

In the Matter of THE AMERICAN NEWS COMPANY, INC. and MAGAZINE,
MAILERS' & DELIVERERS' UNION OF NORTH JERSEY

Case No. 2-C-5196.—Decided April 14, 1944

Mr. Frederick R. Livingston, for the Board.

Mr. Walter B. Lockwood, of Stamford, Conn., for the respondent.

DECISION

AND

ORDER

Upon charges filed by Magazine, Mailers' & Deliverers' Union of North Jersey, an unaffiliated labor organization herein called the Union, the National Labor Relations Board, herein called the Board, by its Regional Director for the Second Region (New York City) issued its complaint, dated September 15, 1943, against The American News Company, Inc., herein called the respondent, alleging that the respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8 (1) and (3), and Section 2 (6) and (7) of the National Labor Relations Act, 49 Stat. 449, herein called the Act. Copies of the complaint were duly served upon the respondent and the Union.

With respect to the unfair labor practices, the complaint, as amended at the hearing, alleged in substance (1) that the respondent on or about June 11, 1943, discharged and locked out nine named employees at its Paterson, New Jersey, branch and thereafter, despite their application for reinstatement made on or about June 21, 1943, failed and refused to reinstate them to their former or substantially equivalent positions because they joined or assisted the Union or engaged in other "concerted activities for the purposes of collective bargaining or other mutual aid or protection," and (2) that the respondent on or about June 10, 1943, and thereafter, warned its employees to refrain from adhering to the Union, and threatened them with discharge if they joined or assisted the Union.

The respondent filed an answer, dated September 24, 1943, denying that it had engaged in unfair labor practices. Further answering, respondent alleged that on or about June 10, 1943, the persons named in the complaint "terminated their employment with respondent without justification or legal excuse and thereby ceased to be employees of re-

55 N. L. R. B., No. 238.

spondent, as defined under Section 2 (3) of the National Labor Relations Act.”

Pursuant to notice, a hearing was held at Paterson, New Jersey, on September 27, 1943, before David Karasick, the Trial Examiner duly designated by the Chief Trial Examiner. The Board and the respondent were represented by counsel and participated in the hearing. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing upon the issues was afforded all parties. During the course of the hearing the Trial Examiner made various rulings. These the Board has reviewed and, finding that no prejudicial errors were committed, hereby affirms. At the close of the hearing counsel for both the Board and the respondent argued orally before the Trial Examiner, and briefs were thereafter filed with him.

On October 19, 1943, the Trial Examiner issued his Intermediate Report, copies of which were served upon the respondent and the Union, finding that respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8 (1) and (3), and Section 2 (6) and (7) of the Act. The Trial Examiner found that the nine employees named in the complaint had gone on strike on June 11, 1943; that their status as employees while on strike was preserved by Section 2 (3) of the Act; that the respondent unlawfully discharged the employees on June 11, 1943, and, despite their application for reinstatement on June 21, 1943, unlawfully refused to reinstate them. The Trial Examiner recommended that the respondent cease and desist from its unfair labor practices, and, *inter alia*, offer reinstatement and back wages to the striking employees. He expressly found that the evidence did not support the allegation of the complaint that the employees had been locked out by the respondent; he found no unfair labor practices other than the termination of the employment of the nine men.

The respondent filed timely exceptions to the Intermediate Report, together with a supporting brief, and participated by counsel in oral argument before the Board at Washington, D. C., on December 28, 1943. The Board has considered the exceptions and brief filed by respondent, as well as the briefs filed before the Trial Examiner, and finds that the exceptions, insofar as they are consistent with the findings of fact, conclusions of law and order set forth below, have merit.

Upon the entire record in the case, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The American News Company, Inc., a Delaware corporation, is engaged in the sale and distribution of magazines and related prod-

ucts. The respondent maintains its principal office in New York City and operates approximately 250 branch offices in the principal cities of the United States and Canada. The value of magazines and other related products shipped to the respondent annually from States other than the State of New York is in excess of \$1,000,000. The value of magazines and other related products shipped by the respondent annually to States other than the State of New York is in excess of \$1,000,000. The Paterson, New Jersey, branch is the only office of the respondent involved in this proceeding, and a substantial portion of the magazines and other related products shipped to that branch are received from the respondent's office located in New York City. Approximately 8 or 9 percent of the magazines delivered by the Paterson branch are sent to places located outside the State of New Jersey.

The respondent concedes that it is engaged in commerce within the meaning of the Act.

II. THE ORGANIZATION INVOLVED

Magazine, Mailers' & Deliverers' Union of North Jersey, unaffiliated, is a labor organization which admits to membership employees of the respondent.¹

III. THE ALLEGED UNFAIR LABOR PRACTICES

Since 1939 the Union had been the recognized bargaining representative of certain of respondent's employees at its Paterson, New Jersey, branch. On or about October 15, 1942, as a result of collective bargaining, an agreement was reached providing for an increase in the wages of the employees here involved. Shortly before this Congress had amended the Emergency Price Control Act of 1942 by the passage of a bill intended to limit and control wage increases. Act of October 2, 1942, 56 Stat. 764. This legislation was approved October 2, 1942, and on the next day the President issued an Executive Order² prohibiting any wage increase arrived at by voluntary agreement, collective bargaining, or otherwise, until such increase had been approved by the National War Labor Board. Section 11 of the Act of October 2 provided that any individual or corporation violating any

¹ Membership in the Union is limited to promotion men, inside men, and truck drivers at the Paterson branch. Promotion men, whose duties are similar to those of salesmen, check the number of magazines at stores and news stands; inside men box and wrap magazines and do general work inside the branch; and truck drivers deliver magazines to stores and news stands and collect for them. In addition to the foregoing classifications of employees, the Paterson branch also employs office workers, who are not eligible to membership in the Union, as well as the manager and assistant manager of the branch.

