Text*] On 7 August 1978 members of Teamsters Locals 287 and 315 employed by the Respondents began an unsanctioned economic strike against the Respondents. Thereafter by letter dated 9 August 1978, Retail Clerks Local 428 and 1179 (the Unions) informed their members that the Central Labor Council had sanctioned the Teamsters strike and advised that: (1) members were not to cross a picket line; (2) if members were requested to work and no bona fide picket line was present, they were authorized to go to work; and (3) if the picket line showed up later, members were to complete their shift unless they had to leave the store, but they were not to cross the line and reenter. The letter also solicited all members to fully support the strike. By letter dated 7 and 8 September, the Unions notified their members that the stike sanction had been withdrawn on 7 September. The strike lasted, however, until about 27 November 1978.

The Respondents had a discretionary policy, not challenged by the Union, of disciplining employees for taking unauthorized or unexcused absences. On 14 August 1978, by letter mail to all employees and posted in all stores, the Respondents advised their employees as follows concerning their participation in the sympathy strike: "If there is picketing at your store, it is *your individual choice* to work or not to work. . . . If striking Teamsters have not placed a picket line at your store you are expected to work as scheduled or be subject to disciplinary action . . . . Should pickets appear after you have started your shift, you may finish your shift . . . .[1] Pursuant to this policy the Respondents discharged 15 employees during the course of the sympathy strike because they refused to work when no pickets were present at their respective worksites. The Respondents also discharged five em-

[1] The judge found that the Respondent's letter violated Sec. 8(a)(1) of the Act because it interfered with employees Sec. 7 rights to engage in such strikes. In view of our deferral to the settlement agreement regarding the discharge allegations we find the violation based on the 14 August letter standing alone to be de minimis and not requiring a notice posting. Accordingly, we shall dismiss it.