1938

Reinstatement of Sit-Down Strikers

George B. Weisiger

REINSTATEMENT OF SIT-DOWN STRIKERS

By GEORGE B. WEISIGER*

IN July, 1938, the United States court of appeals for the seventh circuit decided a case[1] of unusual social significance. The controversy grew out of a sit-down strike continuing from February 17 to February 26, 1937, in the plant of the Fansteel Metallurgical Corporation at Waukegan, Illinois. On February 17, a committee of Local 66 of the Amalgamated Association of Iron, Steel and Tin Workers of America called on the Fansteel superintendent and requested recognition of their Union. Upon the refusal of this request, the committee held a secret meeting, after which about one hundred men seized two key buildings of the plant. Foremen and other employees of the plant were requested to leave. The buildings were locked and barricaded from the inside, resulting in a complete stoppage of the operations of the entire plant. A few hours after the plant was seized, the company's superintendent, with its counsel and two police officers, asked for admission to the buildings and the surrender of possession. When the occupants refused to comply, the counsel announced that all the men remaining in the buildings were discharged for the violent seizure and retention of the buildings.

A mandatory injunction was issued by the circuit court of Lake County, directing the occupants to vacate the buildings and return possession to the owner. When this order was read to the strikers, they refused to comply. The court then issued a writ of attachment for the sit-downers to show cause why they should not be held in contempt of court. The sheriff and about one hundred deputies, in attempting to serve this writ, were driven away with streams of fire extinguishing chemicals, and were bombarded from the upper floors with steel missiles and quantities of sulphuric acid. On February 26, the officers finally evicted the strikers with the use of tear and emetic gases. Thirty-seven of the men who seized the buildings were arrested and sentenced to fine and imprisonment for contempt.[2] No serious damage to the machinery was shown, but most of the windows of the buildings

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[1]Fansteel Metallurgical Corp. v. National Labor Relations Board, (C.C.A. 7th Cir. 1938) 98 F. (2d) 375.

[2]The sentence of the circuit court was affirmed by the Appellate Court of Illinois on May 10, 1938. 295 Ill. App. 323; 14 N. E. (2d) 991.

were broken, and a number of small tools lost and many inventory items rendered useless by being dropped from the windows. When the plant resumed operation, twenty-three of those evicted by the officers were reemployed upon their application. Sixty-one of the men who returned to work were members of Lodge 66, and were reinstated without any condition as to Union membership. Some time in April the employees of the Fansteel Company organized Local No. 1 of the Rare Metal Workers of America upon the suggestion of the corporation, although it did not directly participate in the organization or management. The first meeting was held in the company's building, and use was made of the company's mimeograph machine in printing ballots.

In May, 1937, the Amalgamated Association of Iron, Steel and Tin Workers of America filed an amended charge before the National Labor Relations Board, setting forth unfair labor practices of the Fansteel Company. The board issued its complaint, and set a hearing in June. The board found: that the company had employed a spy to engage in espionage within the Union; that on February 17 and at all times thereafter, a majority of the employees of the appropriate unit had designated Lodge 66 of the Amalgamated Union as their bargaining representative; that a sit-down strike was engaged in, and although the strikers resorted to violence in resisting arrest, no sabotage of equipment occurred. The board also found: that while the employer announced at the beginning of the sit-down strike that the occupants of the buildings were discharged, this in fact did not constitute a discharge, and that they at all times remained employees; that in March the company refused to bargain collectively with the Union, and sent agents to certain employees who had engaged in the seizure of the buildings to induce them to return to work; and that the company had dominated the organization and administration of Rare Metal Workers of America, Local No. 1. The board also found that none of the employees had been discharged for Union activity, and that the attempted discharge of the men for seizing the company's buildings was not discriminatory. Since the board found that at the time the plant was seized Lodge 66 had in its membership a majority of the employees, the company was ordered to recognize and bargain collectively with this Union, notwithstanding the fact that some who returned to work had abandoned the Lodge. The board declined to order back pay for the sit-down strikers, since there was no discriminatory discharge and no applications for reinstatement had been made by them. The board

ordered reinstatement of all who went on strike on February 17, regardless of their conduct. This order included the thirty-seven men who were convicted and sentenced in the state court. The company petitioned the United States circuit court of appeals for a review of the board's order.