² Executive Order No 9250, "Providing for the Stabilization of the National Economy," October 3, 1942, 7 F. R. 7871. This was followed on October 27, 1942, by the somewhat more detailed regulations prescribed by the Economic Stabilization Director and approved by the President, 7 F. R. 8748. There is no claim that the wage increases involved in the instant case fall within any exception contained in the foregoing order or regulations, or within any exception subsequently prescribed.

provision of the statute, or of any regulation promulgated thereunder, should upon conviction be subject to a fine, imprisonment, or both. Following an explicit ruling by a Regional Director of the National War Labor Board that the proposed increases could not be effectuated without the approval of that body, respondent filed appropriate application for such approval. The application was denied. Thereafter, on April 8, 1943, respondent and the Union made a joint application for the proposed increases, retroactive to October 15, 1942. The National War Labor Board had taken no action on this application by June 10, 1943. Throughout, the respondent cooperated with the Union and took whatever steps were deemed necessary in order to secure approval of the wage increases.³

On the afternoon of June 10, the Union members held a meeting and jointly decided to strike unless respondent immediately granted the proposed increases. This decision was communicated to respondent's officials later that afternoon. Respondent's manager refused and protested that, absent prior approval by the National War Labor Board, the wage increases could not lawfully be granted. The Union's president and business manager, who spoke for the men, knew at this time that the wage increases could not lawfully be granted. There was no dispute between the Union and the respondent relating to the wage increases or otherwise, except that arising from respondent's refusal to grant the increases prior to the approval of the National War Labor Board. Nevertheless, the men struck at the beginning of business on the following day, Friday, June 11.

The day the strike began was an exceptionally heavy one for respondent, since both *Life* and *Collier's* were delivered on Fridays. Following the strike threat on Thursday afternoon, respondent's officials pressed into service personnel from other branches and made other adjustments to see that delivery schedules were met. Respondent regarded the action of the Union members in resorting to a strike as a termination of their employment. On June 11, 1943, it sent identical letters to each of the nine men enclosing a check for the period "up to the time when you terminated your services with us Thursday, June 10, 1943."

On or about June 21, 1943, the Union members decided to return to their work, and on that day the Union sent a letter to respondent requesting reinstatement of the nine men. Respondent did not reply to this letter, and has since failed to offer reinstatement to any of the strikers. Respondent's failure to reinstate the men was not based upon the claim that their positions had been permanently filled prior to June 21.

³ The finding set out in this sentence is based on a stipulation entered into at the hearing as well as upon the record as a whole.

The foregoing findings are based on evidence so compelling as to admit of no other interpretation. The allegation of the complaint that respondent locked out its employees is without support in the record, as the Trial Examiner found. Other than respondent's treatment of the strike as terminating the employment of the Union members, which we are about to discuss, the record is barren of any evidence of unfair labor practices.

Conclusions as to the strike

Respondent has consistently taken the position that the conduct of the men in resorting to a strike under the foregoing circumstances justified its reargding their employment as terminated, since the purpose of the strike was to require respondent to take action unlawful under a statute of the United States. Other defenses are also asserted but, in the view we take of the case, need not be considered. If respondent is right in this position, it manifestly did not violate the Act in failing to reinstate the men, or otherwise. The Union's position, so we understand, is that the men left their work in consequence of a current "labor dispute" and hence remained employees within the definitions of Section 2 (3) and (9) of the Act; that the strike was protected by the Act—that is, was within the "concerted activities, for the purpose of collective bargaining or other mutual aid or protection" of Section 7; and that for these reasons respondent's conduct in regarding the employment terminated, and in refusing reinstatement, violated Section 8 (1) and (3).⁴ As we have seen, the Trial Examiner

⁴ The pertinent provisions of the Act referred to are as follows:

SEC. 2 When used in this Act—

(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.

(9) The term "labor dispute" includes any controversy concerning terms, tenure, or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relations of employer and employee

SEC. 7 Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection

SEC. 8 It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of rights guaranteed in Section 7.

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701-712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the

accepted the latter view. He would require respondent to cease and desist from its unfair labor practices and, since it appeared that the positions of the men had not been filled prior to their application for reinstatement, would order the normal remedy of reinstatement and back wages.

A critical fact which shapes our consideration of the case is that the strike was neither provoked nor preceded by unfair labor practices. Had it been, independent basis would have existed for an order directed against respondent and the problem presented by the strike might have been solved in the context of our powers to require appropriate remedial action, under Section 10 (c). As the case comes to us, however, this course is foreclosed; unless the respondent was unjustified in regarding the strike as a termination of employment, there is nothing upon which our order may operate. We must thus squarely face the question whether the strike, standing by itself, was the kind of collective activity protected by Section 7, so as to make respondent's action in treating the employment terminated and in refusing reinstatement a violation of Section 8.

We think it apparent that the Trial Examiner failed to perceive the full force of respondent's position when he determined that the strike was for "wage increases" and that its objective was "both normal and legitimate." The fact is that the strike was called to compel the employer to grant the wage increases prior to the approval of the National War Labor Board, and it is unchallenged before us that such action on the part of the employer would have brought down the criminal penalties provided by the wage stabilization legislation of October 2, 1942.⁵ To what extent this is a relevant factor is the real question in the case. That must depend upon the impact of the Act of October 2, and the orders and regulations thereunder, upon the National Labor Relations Act.

The Act of October 2, Section 11, to which we have previously referred, provides that:

Any individual, corporation, partnership or association willfully violating any provision of this act, or of any regulations promulgated thereunder, shall, upon conviction thereof, be subject to a fine of not more than \$1,000, or to imprisonment for not more than one year, or to both such fine and imprisonment.

