In the Matter of Soss Manufacturing Company *and* Foremen's Association of America

In the Matter of Republic Steel Corporation (98" Strip Mill) *and* Foremen's Association of America

Cases Nos. 7–C–1148 and 8–C–1569, respectively—Decided May 8, 1944

DECISION ON APPEAL

These cases are now before us at the request of the Foremen's Association of America, a labor organization admitting only supervisory personnel and unaffiliated with any labor organization admitting rank and file employees, for review of the action of the Regional Directors of the Seventh and Eighth Regions, respectively, in refusing to issue complaints upon charges filed by the Foremen's Association of America. The charges in each case allege that the company involved discriminatorily discharged certain named foremen because of their membership and activities on behalf of the Foremen's Association of America, thereby engaging in unfair labor practices within the meaning of Section 8 (1) and (3) of the National Labor Relations Act, herein called the Act.

The issue posed by these cases is whether the discharge of a person in a supervisory capacity because of his membership in and activities on behalf of a labor organization whose membership is confined to supervisory personnel, such as the Foremen's Association of America, constitutes an unfair labor practice within the meaning of Section 8 (1) and (3) of the Act.

In view of the general interest in the question, the Board provided for an open hearing and invited representatives of labor organizations and employer groups to participate at an oral argument held before the Board at Washington, D. C., on February 15, 1944. Numerous representatives appeared and participated and subsequently filed statements and briefs which have been considered by the Board.

At the hearing, two sharply divergent courses were urged upon the Board by representatives of industry and labor groups, respectively. The spokesmen for the labor groups argued that since the term "employee," as defined in Section 2 (3) of the Act, is not restricted to nonsupervisory employees, the Board was compelled as a matter of law to deem supervisors within the protection of Section 8 (1) and (3).

The primary contention made by the employer representatives was that supervisory officials are not employees within the meaning of the Act and that, consequently, none of the unfair labor practice Sections of the Act apply to such persons. In support of this contention we have been directed to the language of the Act itself, to certain aspects of the legislative history of the Act and related statutes, to various arguments based on modern industrial organization, and to our decision in the *Maryland Drydock Company* case.[1]

It is our view that neither of these extreme positions can be reconciled with the principles enunciated by this Board in the *Maryland Drydock* case. The argument that any person employed by a corporation is entitled to the full protection of the Act because of the absence of specific limiting language in Section 2 (3) is the very argument rejected as untenable in the *Maryland Drydock* case. We assumed in the *Maryland Drydock* case that the supervisory personnel involved were "employees" within the Act, but we nevertheless refused to hold that such persons could constitute an appropriate bargaining unit. Nor, on the other hand, is the contention that minor supervisors cannot be deemed "employees" within the meaning of the Act persuasive. The definitions in Section 2 of the terms "employer" and "employee" [2] are not mutually exclusive, and there is judicial authority for the view that under certain circumstances supervisors may be employees.[3]

Moreover, the legislative history of the Act and related legislation lend little support to either of these extreme positions. While it was argued that the use of the terms "worker" and "labor" in other portions of the Act indicate an attempt to exclude all supervisory personnel, we are not convinced that the use of these words in the light of the broad generic meaning given to them in different contexts throws much light on the problem. The committee reports and the records of the debates in the House and Senate are completely barren of any

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[1] 49 N L R B. 733.

[2] Sec 2 When used in this Act—

(2) The term "employer" includes any person acting in the interest of an employer, directly or indirectly, but shall not include the United States, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization

(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 labor 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

[3] See, for example, *N. L. R B. v. Skinner and Kennedy Stationery Co.*, 113 F. (2d) 667 (C. C A 8) enf'g 13 N. L R B 1186; *Matter of American Potash and Chemical Corporation*, 3 N. L. R. B. 140, enf'd 98 F. (2d) 488 (C. C. A. 9); *Eagle-Picher Mining and Smelting Company* v. *N. L. R. B*, 119 F. (2d) 903.

references to the problem as to whether supervisory employees are within the coverage of the Act.[4]

Our attention has been directed to the Railway Labor Act of 1934, as amended, in which Congress expressly defined the term "employee" to include "subordinate officials." It was stressed by employer representatives that the omission of corresponding language from the definition of the same term in the Labor Relations Act must be viewed as evincing a Congressional intent to exclude supervisory employees from the purview of the Labor Relations Act. We do not believe that such an inference is properly drawn, nor, conversely, that the inclusion of "subordinate officials" in the employee definition in the Railway Labor Act provides a fair basis for inferring that the Labor Relations Act must be similarly construed. As contrasted to the relatively narrow area covered by the Railway Labor Act and the fixed and established collective bargaining patterns within that area, the wide and changing variety of collective bargaining forms and practices in the large industrial area subject to the jurisdiction of the Labor Relations Act impels the view that Congress, rather than attempting an exact definition, left to the administrative determination of the Board in each case the duty of deciding whether a particular type of worker, not specifically excluded, is within the ambit of the unfair labor practice Sections of the Act.