The court set aside the board's order in a two-to-one decision. It held that there was substantial evidence to support the board's finding that the company had engaged in espionage within the Amalgamated Workers' Union, and that the evidence supported the finding that the company had contributed support to the organization of the Rare Metal Workers' organization. The court held erroneous the board's finding that the company had refused to bargain collectively with representatives of employees as required by section 8(5) of the Labor Act.[3] This holding was based on the legality of the discharge of the sit-down strikers. After the strike and resumption of operations at the plant, Lodge 66 no longer had a majority of the employees if discharge of those who seized the buildings was valid. The board's contention was that the men were not discharged, and from the standpoint of bargaining they were still employees, and the company was bound to reinstate them. The board contended before the court that the re-employment of some of the strikers who, the company believed, had been coerced to take part in the sit-down, indicated that there never was an intention to discharge any of them. Furthermore, it was contended the men did not think the announcement of the company was intended as a discharge. The court denied the validity of this argument, and held the men were discharged for cause, and that they could not be counted as employees for determining a bargaining representative.

In support of its order for reinstatement of the sit-down strikers, the Labor Board contended that it had found that the men were not engaged in sabotage, and that no malicious sabotage of equipment occurred. The court set aside these findings as not being supported by substantial evidence. The court held that the contrary

[3]National Labor Relations Act. U. S. Code, title 29, sections 151-166. Sec. 8(5) of the Act provides: "It shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees subject to the provisions of section 9(a)."

Section 9(a) provides: "Representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment."

was established by undisputed evidence, and that while there was no serious damage to the machinery, other equipment of the plant was subject to sabotage as well as the machines. The court, however, regarded the matter of sabotage as not decisive of the case. In other words, whether or not sabotage existed, there was still, on account of the sit-down strike and the refusal of the employees to surrender possession, just cause for the discharge of the employees. In support of this holding, Judge Sparks in the majority opinion said:[4]

"With respect to the board's findings and conclusions relating to petitioner's violation of section 8(5) we are unable to concur, because some of the facts upon which the conclusions are said to be based are not only not supported by substantial evidence, but the contrary is undenied. The difference of opinion in this respect arises over the questions whether petitioner had good cause to discharge the sit-down strikers on February 17, and, if so, did the petitioner at that time discharge them? There seems to be no denial by the board that there was ample cause for discharge. Indeed, in the argument before this court the board admitted that the men in conducting a sit-down strike and resisting the officers 'did a foolish and illegal act.' Certainly it cannot be denied that an employer is warranted in discharging his employees, and severing that relationship, when they take and retain exclusive possession of his property against his will. They had a complete and adequate remedy, without cost to them, at the hands of the board, by the use of which they would have lost nothing in time or wages, if their cause were just. The employer had no coordinate right in this respect. The employees, however, spurned this legal remedy, disregarding all law on this subject and essayed to settle the difficulty according to their own sense of right and justice, and contrary to the better thought of those who really have at heart the best interests of all laborers. In this they violated the law which they now seek to enforce against petitioner. We are convinced that petitioner was warranted in discharging the employees, and we are compelled to so hold in order to avoid placing our approval upon such activities as they engaged in. To do otherwise, would be an injustice not only to the employer, but to the unions and their friends who wish them well."

Judge Lindley in a concurring opinion said:[5]

"The discharge was justified and the employer was not thereafter under any obligation and sustained no relationship to the discharged men. They were no longer employees; consequently the board's order being based erroneously (in part) upon a contrary premise, must be vacated."

[4](C.C.A. 7th Cir. 1938) 98 F. (2d) 375, 380.

[5](C.C.A. 7th Cir. 1938) 98 F. (2d) 375, 382.