United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require, as a condition of employment, membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

⁵ Indeed, the men could not have received the wage increases without themselves violating the law. Section 5 (a), Act of October 2, 1942.

Section 1, Title II of the Executive Order of October 3, 1942, explicitly provides:

No increases in wage rates, granted as a result of voluntary agreement, collective bargaining, conciliation, arbitration, or otherwise, and no decreases in wage rates, shall be authorized unless notice of such increases or decreases shall have been filed with the National War Labor Board and unless the National War Labor Board has approved such increases or decreases.

The Emergency Price Control Act, of January 30, 1942, 56 Stat. 24, and the supplementary wage stabilization legislation, of October 2, 1942, are among the most important Congressional enactments with respect to our wartime economy. The passage of these measures was brought about to curb an inflationary spiral which threatened the value of our currency and the ability of the nation to prosecute the war. The formulation and the proper administration of these statutes have been the constant concern of Congress and the President. Section 4 of the Act of October 2, 1942 provides that no action should be taken under the authority of that statute with respect to wages or salaries which is inconsistent, *inter alia*, with the National Labor Relations Act. The legislative history makes it clear that this provision was inserted to give assurance that the Government's power of review over wages would not render collective bargaining obsolete.⁶ The Board has given this provision full effect by holding that a refusal to bargain in good faith with respect to wage increases subject to War Labor Board approval is a violation of the duty to bargain imposed by Section 8 (5) of the National Labor Relations Act.⁷ On the other hand, the preamble of the Emergency Price Control Act, of January 30, 1942, expressly enjoins this Board, among other agencies, "to work toward a stabilization of prices, fair and equitable wages, and cost of production."⁸

⁶ This section is paraphrased in Title VI, Section 1 of the Executive Order of October 3. In the debate on the bill, Senator Brown, speaking for the committee, said: "Section 4 applies, as nearly as practical, the same limitations on the President with respect to wages and salaries as are contained in Section 3 with respect to farm prices. In substance, it preserved for labor the provision of the Fair Labor Standards Act relating to minimum wages, hours, and so forth, and the right of collective bargaining contained in the National Labor Relations Act." Cong. Rec. Vol. 88, Part 6, at p. 7207 (77th Cong., 2d Sess.). Similarly, Executive Order No. 9017, of January 12, 1942, creating the National War Labor Board (7 F R 237), provided in Section 7 that nothing therein should be construed as superseding or in conflict with the provisions of the Railway Labor Act, the National Labor Relations Act, or the Fair Labor Standards Act.

⁷ *Matter of Ideal Leather Novelty Co., Inc.*, 54 N L R B. 761.

⁸ Act of January 30, 1942, 56 Stat. 23, ". . . It shall be the policy of those departments and agencies of the Government dealing with wages (including the Department of Labor and its various bureaus, the War Department, the Navy Department, the War Production Board, the National Labor Relations Board, the National Mediation Board, the National War Labor Board and others heretofore or hereafter created) within the limits of their authority and jurisdiction, to work toward a stabilization of prices, fair and equitable wages, and cost of production."

In the light of the foregoing, it is impossible to escape the conclusion that the wage stabilization statute is the kind of enactment to which the National Labor Relations Act should be accommodated if this can reasonably be done. Certainly legislation of such immense importance as that of the Act of October 2, 1942, enacted during a critical war, should not be severed from the body of Congressional legislation of which it is a part and read in isolation. See *United States v. Hutcheson*, 312 U. S. 219, 234-235; *Southern Steamship Co. v. N. L. R. B.*, 316 U. S. 31. We have but recently been admonished (*Southern Steamship* case, 316 U. S. p. 47)—

“ . . . that the Board has not been commissioned to effectuate the policies of the Labor Relations Act so singlenindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task.”

The question, of course, is the purpose of Congress. As applied to the instant case, its probable intention in adopting the Act of October 2, 1942 is also illumined by what it did in 1935 in enacting the National Labor Relations Act.

The basic guarantee of the National Labor Relations Act is set forth in Section 7. That section provides that employees “shall have the right” to “join” labor organizations, but it also provides much more. In addition, they have the right to “self-organization,” to “form” and “assist” labor organizations, “to bargain collectively through representatives of their own choosing,” and to participate in “concerted activities, for the purpose of collective bargaining or other mutual aid or protection.” Section 8 (1), in turn, provides that it is an unfair labor practice for an employer to interfere with employees in the exercise of the rights guaranteed in Section 7 and, although Section 8 (3) does not make express reference to Section 7, the same concept of concerted activities would seem to be implicit in it. The Act, however, does not define the expression “concerted activities.” It does define in Section 2 (3) and (9) the terms “employee” and “labor dispute.” These definitions serve a highly useful purpose (*Phelps Dodge v. N. L. R. B.*, 313 U. S. 177, 191-192), but it is too late in the day to suggest that an employee is rendered invulnerable to discharge, regardless of the character of his conduct, merely because his work has ceased in connection with a current “labor dispute.” Although the matter is not entirely free from doubt, we may assume in passing that the strike involved in the instant case was called in connection with a “labor dispute” as that term is used in Section 2 (3).

and (9). Section 13 of the Act provides that nothing therein shall be construed "so as to interfere with or impede or diminish in any way the right to strike." As the legislative history shows, this provision was inserted to underscore the distinction between the National Labor Relations Act and its companion legislation, the Railway Labor Act, 44 Stat. 577, as amended, which placed specific restrictions in the form of waiting periods upon strikes by railway employees. The instant case involves no question of restricting the right to strike. The sole question presented is whether or not the respondent's treatment of the strikers under the circumstances in this case was an unfair labor practice. In the decisions in which this Board has given affirmative relief to discharged strikers it has never relied upon Section 13, but rather upon the provisions of Section 8 (1) and (3) of the Act.

