

Arizona Public Service Company and International Brotherhood of Electrical Workers, Local Union No 387, AFL-CIO Case 28-CA-7074

February 28, 1989

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

On February 5, 1985, the National Labor Relations Board issued a Decision and Order¹ in this proceeding, finding that the Respondent did not violate Section 8(a)(3) and (1) of the National Labor Relations Act by suspending eight employees because they engaged in a sympathy strike. The Board concluded that their refusal to cross a stranger picket line contravened the no strike provision of the parties' collective-bargaining agreement, which prohibited unauthorized work stoppages and permitted the Respondent to discipline employees who took part in them.

The Union filed a petition for review with the United States Court of Appeals for the Ninth Circuit. On May 6, 1986, the court remanded the case to the Board for consideration of evidence bearing on whether the parties intended to ban sympathy strikes through the contract's broad no-strike provision.²

On June 11, 1986, the Board advised the parties that it accepted the remand and that they might submit statements of position concerning the remanded issue. Thereafter, all parties filed statements of position.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reconsidered its original decision, the administrative law judge's decision, and the record in light of the court's remand, which the Board accepts as the law of the case, and the statements of position, and has decided to reverse the Board's prior decision.³

In the original decision, the Board based its analysis on the following facts: After eight of Respondent's crewmembers refused to perform work on July 28, 1982,⁴ because of a stranger picket line at

the worksite, the Respondent by letter dated July 29 threatened the Union with a lawsuit. By letter dated the same day the Union replied that it had not authorized the employees' refusal to work. On August 2 the Respondent suspended the eight employees for 3 days, informing them that their work stoppage violated article I, section 2, of the contract, which reads as follows:

During the term of this Agreement, and during any period of time while negotiations are in progress between the parties hereto for the extension or renewal of this Agreement, the Union agrees on behalf of itself and each of its members that there will be no authorized concerted failure to report to work, cessation or interruption of work, slowdown, strike, boycott, or otherwise, with the Company's business.

The Company agrees, as part of the consideration of this Agreement, that neither the Union, its officers, representatives, or members shall be liable for damages for unauthorized stoppages, strikes, intentional slowdowns, or suspensions of work in Company's service, if

(a) The Union gives written notice to the Company within twenty-four (24) hours of such action that it has not authorized the stoppage, strike, slowdown, or suspension of work,

(b) Copies of the notice described (a) above are posted immediately by the Union on the bulletin board,

(c) The Union further cooperates with the Company in getting the employees to return and remain at work.

It is recognized that the Company has the right to take disciplinary action, including discharge, against any employees who engage in any unauthorized stoppage, strike, intentional slowdown, or suspension of work, subject to the Union's right to present a grievance on such discipline in accordance with Article VII of this Agreement in cases in which an issue of fact exists as to whether or not any particular employee has engaged in, participated in, or encouraged any such violation.

Because the parties' contract permitted the Respondent to discipline employees who participated in "unauthorized" strikes and the Union identified the strike as unauthorized, the Board concluded that the Respondent was free to discipline sympathy strikers for participating in conduct the contract expressly prohibited. In a footnote at the end of its decision the Board cited *Indianapolis Power*

¹ 273 NLRB 1757

² *Electrical Workers IBEW Local 387 v. NLRB* 788 F.2d 1412 (1986)

³ In accordance with our decision in *New Horizons for the Retarded* 283 NLRB 1173 (1987) interest on and after January 1, 1987 shall be computed at the short term Federal rate for the underpayment of taxes as set out in the 1986 amendment to 26 USC § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 USC § 6621) shall be computed in accordance with *Florida Steel Corp.* 231 NLRB 651 (1977).

⁴ All dates are in 1982 unless otherwise indicated.

Co., 273 NLRB 1715 (1985) (*Indianapolis Power I*),⁵ which held that a broad no strike clause prohibits all strikes, including sympathy strikes, unless the contract or extrinsic evidence shows that the parties intended otherwise.