In a dissenting opinion Judge Treanor said:[6]

"My disagreement with the reasoning and result of the majority decision rests upon a difference of opinion as to the respective powers of the National Labor Relations Board and this court in the determination of the legal consequences to be attached to the unlawful acts of striking employees. It is, in short, my understanding of the National Labor Relations Act that when employees have ceased work in connection with a labor dispute or because of an unfair labor practice, the employer-employee relationship continues by force of law; and that although unlawful conduct by striking employees is a fact which must be considered by the board in determining the scope of its order, such order cannot be set aside by this court unless the making of the order constitutes an abuse of discretion by the Board in view of all pertinent facts, including the fact of misconduct of the employees."

The substance of the decision was that the National Labor Relations Act imposed no duty on the Fansteel Company to reinstate as employees the men whom it discharged for engaging in the sit-down strike. Inasmuch as these strikers lost their status as employees by the discharge, Lodge 66 of the Amalgamated Union, not constituting a majority of the Fansteel workers, was not a legally chosen representative for bargaining purposes and the company did not violate section 8(5) of the Act which provides:

"It shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees subject to the provisions of section 9(a)."

The text of section 9(a) is as follows:

"Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment; Provided, That any individual employee or group of employees shall have the right at any time to present grievances to their employer."

It should be noted, however, that the court upheld the board's findings that the company had violated the Labor Act, section 8(1), 8(2), by engaging in espionage and by contributing support to the organization of Rare Metal Workers of America, Local No. 1.[7]

[6](C.C.A. 7th Cir. 1938) 98 F. (2d) 375, 383.

[7]National Labor Relations Act, section 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

Thus the validity of the discharge of the strikers was the important issue before the court. If the employer-employee relationship was terminated, then the Labor Board had no more authority to demand their reinstatement than it would have to demand the employment of any group of men whose names it might submit to the company. The contention of the board that there was no discharge in fact for lack of intention on the part of the company to dismiss the strikers deserves little attention, and is satisfactorily answered by the court. The statement of Judge Treanor in his dissent is of more substance. His understanding of the National Labor Relations Act was that when men cease work in connection with a labor dispute or because of an unfair labor practice, the employer-employee relationship continues by force of law. Does this mean that regardless of the nature of an employee's unlawful conduct after a strike begins, the employer-employee relationship must continue? The dissent goes on to say that the unlawful acts are facts to be considered by the board in making its order, but the court should not set aside the order in the absence of abuse of discretion by the board.

Generally at common law an employer was privileged to discharge employees. Likewise, employees could quit work when they desired, and under most conditions were entitled to strike. But under the National Labor Relations Board, since the main objective is compulsory collective bargaining, if an employer could discharge employees for ceasing work whenever a dispute arose, or for engaging in some labor activity, and could employ others in their stead, there would be little substance left in the Act. The board has issued many orders requiring reinstatement of workers, and frequently this has been coupled with a requirement for back pay or compensation for the employees during the period of the dispute.

The National Labor Relations Act, section 2(3) provides:

"The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless

engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection."

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

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

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it; Provided, That subject to rules and regulations made and published by the Board pursuant to section 6 (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay."

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. . . ."

In view of this section, it is pertinent to inquire whether the men whose reinstatement the board ordered ceased working for the company "in connection with a current labor dispute," or on account of a lawful discharge by the employer for their unlawful conduct. It is believed that the second ground is the true basis for the cessation of their work. It seems unreasonable to interpret this section so as to prevent an employer from discharging an employee regardless of how outrageous the employee's conduct may be, merely because at the time he is engaged in a strike. The employee's attempt to burn the employer's factory would certainly be ground for discharge. The opposite view should make this section void on constitutional grounds.

The findings of the Labor Board may here be considered with reference to whether a sit-down strike is recognized as included in the expression "as a consequence of, or in connection with any current labor dispute." The board found that the discharge was not discriminatory. Section 8(3) of the Act provides:

"It shall be an unfair labor practice for an employer 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. . . ."

If the board had recognized the sit-down strike as a legitimate method of collective bargaining, it is difficult to understand why the discharge was not discriminatory. Suppose a committee of the Amalgamated Union Lodge 66 had been discharged immediately upon asking recognition of their organization. It seems clear this discharge would amount to discrimination, under section 8(3) in regard to tenure, as discouraging membership in a labor organization. Or if a few employees were discharged for holding a meeting to discuss plans for organizing all the employees, this also would appear to be discrimination, and their reinstatement would be ordered with back pay. But when the employees were discharged for seizing the employer's property and shutting down the plant, this, by finding of the board, was not discriminatory.