This view finds ample support in the recent opinion of the Supreme Court in *National Labor Relations Board* v. *Hearst Publications, Inc.*, U. S. Nos. 336–339, October Term, 1943, where Mr. Justice Rutledge, speaking for the Court, stated:

> It is not necessary in this case to make a completely definitive limitation around the term "employee." That task has been assigned primarily to the agency created by Congress to administer the Act. Determination of "where all the conditions of the relation require protection" involves inquiries for the Board charged with this duty. Everyday experience in the administration of the statute gives it familiarity with the circumstances and backgrounds of employment relationship in various industries, with the abilities and needs of the workers for self-organization and collective action, and with the adaptability of collective bargaining for the peaceful settlement of their disputes with their employers. The experience thus acquired must be brought frequently to bear on the question who is an employee under the Act. Resolving that question, like determining whether unfair labor practices have been committed "belongs to the usual administrative routine" of the Board.

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[4] See *Maryland Drydock Company*, 49 N. L. R. B. 733, at p. 738.

This conclusion is in harmony with the cases[5] in which the Board held that the certification of units composed in whole or in part of supervisory employees would not effectuate the policies of the Act. In those decisions, the Board was not faced with any theoretical problem of industrial relations, but with the necessity of solving some very practicable problems which had arisen in the industrial field. Employers throughout the country were confronted with the dilemma of being faced with charges of unfair labor practices no matter what course of action they adopted in dealing with their foremen. If they permitted them to take an active part in the organization of unions and the soliciting of employees for membership they were guilty of domination and support of a labor organization under Section 8 (2)[6] (if the union happened to be unaffiliated), or of illegal interference and assistance under Section 8 (1) and (3) if the union was an affiliated one.[7] But, on the other hand, if they discharged such supervisory officials they were confronted with the possibility of falling within the prohibition of Section 8 (3).[8] Moreover, the very existence of this situation tended to disrupt well-established relationships between management and labor. The express purpose, of course, for which foremen and other supervisory officials are hired, is to represent management in its dealings with production workers. In such situations, management is, of course, entitled to the undivided allegiance of the foremen, which implies such foremen being free from the orders and directions of organizations composed primarily of subordinate employees.

It was these anomalous situations which the *Maryland Drydock* opinion sought to correct. For this reason we were constrained to reject the view that supervisory officials in mass production industries were entitled to be placed in appropriate units for the purpose of having collective bargaining representatives under Sections 9 (c) and 8 (5).

For analogous reasons, we applied the principle of the *Maryland Drydock* case to independent unions of foremen in the *Boeing*, *Murray Corporation* and *General Motors* cases[9] although the dilemma confronting employers by reason of the notion that persons for whose conduct they were responsible had unlimited rights under the Act was not immediately present in those situations. A certification of a labor organization as the exclusive representative of employees under Sec-

[5] See *Maryland Drydock Company, supra; Matter of Boeing Aircraft Company*, 51 N L R. B 67; *Matter of The Murray Corporation of America*, 51 N L R. B. 94; *Matter of General Motors Corporation*, 51 N. L. R B. 457.

[6] See, e. g., *Matter of M. E. Blatt Company*, 47 N. L R B 1055.

[7] See, e. g., *Matter of Eagle-Picher Mining and Smelting Co.*, 16 N. L. R B. 727, enf'd as modified 119 F. (2d) 903 (C. C. A 8).

[8] See, e g, *Matter of Golden Turkey Mining Company*, 34 N. L. R. B. 760.

[9] See footnote 5, *supra*.

tion 9 of the Act, on the basis of an election, is customarily valid for at least 1 year. It is calculated to stabilize industrial relations by foreclosing any question of representation, and thus clearly defining the duty of the employer, during that period.[10] It is obviously impractical for us to premise our certifications upon a prediction that a union of foremen will not affiliate with non-supervisory groups during the period of a certification, or to police our certifications, once issued.[11]

We do not depart from our decisions in *Maryland Drydock* and the related cases which followed it; we reaffirm them and the considerations upon which they are based. But the patent differences between the *Maryland Drydock* problem and that presented by the instant cases are self-evident. Here we are not dealing with the period of a certification, running into the future, but with alleged unfair labor practices occurring at a fixed point of time in the past, the correction of which will require merely the restoration of the *status quo*. We are not called upon to predict the future course of the labor organization involved, here the Foremen's Association of America, but only to appraise its status at a past period and the employer's conduct with respect to it at a point of time which will be spread before us in the record of the proceedings.