The Ninth Circuit remanded the case for further consideration under *Indianapolis Power* because the Board failed to consider the parties' actual intent concerning sympathy strikes. Although the Ninth Circuit did not specifically address the Board's reliance on inferences drawn from the Union's express statement that it did not authorize the sympathy strike, it is apparent from the opinion that the court implicitly rejected the Board's reasoning, and we are therefore precluded from relying on that rationale now. The court instructed the Board to interpret the no-strike provision in light of all the evidence, including the contract as a whole, the law relating to no-strike provisions when the parties last ratified the contract, bargaining history, and the parties' past practice under the contract. Because the court concluded that the *Indianapolis Power* rule was misapplied in the present case, it did not reach the issue of the validity of the rule itself.

After the Ninth Circuit remanded the instant case, the District of Columbia Circuit remanded *Indianapolis Power I* for further consideration of certain evidence the Board failed to address.⁶ On December 9, 1988, we issued *Indianapolis Power II* in which we concluded that "the *Indianapolis Power* rule is sound, and we continue to adhere to it."⁷ However, we cautioned that in applying the *Indianapolis Power* rule careful consideration [must] be accorded extrinsic evidence bearing on the parties' intent, such as bargaining history and past practice under the no strike clause.⁸ We restated the rule in the following terms:⁹

To summarize, we continue to believe that a broad no-strike clause should properly be read to encompass sympathy strikes unless the contract as a whole or extrinsic evidence demonstrates that the parties intended otherwise. In deciding the issue of whether sympathy strikes fall within a no strike provision's scope, the parties' actual intent is to be given controlling weight and extrinsic evidence should be considered as an integral part of the analysis.

We now address the terms of the Ninth Circuit's remand in light of our decision in *Indianapolis Power II*. The court described, at some length, the judge's decision, which the Board reversed. The court particularly noted that the judge followed the law existing at the time the relevant contract was ratified, that the judge credited testimony indicating the Company believed the contract's language excluded sympathy strikes, and that the judge's examination of past practice showed the Company had not disciplined employees who honored stranger picket lines.

Initially, we find that the language of the parties' no-strike clause, as set forth earlier, is broad enough, standing alone, to encompass sympathy strikes. We proceed to examine the extrinsic evidence, as the court instructed us to do and as *Indianapolis Power II* requires.

The no strike provision has remained unchanged in the contract since it first appeared in 1949. The administrative law judge found that in negotiations leading to the 1980 and 1982 contracts, the Respondent proposed changes in the language of the no-strike clause to clarify that sympathy strikes were prohibited. The Union rejected both proposals, and the Respondent withdrew them. Although the Respondent contended that it withdrew the offers only because the Union conceded the no-strike clause covered sympathy strikes, the judge credited union witnesses who testified that the withdrawal of the second company proposal was not conditioned on any concession by the Union that the existing no strike language included sympathy strikes. We find that the bargaining history provides persuasive evidence that company officials recognized that there was no agreement that sympathy strikes were covered by the existing no strike language. See *Electrical Workers IBEW 1395 v NLRB*, 797 F.2d 1027, 1036 fn 10 (D.C. Cir. 1986), *W-I Canteen Service v NLRB*, 606 F.2d 738, 747 (7th Cir. 1979).

As to past practice, the judge found that the Respondent's general policy was to tolerate sympathy strikes, deferring service at projects affected by stranger pickets until the third party picket lines were removed. The judge detailed numerous instances over the life of the no-strike clause during which employees honored stranger picket lines with impunity. He found that the Respondent levied discipline only once, in the instance at issue in this case. Again, in agreement with the judge and based on his findings, we conclude that the Respondent's repeated acquiescence to sympathy strikes indicates that sympathy strikes were not contractually proscribed.

⁵ Remanded sub nom *Electrical Workers IBEW Local 1395 v NLRB* 797 F.2d 1027 (D.C. Cir. 1986) decision on remand 291 NLRB No. 145 (Dec. 9, 1988) (*Indianapolis Power II*).

⁶ *Electrical Workers IBEW Local 1395 v NLRB* supra 797 F.2d 1027.

⁷ 291 NLRB 1039, 1040.

⁸ Id. at 1040-1041.

⁹ Id. at 1041.

The Ninth Circuit also directed us to consider as relevant to the interpretation of the no-strike clause the Board's law when the contract was entered into. As the Ninth Circuit stated, at the time the parties last ratified the contract, in 1982, under Board law the parties' broad no-strike clause was not sufficient to establish a waiver of the right to participate in sympathy strikes. Thus, the court's opinion compels a finding in this case that the contract language further demonstrates that the parties did not intend the clause to cover sympathy strikes.