In this connection, the language of section 7 may again be considered:

"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."

And section 8(1) makes it an unfair labor practice for an employer:

"To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7."

Now a sit-down strike is a concerted activity, and it was engaged in for the purpose of collective bargaining. And clearly, the employer interfered with it by driving out the strikers by throwing tear gas into the building. It even restrained it by help of the court, and went to the extent of having some of the sit-down strikers fined and imprisoned for contempt. If the Labor Board had regarded the sit-down strike performance as one in respect to which the Act protected the strikers, it would seem that a complaint for violating section 8 (1) should have been made for interfering with "a concerted activity engaged in for the purpose of collective bargaining." If a sit-down strike is not legalized by the language of section 7, neither should it be by the language of section 2(3). The employees' work did not cease "as a consequence of, or in connection with any current labor dispute or because of any unfair labor practice," but by discharge for unlawful conduct.[8]

The dissenting opinion denied the power of the court to set aside the order of the board unless the making of the order constituted an abuse of discretion by the Board in view of all the pertinent facts. Section 10(f) of the Act provides that when a final order of the Labor Board is reviewed by the circuit court of appeals the findings of the board as to the facts, if supported by evidence, shall be conclusive. The question arises as to what is meant by *facts* in this provision.

The board can exercise only such powers as are conferred upon it by the Act. Its jurisdiction to hear and determine cases is determined by the provisions of the statute. Suppose an employer dismissed one of his men who followed a practice of appropriating the property of other employees to his personal use, and

[8]In National Labor Relations Board v. Mackay Radio and Telegraph Co., (1938) 50 Sup. Ct. 904, it was held that the employer-employee relationship continued under sec. 2(3) but the Supreme Court sustained a finding by the Board that the Mackay Co. was guilty of discrimination in refusing to reinstate some of the employees.

there was evidence that the man discharged was active as an organizer of a labor union that was seeking a collective bargaining agreement with the employer. Would the board's finding of discrimination be conclusive? Or would the court determine whether there was substantial evidence of a discharge for union activity? If the court found the discharge was for theft, would not the board's order for reinstatement on the ground of discrimination be in excess of its authority? In the case at hand, in determining whether the employer-employee relationship continued, the question is whether the men ceased work as a consequence of or in connection with a labor dispute. If they did, then, by the terms of the Act, they were still employees. If their work ceased as a result of their valid dismissal on another ground not included in the Act, then the board was without authority to order their reinstatement. If the board had the power if supported by evidence to make a conclusive finding that the men continued as employees, it would, it seems, have the same power to find that a sit-down strike is "a concerted activity for the purpose of collective bargaining."[9]

In setting aside the board's order the court said:

"With respect to the board's findings and conclusions relating to petitioner's violation of section 8(5) we are unable to concur, because some of the facts upon which the conclusions are said to be based are not only not supported by substantial evidence, but the contrary is undenied."

With respect to the facts there was really no dispute. On the basis of these facts the board's conclusion was that the strikers continued to be employees. The court's conclusion was that the employment of these men had ended. This is a conclusion of law with respect to what the statute means, and *is not a finding of fact.* The court decided that with reference to the Act the strikers' work had ceased, not in connection with a current labor dispute, but by a valid discharge. With reference to the powers of the board as defined by the statute, it had acted beyond its authority. It is submitted that in construing the statute with respect to the jurisdiction of the board the court is not bound by the board's conclusions.[10] Otherwise there would be little reason for a review at all.

A similar problem arises under the workmen's compensation

[9]See sections 7 and 8(1) in note 7, supra.