Since the contention has been made that the legislative history of the Act conclusively demonstrates that Congress intended the protection of the Act to extend to "concerted activities," irrespective of whether or not their objective was lawful, we have scrutinized the Committee reports, the transcript of the hearings and the Congressional debates with considerable care. We have discovered in none of these documents anything to indicate that Congress expressly adverted to the question raised by the instant case. It is true that several witnesses representing employer interests urged at the hearings that the bill should contain provisions curbing oppressive and illegal practices by unions. No witness, however, limited his suggestions to the single proposal that the bill explicitly deny protection to employees guilty of seeking to coerce employers into performing an unlawful act. Their suggestions were rather that the Act should contain provisions giving employers or minority groups of employees affirmative protection against various objectionable practices of labor organizations, and it is quite clear from the Committee reports that the proposition which the Committee rejected was the notion that the bill should be broadened so as to afford administrative remedies against labor misconduct.

It is also argued that the House of Representatives had rejected an amendment which would have denied the protection of the Act to a labor organization that sponsored a strike against the Government or for an illegal purpose. This is a reference to the Rich amendment⁹ which was not confined to this feature, but was a combination of 12 standards with which labor organizations must comply to come within the protection of the statute, including a duty to maintain accounting systems, to submit jurisdictional disputes to arbitration, and to refrain from strikes in violation of collective bargaining agreements. There was no attempt on the part of the

⁹ Cong. Rec., Vol. 79, Part 9, at p. 9721 (74th Cong., 1st Sess.).

author to segregate any of these proposals and the amendment was rejected without discussion. If this event is to be taken as a manifestation of Congressional intent, it is apparent that the Supreme Court reached an erroneous result in the *Southern Steamship* (supra), the *Sands* and *Fansteel* cases (infra).

The Act was addressed to employer, not employee, misconduct.¹⁰ But this does not mean, and never has meant, that employee misconduct is necessarily irrelevant to the determination of violations of Section 8. For example, it is plainly relevant where there is fraud or violence in securing members such as to vitiate the majority required as a condition to the establishment of the refusal to bargain proscribed by Section 8 (5).¹¹ Similarly, while we may properly disregard minor acts of violence incident to a strike,¹² there can be no question but that violence of an aggravated character, certainly when not provoked by unfair labor practices, places the employees outside the protection of Section 8 (1) and (3) of the statute. *N. L. R. B. v. Fansteel Metallurgical Corp.*, 306 U. S. 240, 252-261. Nor, we are forewarned, is relevant misconduct on the part of employees limited to fraud or violence. In two cases where the misconduct was untainted by either the Supreme Court nevertheless held the concerted activities outside the protection of the Act. *Southern Steamship Co. v. N. L. R. B.*, supra (strike in violation of the federal mutiny statute); *N. L. R. B. v. Sands Mfg. Co.*, 306 U. S. 332, (concerted action to compel employer to accept modification of existing contract).¹³

At the time the Act was passed strikes had been traditionally adjudged in the light of the objectives sought to be accomplished and the means utilized to achieve them.¹⁴ The so-called objectives test had at one period, no doubt, served as a liberalizing influence in providing legal justification for strikes otherwise tortious as an infliction of intentional harm. As time went by, the objectives test was subjected to heavy attack by labor groups since some judges conceived of it as setting up themselves as arbiters of social policy

¹⁰ S Rep No. 573, 74th Cong, 1st Sess, p 16.

¹¹ *N. L. R. B. v. Dadourian Exporting Co.*, 138 F. (2d) 891 (C. C. A. 2), reversing 46 N. L. R. B. 498; *Matter of Fisher Body Corporation*, 7 N. L. R. B. 1083, 1092. Differences of opinion arise in application but none as to the rule itself.

¹² See, e. g., *Republic Steel Corp. v. N. L. R. B.*, 107 F. (2d) 472, 479-480 (C. C. A. 3), modified on another point, 311 U. S. 7; *Stackpole Carbon Co. v. N. L. R. B.*, 105 F. (2d) 167, 176 (C. C. A. 3), certiorari denied, 308 U. S. 605.

¹³ In one important respect the employes in the *Fansteel* and *Southern Steamship* cases stood in a much more favorable light than the employees in the instant case, since there, unlike the situation here, the strikes were provoked by flagrant unfair labor practices. The dissenting opinions in both cases noted this fact. Two members of the Court dissented in the *Sands* case, but they wrote no opinion and it is therefore unclear whether they disagreed with the view that concerted action to enforce demands contrary to an existing contract was outside the protection of the Act, or whether they simply disagreed with the majority's construction of the contract.

¹⁴ See Frankfurter and Greene, *The Labor Injunction* (1930), pp. 24-26.

and as investing them with a roving commission to interfere with strikes, even though peaceably conducted, if the ends sought by the striking employees conflicted with the court's own economic predilections. See Mr. Justice Brandeis dissenting in *Duplex Co. v. Deering*, 254 U. S. 443, 484-485. Mindful of that history, we think it most improbable that the Congress meant to invest this Board, or the courts in reviewing our action, with any broad discretion to determine what we or the courts might choose to consider the proper objectives of concerted activity. See *N. L. R. B. v. Peter Cailler Kohler Swiss Chocolates Co.*, 130 F. (2d) 503 (C. C. A. 2). By the same token, we think it most unlikely that Congress intended to exclude from the concerted activities protected by Section 7 all conduct deemed tortious under state rules of decision or statutes, or city ordinances, merely because of the objective sought to be accomplished. See *N. L. R. B. v. Reed & Prince Mfg. Co.*, 118 F. (2d) 874 (C. C. A. 1), certiorari denied, 313 U. S. 595; cf. *Allen-Bradley Local v. Board*, 315 U. S. 740. It is quite another matter, however, to suggest that Congress, either in 1935 or 1942, intended us to ignore the character of a strike knowingly prosecuted to compel an acknowledged violation of an act of the Congress itself. The cases heretofore cited provide compelling support for this analysis.¹⁵

For these reasons we believe the conclusion inescapable that the Act of October 2, 1942 is precisely the type of legislation which Congress intended to be taken into consideration in applying the provisions of the National Labor Relations Act. We conclude that a strike prosecuted in order to compel an employer to violate the Act of October 2, 1942, is not within the concerted activities protected by Section 7.