In sum, we find that the parties did not intend the contract's no strike clause to encompass sympathy strikes. We therefore affirm the judge's finding that the Respondent violated Section 8(a)(3) and (1) of the Act by suspending eight employees for engaging in a sympathy strike and adopt his recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as restated and set forth in full below and orders that the Respondent, Arizona Public Service Company, Flagstaff, Arizona, its officers, agents, successors, and assigns, shall

1 Cease and desist from

(a) Suspending or otherwise discriminating against employees because they engage in their statutory right to refuse to cross picket lines established by labor organizations other than their collective-bargaining representative

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act

2 Take the following affirmative action necessary to effectuate the policies of the Act

(a) Remove from its records any reference to the 3 day staggered suspensions of Jerry Murphy, Edwin M. Wilson, Gerald Nelson, Gary Smith, Clifford Miles, Nap Birner, Mark R. Finrock, and Dale Hudson, which were effective from about August 4, 1982, to about August 17, 1982, and notify each of them in writing that this has been done and that evidence of this unlawful discipline will not be used as a basis for future personnel action against him

(b) Make Jerry Murphy, Edwin M. Wilson, Gerald Nelson, Gary Smith, Clifford Miles, Nap Birner, Mark R. Finrock, and Dale Hudson whole for any loss of his pay each of them may have suffered by reason of its discrimination against him, in the manner set forth in the remedy section of the judge's decision, as modified by footnote 3, supra

(c) Post at its various facilities to which employees in the bargaining unit represented by the Union are assigned, copies of the attached notice marked "Appendix,"¹⁰ Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply

MEMBER JOHANSEN, concurring

The court's remand in this case and its remand in a later decision¹ have raised questions about the validity of the Board's application of the *Indianapolis Power*² standard. I have stated my disagreement with the continued application of that standard in my concurring opinion in *Indianapolis Power*³ and shall not repeat my objections here.

Based on an analysis of all the relevant evidence of the parties' intent, including the terms of the contract, the bargaining history, the parties' application of the contract, and the state of the law relating to it when last ratified,⁴ I conclude, in agreement with my colleagues, that there is no showing of mutual intent to include sympathy strikes under the contractual no-strike provisions and thus no showing that the Union clearly and unmistakably waived the right to engage in sympathy strikes.⁵

¹⁰ If this Order is enforced by a judgment of a United States court of appeals the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

¹ *Oil Workers Local 1 547 v. NLRB*, 842 F.2d 1141 (9th Cir. 1988).

² *Arizona Public Service Co.* 273 NLRB 1757 (1985) remanded sub nom. *Electrical Workers IBEW Local 387 v. NLRB*, 788 F.2d 1412 (1986) reaff'd *Indianapolis Power Co.* 291 NLRB 1039 (1988).

³ *Id.* at 1042.

⁴ The majority considers what support Board law at the time the contract was last ratified lends to a finding of mutual intent to be compelled by the court's opinion. In contrast, I consider the state of the law as formulated by the agency entrusted with federal adjudication of unfair labor practices to be integral to any analysis for determining the merits of an unfair labor practice complaint, especially one in which the parties' intent is to be given controlling weight, as reported by the *Indianapolis Power* majority. *Indianapolis Power II*, supra at 1041.

⁵ *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983).

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice

WE WILL NOT suspend or otherwise discriminate against employees because they engage in their statutory right to refuse to cross picket lines established by unions other than their collective bargaining representative

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act

WE WILL remove from our records any reference to the 3-day staggered suspensions effective from about August 4, 1982, to about August 17, 1982, of Jerry Murphy, Edwin M Wilson, Gerald Nelson, Gary Smith, Clifford Miles, Nap Birner, Mark R Finfrock, and Dale Hudson WE WILL notify each of them in writing that this has been done and that evidence of this unlawful discipline will not be used as a basis for future personnel actions against him

WE WILL make Jerry Murphy, Edwin M Wilson, Gerald Nelson, Gary Smith, Clifford Miles, Nap Birner, Mark R Finfrock, and Dale Hudson whole for any loss of earnings each may have suffered by giving each of them backpay with interest for the days each was unlawfully suspended

ARIZONA PUBLIC SERVICE COMPANY