As we have seen, moreover, the *Maryland Drydock* case did not lay down the hard proposition that supervisors were not "employees." It is therefore much too broad an interpretation of this decision to say that it necessarily means that any person having supervisory duties may be discharged or otherwise discriminated against for his union membership and have no recourse under the Act. For example, if a foreman in a pattern shop or in an electrical department could be discharged because he had retained his membership in his particular craft union for the purpose of being eligible for employment in other union shops or to retain such insurance and death benefit rights as he obtained from his payment of union dues, it would seem on the face of it a serious discouragement to membership in such organizations. On the other hand, if such persons held union office or engaged in influencing the union allegiance of their subordinates, an employer would be fully justified in taking appropriate steps necessary to preserve his own neutral position. Moreover, our opinion in that case did not illegalize collective bargaining outside the framework of the Act for the supervisors' organizations. An employer, should he be so disposed, may still elect with legal immunity voluntarily to bargain

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[10] See, e. g., *N. L. R. B.* v. *Century Oxford Mfg. Corp.*, 140 F. (2d) 541 (C. C. A. 2) enf'g 47 N. L. R. B. 835.

[11] In *Maryland Drydock*, we observed that "although supervisors may nominally constitute a separate bargaining unit, it is clear that they may—as they did in the case at bar—affiliate with and designate as their representative the same union which represents their subordinates."

with a labor organization composed of supervisors, provided that such bargaining does not also have the effect of interfering with the protected rights of other employees. It is true that in the *Maryland Drydock* case the Board announced that "full benefit of their [the employees'] right to self-organization and to collective bargaining" would not be insured were an employer subject to an order to bargain with employee supervisory groups. But it is quite another matter to say that this holding created a prohibition against voluntary recognition and the establishment of collective bargaining relationships by mutual agreement between employers and supervisory employees. From the premise that supervisory employees, under Board policy, may not constitute appropriate units and thus utilize the processes and sanctions of the Act to compel bargaining, it does not follow that an employer may therefore disregard the rights to self-organization and to engage in concerted activities for mutual aid and protection, which are guaranteed to all employees under the Act, and discriminate against such employees because of their exercise of such rights.[12] A statute containing the basic guarantee of freedom of association cannot be so narrowly construed as to exclude particular occupational groups from its broad coverage except where such limited construction is necessary to give full effect to the rights of the great majority of persons within its scope and to avoid interpretations which would make the Act unworkable in practice.

We conclude that supervisors are "employees" and that supervisory status does not by its own force remove an employee from the protection of Section 8 (1) and (3) of the Labor Relations Act.

In reaching this conclusion we do not mean to suggest, of course, that every discharge of a supervisory employee for engaging in union activity is a violation of the Act. As well as being employees, supervisors are also representatives of management and their conduct is held attributable to their employer when it interferes with the rights of ordinary employees to self-organization and collective bargaining. That being true, we recognize the right of an employer to protect his neutrality by requiring his supervisory employees to refrain from unneutral activities which impinge upon the rights of their subordinates, and to take appropriate measures to that end. Consequently, the

[12] The right of employees to protection under Sections 8 (1) and 8 (3) is not bottomed on Section 8 (5) of the Act The legislative history of Section 8 (5) itself confirms this view In the original bill which was presented to Congress, no provision for the imposition of an affirmative duty upon employers to bargain collectively was made It was considered that the basic purpose of the legislation was achieved by the enactment of Section 7 and the first four subsections of Section 8 Only after authorities pointed out the desirability of avoiding harassing litigatiton on the question whether the duty to bargain could be inferred from the broad grant of rights in Section 7 and restraints on employers in the first four subsections of Section 8 did Congress add the fifth subsection. (Sen. Rep. 573, 74th Cong., 1st Sess., p. 12.)

right under the Act of supervisors to protection in their organizational and other concerted activities is not an unqualified one, but is subordinate to the organizational rights and freedom of rank and file employees, and to the need of an employer to maintain his neutrality.

In the cases now before us we are concerned solely with the question of the right of employers to discriminate against foremen because of their membership and activities in an independent labor organization whose membership is confined to supervisory employees. Adherence of supervisory officials to such an organization cannot normally have any impact upon the rights of ordinary employees, nor can it normally affect an employer's position of neutrality. On the basis of the charges before us, and without determining the merits of the cases, we are of the opinion that the supervisory status of the foremen alleged to have been discriminated against presents no bar to findings of violations of Section 8 (1) and (3) of the Act.

We shall accordingly sustain the appeals of the Foremen's Association of America in the above-captioned proceedings, to the extent noted, and shall advise the Regional Directors of the Seventh and Eighth Regions to take further steps in accordance with the statute, including the issuance of complaints if such appears to be otherwise warranted.

Separate opinion of CHAIRMAN HARRY A. MILLIS:

I concur in the conclusion of my colleagues that "supervisors are 'employees' and that supervisory status does not by its own force remove an employee from the protection of Section 8 (1) and (3) of the Labor Relations Act." My interpretation of the decision is that the instructions given our Regional Offices some months ago not to accept 8 (3) charges in behalf of foremen are withdrawn and that charges of discrimination against foremen will be treated, case by case, under principles underlying decisions made by the Board throughout the years prior to, and also largely since, the decision in the *Maryland Drydock* case was made.

I do not concur altogether in the rationale upon which the present decision is based, but, unlike my colleagues, it is unnecessary for me to distinguish my position in this case from the majority holding in the *Maryland Drydock* case. My views on the question involved in that case are set forth in my dissenting opinion. I am still convinced of the soundness of those views.