In reaching this conclusion we are well aware that the result might be different under the Norris-LaGuardia Act, 47 Stat. 70, in that it could reasonably be held that the explicit restraints upon the issuance of injunctions in labor disputes provided by that Act are left untouched. The National Labor Relations Act adopts the same definition of "labor dispute" as that used in the Norris-LaGuardia Act. We have seen, however, that this definition does not answer the question here. And whereas the National Labor Relations Act contains no definition of "concerted activities," the Norris-LaGuardia Act, in Sections 4 and 5, explicitly defines the conduct protected from injunctive relief.

¹⁵ It may be noted that the American Law Institute adopts what has been referred to as the objectives test with careful limitation to two situations. IV Restatement of the Law of Torts (1939) declares:

"§ 794. *Object Prohibited by Law.* An act by an employer which would be a crime or a violation of a legislative enactment or contrary to defined public policy is not a proper object of concerted action against him by workers."

"§ 795. *Object Prohibited by Contract.* An act by an employer which workers are, by a collective contract with him, under a duty not to demand is not a proper object of concerted action against him by such workers."

Drivers' Union v. Lake Valley Co., 311 U. S. 91, involving the Norris-LaGuardia Act, bore certain resemblances to the instant case in that the concerted action there involved was claimed to be unlawful apart from the means utilized to effectuate it. In denying an injunction the Supreme Court decision turned not merely on the definition of a labor dispute but upon the explicit provision of Section 5 (311 U. S. p. 101). Moreover, the decisions under the National Labor Relations Act provide no support for the notion that the concerted activities referred to in Section 7 are coterminous with the conduct referred to in Sections 4 and 5 of the Norris-LaGuardia Act. The concerted action involved in the *Southern Steamship* and *Sands* cases involved neither fraud nor violence and yet was held outside the protection of the National Labor Relations Act. Indeed, the employer would have been denied an injunction in the *Fansteel* case by virtue of Section 8 of the Norris-LaGuardia Act. See *Brotherhood of Railroad Trainmen v. Toledo, Peoria & Western Rd.*, decided by the Supreme Court January 17, 1944. Probably the gist of the matter is the distinction between non-intervention and intervention. The basic policy of the Norris-LaGuardia Act is to keep the United States Marshal away from the picket lines. The basic policy of the National Labor Relations Act, on the other hand, is one of intervention in labor matters, of clothing with affirmative protection those collective activities which are within the policies established by the Federal Government. For like reasons, the fact that at the time the instant case began Congress had not outlawed strikes *per se*, is irrelevant to our problem.¹⁶

We have examined the important issues involved in this case with unusual care because of our colleague's vigorous contention which would brush aside the considerations we have outlined in order to hold all collective activity, whatever its objective, within the protection of the Act. We reject as untenable the reasoning upon which that approach is based. Nor are we impressed with the view¹⁷ that the giving of legal protection to the very acts designed to cause a violation of the wage stabilization laws would be consistent in any respect with the Government's wartime labor policies. The dissenting opinion proposes that we should hold respondent's conduct to be

¹⁶ The War Labor Disputes Act, 57 Stat. 163 commonly known as the Smith-Connally Act, which makes strikes in certain industries unlawful until after the expiration of a 30-day waiting period, did not become law until June 25, 1943.

¹⁷ The dissenting opinion contains the suggestion that reinstatement would promote the best utilization of valuable manpower. There is nothing in our decision, of course, which prevents the Manpower Commission from certifying any workers to establishments deemed important to war production or which gives the employer in this or similar cases the right to tap manpower sources which would not otherwise be available to him. We are unable to perceive the relevance of the reference to the indirect restriction of this decision upon the powers of the National War Labor Board, since the statute gives this Board exclusive jurisdiction in cases of this character, and neither an executive order nor subsequent legislation has conferred concurrent jurisdiction on any other agency.

in violation of Section 8 (1) and (3), but should then, in exercising discretion under Section 10 (c), deny back wages. We have already indicated that this treatment cannot be applied. Another vice in this suggestion lies in the fact that precisely the same elements which were held to be within the protection of Sections 7 and 8 would be used to defeat the affirmative relief normally following any such determination.

Under this view, the concerted activity would be protected conduct entitled to less than effective protection. Basically, the difficulty lies in the assumption that Congress meant us to consider and appraise under Section 10 of the Act the nature of the very activity to which, it is asserted, Congress meant us to blind ourselves under Sections 7 and 8. Those favoring this view would argue, and we believe fallaciously, to establish that the character of the conduct involved should not be considered and would then proceed to consider it. The salutary lessons of the past can be respected without attributing to Congress any such policy of conclusion and futility.

We therefore feel constrained to reverse the recommendations of the Trial Examiner in their entirety, and shall order the complaint dismissed.

CONCLUSIONS OF LAW

1. Magazine, Mailers' & Deliverers' Union of North Jersey, unaffiliated, is a labor organization within the meaning of Section 2 (5) of the Act.

2. The operations of the respondent, The American News Company, Inc., at its Paterson, New Jersey, branch, occur in commerce within the meaning of Section 2 (6) of the Act.

3. The respondent at its Paterson, New Jersey, branch, has not engaged in the alleged unfair labor practices here in issue within the meaning of Section 8 (1) and (3) of the Act.

ORDER

Upon the basis of the foregoing findings of fact and conclusions of law, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the complaint against The American News Company, Inc., be, and it hereby is, dismissed.

CHAIRMAN MILLIS, dissenting:

Although I greatly deplore the action of the Union, I cannot remain silent where, in my opinion, the view of the majority proceeds from a serious misinterpretation of the Act.

The facts are correctly stated by the majority. In fairness to the strikers, however, it should be added that on the advice of the Regional

War Labor Board, they quickly abandoned the strike and asked to be put back to work on the old terms.

In approaching the question before us, two well-established and undisputed principles must be borne in mind: First, employees who go on strike remain employees within the purview of Section 2 (3) of the Act, whether or not the strike is caused or prolonged by unfair labor practices. Secondly, if, as here, the strike is not caused by unfair labor practices, the employer may, without violating the Act, protect his business by replacing the men. With these principles in mind, it is clear that on abandoning the strike and asking for reinstatement the employees should have been restored to their jobs, unless as a matter of law they forfeited that right because they went on strike to induce their employer to give them a wage increase in violation of the Wage Stabilization Act. I believe that, properly construed, the National Labor Relations Act required the employer to accede to their request for reinstatement in spite of the purpose for which they had struck. In saying this, I wish to emphasize that, because of the nature of the strike, I would deny the men back pay.

I agree with the majority that in effectuating the policies of this Act, we must accommodate its purposes to other expressions of Federal policy. Further, I fully agree that in proper circumstances employee misconduct may be a relevant consideration, when, in the exercise of our broad discretion under Section 10 (c), we fashion an appropriate remedy for unfair labor practices.¹⁸ Indeed, as I have stated, I would deny the employees in this very case the usual back-pay remedy because I believe that by so doing we would best accommodate our statute to the Federal labor policy, as expressed not only in the Wage Stabilization Act, but in other Executive and Congressional pronouncements. In short, the critical difference between my colleagues and myself is that, in my opinion, the guaranty to employees in Section 7 of the Act of the right to engage in "concerted activities" for collective bargaining and other mutual aid and protection was not intended by Congress to be completely vitiated solely on the ground that such concerted activity is not consonant with another Federal statute.

I am impelled to this view by the language of the Act itself, by its legislative history, and by the conviction that the wartime Federal labor policy would not be served by interpreting the Act as my colleagues have done. Section 7 of the Act guarantees employees the right "to engage in concerted activities, for the purpose of collective bar-

¹⁸ My colleagues suggest that I am inconsistent in that I consider the illegal purpose for which the men struck relevant in fashioning an appropriate remedy, but irrelevant in determining whether a substantive violation of the Act has occurred. I am unable to perceive the force of this suggestion, for, as is well known, courts and administrative bodies, including this very Board, in formulating remedies for wrongs committed, frequently take cognizance of facts which are not germane to the substantive right found to have been invaded.

gaining or other mutual aid or protection." As its very words disclose, this right is not circumscribed by any words of limitation whatsoever. Furthermore, to avoid an interpretation of its language that would "in any way" "interfere with," "impede," or "diminish" the right to strike, Congress enacted Section 13 as a limitation on the Board's power. In view of the sweeping language of Section 13 and of an explicit statement in the House Report (No. 1447, p. 25) that "Section 13 is designed to preclude the interpretation of any provision in the Bill so as to interfere with or impede or diminish in any way the right to strike," I cannot agree that the only purpose of Section 13 was to underscore a distinction between the Railway Labor Act and our statute. Thus, the view that Congress intended to deny employees all rights under the Act if they strike for a purpose deemed repugnant to another Federal statute is contrary to the clear and unequivocal words of the statute.

The majority, moreover, point to nothing in the legislative history of the Act that would justify imputing that intention to Congress. Indeed, my colleagues seemingly recognize this when, in referring to unconscionable restraints upon employee freedom of action that had resulted from the use by courts of the legality-of-object test, they properly conclude that it is "most improbable that the Congress meant to invest this Board . . . with any broad discretion to determine what we or the courts might choose to consider the proper objectives of concerted activity." The legislative history, I am convinced, conclusively demonstrates that Congress intended the guaranty of Section 7 to extend to "concerted activities" irrespective of whether they are pursued for a lawful objective. A clear indication of this is the rejection by Congress of numerous proposals, when the Act was being considered, to deny its protection to employees who strike for an unlawful purpose.¹⁹ Indeed, one of these proposals was specifically designed to deny the protection of the Act to employees who strike to compel an employer to violate a Federal law. Another, which the House of Representatives rejected, would, if adopted, have denied the protection of the Act to a labor organization that sponsored a strike against the Government or for an illegal purpose.²⁰ In connection with these proposals, it was urged before Congress that the Supreme Court of the United States had recognized²¹ that "a strike may be illegal because of

¹⁹ S Com Hearings on S. 1958, 74th Cong., 1st Sess., pp. 314, 317, 318, 329, 330, 771, 772. see also pp. 291, 292, 293, 602, 609, 635, 673, 790 and 791. S Rep. No. 573, 74th Cong., 1st Sess., pp. 16, 17; H Rep. No. 1147, 74th Cong., 1st Sess., p. 16, 17. Also, in the Committee Hearings on H. R. 6288, the companion bill to S. 1958, it was proposed that the bill be amended so as to follow the pattern of the British Trade Disputes and Trades Unions Act which, among other things, "forbids strikes intended to coerce the Government by inflicting injuries to the public." H Com Hearings on H. R. 6288, 74th Cong., 1st Sess., p. 311.

²⁰ Debates in the House on S. 1958, 74th Cong., 1st Sess., Vol. 79, Cong. Rec., p. 9721.

²¹ *Dorchey v. Kansas*, 272 U. S. 306.

its purpose, however orderly the manner in which it is conducted.”²² With full knowledge of this fact, Congress rejected these proposals.²³ Furthermore, the Committee Reports reveal that Congress did not consider the Act a fitting instrument for the regulation of coercive conduct by employees or labor organizations.²⁴ The failure of Congress to adopt any of these proposals is clear evidence of a legislative purpose to extend the protection of the Act to employees who engage in concerted activity, whatever its purpose. *Southern Steamship Co. v. N. L. R. B.*, 316 U. S. 31, 44;²⁵ 2 Sutherland Statutory Construction, 3rd ed., p. 497-8.

Moreover, the history and judicial interpretation of the Norris-LaGuardia Act, from which the language of Section 7 of our Act was taken, confirm my belief that Congress did not intend to deprive employees engaging in concerted activity of the protection of the Act on the ground that the aim of their activity was unlawful. Section 2 of the Norris-LaGuardia Act, as does Section 7 of our Act, explicitly affirms in virtually the same words that employees shall enjoy full freedom to engage in self-organization or in other concerted activities “for the purpose of collective bargaining or other mutual aid or protection.” When it enacted each of these statutes with this broad language, Congress was mindful of the interpretation given the Clayton Act by the Federal Courts. As is now well recognized, the courts, by broadly construing the term “lawful” in the Clayton Act, had largely nullified that Act by holding, *inter alia*, that it did not apply to concerted activity engaged in for a purpose deemed illegal. Indeed, a principal reason for enactment of the Norris-LaGuardia Act was to put an end to the doctrine of these decisions by denying the Federal Courts power to enjoin concerted activity, even if the Court should be of the opinion that its purpose was illegal. *Milk Wagon Drivers’ Union v. Lake Valley Co.*, 311 U. S.

²² The fact that some of these proposals took the form of affirmative prohibitions of concerted activities for a purpose deemed illegal rather than a withdrawal of the protection of the Act from persons engaging in such activities is beside the point. The significant fact is that all of these proposals, whatever their form, were rejected for the reason that Congress on broad considerations of policy did not intend to vest the Board with authority to inquire into the objectives of employee concerted activity in determining substantive rights under the Act.

²³ S. Com. Hearings on S. 1958, *supra*, pp. 314, 329, 330.

²⁴ S. Rep. No. 573, 74th Cong., 1st Sess., pp. 16, 17; H. Rep. No. 1147, 74th Cong., 1st Sess., pp. 16, 17.

²⁵ In the *Southern Steamship* case, decided on April 6, 1942, it was urged upon the Supreme Court that a strike on board a vessel moored to a dock in a safe domestic port did not come within the purview of Secs. 292 and 293 of the U. S. Mutiny Law. In rejecting this contention, the Court relied heavily upon the fact that “As recently as 1930, two bills were introduced in the House of Representatives for the purpose of limiting the scope of [Sections] 292 and 293 to vessels ‘under way on the high seas,’ ” and that these bills, *which were never reported to the House*, “were never enacted.” The Supreme Court concluded that “When the legislative purpose is so plain, we cannot assume to do that which Congress has refused to do.”

91, 100-103.²⁶ In deference to the clearly revealed wish of Congress, the weight of judicial authority has construed the Norris-LaGuardia Act as rendering immaterial any inquiry into the legality of the object for which employees strike. In expressing this view, the Circuit Court of Appeals for the Third Circuit, in *Wilson & Co. v. Birl*, 105 F. (2d) 948, has said: "Whether or not the strike in this case is illegal because of its purpose is . . . beside the point. The test is no longer given the uncertain elasticity of 'illegality.' The Statute . . . nowhere attempts to define as lawful the acts which it says may not be enjoined."²⁷ The sponsors of the National Labor Relations Act, in explaining to Congress the reasons for borrowing the unrestricted phrase "concerted activity" from the Norris-LaGuardia Act, urged the same considerations which had moved Congress to adopt that phrase in the Norris-LaGuardia Act. In the light of this and of the other legislative history of our Act before mentioned, it is clear that Congress adopted the unrestricted phrase "concerted activity" in the belief that it would guard against a revival of the discredited legality-of-object test.²⁸

That Congress preserved the power of the Federal Courts to enjoin fraud and violence in labor disputes when it passed the Norris-LaGuardia Act manifestly does not alter the fact that it denied the Courts power to enjoin concerted activity which they might deem illegal because of its object. Since, as I have pointed out, Congress used the phrase "concerted activity" in our Act, as in the Norris-LaGuardia Act, with the deliberate aim of excluding any inquiry by the Board or the Courts into the purpose for which employees strike, it is of no importance that the two statutes may differ in other respects.

Nor, as I read them, do the decisions of the Supreme Court in the *Fansteel*, *Southern Steamship*, and *Sands* cases, cited by the majority, require this Board to deny reinstatement to the employees in the present case. A mere reference to the facts in each of these cases demonstrates that they are not controlling. In the *Fansteel* case, the employees forcibly seized and retained their employer's plant in defiance of an injunction; in the *Southern Steamship* case, the employees had committed the serious crime of mutiny in circumstances which, in the view of the Supreme Court, might have endangered the lives of the passengers and crew; and, in the *Sands* case, the employees had, in

²⁶ See Frankfurter & Greene, "The Labor Injunction," p 219, and *passim*.

²⁷ See also *Milk Wagon Drivers' Union v. Lake Valley Co.*, 311 U. S. 91, 100-103; *Fur Workers Union v. Fur Workers Union*, 308 U. S. 522, aff'g 105 F. (2d) 1; *U. S. v. American Federation of Musicians*, 318 U. S. 741, aff'g 47 F. Supp. 304; *Cf. U. S. v. Hutcheson*, 312 U. S. 219

²⁸ S. Com. Hearings on S. 1958, 74th Cong., 1st Sess., pp. 32, 33, 34, 38, 47, 102; S. Rep. No. 573, 74th Cong., 1st Sess., pp. 1, 8, 9, S. Rep. No. 1184 (on S. 2926 which was similar to S. 1958), 73rd Cong., 2nd Sess., pp. 4, 8, 9, 10; H. Rep. No. 1147, 74th Cong., 1st Sess., p. 15; Debates in the Senate on S. 1958, 74th Cong., 1st Sess., Vol. 79, Cong. Rec., p. 7569, 7654, 7660, 7661. See also the references cited in note 19, *supra*.

violation of their contract, taken the position that they would not return to work on the terms stipulated in the contract. In none of these cases, therefore, was there presented the question whether employees, who peaceably go on strike and whose conduct throughout, viewed apart from purpose, is entirely lawful, lose all protection of the Act solely because the purpose of their strike is deemed unlawful. In the light of the clear intention of Congress to exclude an inquiry into the purpose for which employees engage in concerted activity, we should be slow to enlarge upon the actual holdings in these cases by applying them to a state of facts entirely different from their own.

I dissent for a further reason. Although my colleagues do not state that they intend to lay down the broad doctrine that concerted activities engaged in for the purpose of inducing an employer to violate any Federal, State or local law fall outside the protection of the Act, it is only to be expected that attempts will be made, in reliance upon this decision, to extend its rationale beyond the precise contours of this case to embrace a wide variety of employee conduct, the purpose of which is deemed to be in violation of some Federal law or other expression of public policy contained in State or local laws or court decisions. I fear that this will result in resurrecting and reinstating as a measure of permissible union conduct the vague and uncertain test of legality of objective. This test has in the past proved to be a convenient device whereby a judge might outlaw union conduct which was contrary to his own economic and social philosophy. With the passage of the Norris-LaGuardia Act and the National Labor Relations Act, I had thought that this dangerous touchstone had at last been banished from the Federal law pertaining to labor relations. I should not like to see its revival.

And, I desire to say with all the emphasis at my command, that I believe the action of the majority is not in accord with our wartime Federal labor policy. Instead of banning strikes by law, the President and Congress have chosen to rely upon Labor's no-strike pledge. From time to time, attempts have been made in Congress to enact laws that would ban all wartime strikes under criminal penalties, or that would deny labor organizations engaging in such strikes the protection of Federal labor laws. Yet, neither the President nor Congress has been willing to annul or abridge the fundamental substantive rights that workers enjoy under existing Federal labor laws. But, by interpreting the statute as they do, my colleagues are, in effect, denying the employees in this case all protection of the Act. This is precisely what Congress has not been willing to do.

The construction of the Act which I think correct would, on the other hand, respect the policy that Congress has pursued and, at the same time, would discourage resort to strikes incompatible with the aim of the Wage Stabilization Act. As I have stated, I would deny

the employees in this case all back pay but would require the reinstatement of those who had not been replaced when they sought to return to work. By denying them back pay, this Board would serve notice that employees engaging in strikes of this kind forfeit wages that would otherwise accrue following a denial of their request for reinstatement. Such a ruling would obviously tend to discourage work stoppages of this character. Reinstating the men, moreover, would promote the best utilization of available manpower²⁹ by discouraging refusals to reinstate employees who, repenting an ill-advised strike, ask to go back to work. Furthermore, the National War Labor Board, the agency primarily charged with enforcing the Wage Stabilization Act, might itself seek the return of the employees to work, in order to promote full employment, as, indeed, the Regional War Labor Board urged in this very case. Yet, under the ruling of the majority, the National War Labor Board might have to refrain from directing the reinstatement of the employees. For, an employer, in opposing reinstatement, might urge that the provision in the War Labor Disputes Act requiring the National War Labor Board to conform to the National Labor Relations Act renders the National War Labor Board powerless to order reinstatement of employees who had engaged in such a strike.

In refusing to allow an employer to prolong a dispute like the one here involved by not taking the men back, we would promote the policy of full employment and effectuate the policy of our own Act by substituting its peaceable procedures for industrial strife. The action of the majority, on the other hand, would, once such a strike had begun, leave the employees with no practical alternative but to persist in their ill-advised course because the employer is given full freedom to deny them reinstatement. Nor should it be overlooked that under the majority decision, an employer could refuse to put some or all of the men back to work because of a desire to rid himself of the union.

In short, the vice of my colleagues' position is that in an understandable desire to implement the policy of the Wage Stabilization Act, they have lost sight of the larger public interest in maintaining the entire governmental scheme for effectuating our wartime labor policy. We have here, as I see it, a delicate problem which, in the language of the Supreme Court, "calls for careful accommodation of one statutory scheme to another,"³⁰ without excessive emphasis being given to either statute. Rather than give single-minded support to any one statute, therefore, I would attempt, in the manner already stated, to strike a just balance among the several important expressions of Congressional and Executive policy applicable to this case.

²⁹ See the President's Executive Order 9139 of April 18, 1942 (7 F. R. 2919), Executive Order 9279 of December 5, 1942 (7 F. R. 10177), and Executive Order 9301 of February 9, 1943 (8 F. R. 1825).

³⁰ The *Southern Steamship* case, 316 U. S. 31, p. 47.