[10]See Crowell v. Benson, (1931) 285 U. S. 22, 52 Sup. Ct. 285, 76 L. Ed. 598; Rosenberry, Power of Courts to Set Aside Administrative Rules and Orders, (1938) 24 A. B. A. J. 279.

laws. The industrial board is given authority to make awards for accidents "arising out of and in the course of employment." Many awards of the boards have been set aside by the courts because the accident did not "arise out of the employment" or did not occur "in the course of employment." In these cases the boards have acted outside of their jurisdiction as defined by the law. The courts interpret these phrases, "arising out of employment" and "in the course of employment," in a way that is reasonable with respect to the risk that should be put upon an employer. The point is that the courts and not the boards have the final word as to the meaning of these phrases under the workmen's compensation statutes.[11]

It may be contended, however, that the *Fansteel Case* is of such social significance that the rights of the strikers should not be confined by any strict construction of the Act under which they sought relief, or by any legalistic reasoning as to the interpretation of the Act. The position taken by the board before the court in support of its order appeared to be based in part on the ground that since the company had been guilty of espionage and of fostering a company union, the unlawful conduct of the sit-down strikers should not preclude their reinstatement. This raises the question as to what should be the legal consequences of a sit-down strike. That such conduct constitutes a continued trespass seems clear.[12] Furthermore, equity may enjoin a sit-down strike and order the participants to vacate the premises.[13] Force used by

[11]2 Schneider, Workmen's Compensation Law, (2d ed. 1932) sec. 554.

[12]Restatement of the Law of Torts, section 158.

[13]Apex Hosiery Co. v. Leader, (C.C.A. 3rd Cir. 1937) 90 F. (2d) 155. When this case reached the Supreme Court, the District Court was ordered to dismiss the complaint on the ground that the cause was moot. Leader v. Hosiery Co., (1937) 302 U. S. 656, 58 Sup. Ct. 140.

The circuit court of appeals in the Apex Hosiery case based its jurisdiction on the Sherman Anti-Trust Act, holding the sit-down strike a conspiracy in restraint of interstate commerce. The sit-down strike, however, was regarded as illegal per se as shown by the following passage from the opinion: ". . . The defendants in effect argue that the purpose of the conspiracy here was not aimed at interstate commerce but at the plaintiff, to compel it to yield to their demand for a closed shop and check-off; that however unlawful their acts were, they were incidental, only a means to an end, and do not constitute a conspiracy in restraint of interstate commerce.

"This argument overlooks the fact that a strike if lawfully conducted is in itself lawful and its lawfulness now has statutory recognition. There could be no conspiracy under the Sherman Act or otherwise because of doing a lawful thing. It could not become a conspiracy unless the means employed were unlawful." (90 F. (2d) 160).

See also Bryan, Injunctions Against Boycotts and Similar Unlawful Acts, 40 Am. Law Rev. 196, 206, where he says: "Granted that the act (Sherman Act) does apply to consolidated labor as well as to consolidated

the strikers to keep the employer from his premises is not privileged, and constitutes a breach of the peace or a criminal assault. All of these propositions grow out of the concept of private property developed by courts of law and equity as the result of long experience. Of course, if a revolutionary view with respect to private property were adopted, if the law of trespass were denied, and if the protection of interests in private property set forth in the various constitutions of our land were set aside, then it might be said that a sit-down strike is legal. It seems that the board did not insist on the reinstatement on the ground that the strike was a legal act, but rather on the ground that the unlawful conduct did not terminate the employer-employee relationship.

But even though the Act might seem to indicate a continuance of the employer-employee relationship, there is still a sufficient ground why the court should set aside the reinstatement order. There are many instances in the law where courts have denied relief on the ground of public policy. Courts have refused to enforce agreements in restraint of trade, even where the complainant would not be subject to a civil action or any penalty provided by law. The maxim of clean hands in equity is applicable here.[14] Courts are constantly deciding cases on the basis of what they regard as public policy. Sometimes a penal statute declares the policy that is observed in a case in tort or contract. The doctrine of clean hands or public policy as here considered means the court in its interpretation gives effect to an implied exception in the statute. The Sherman Law made every combination in restraint of trade illegal. This was construed to mean every unreasonable restraint. Many situations that may later appear to be covered by the provisions of a statute cannot be anticipated when it is adopted. The court interprets a statute by deciding what it means with respect to the facts in the particular

capital, it cannot abridge the right of the men to combine and quit work for lawful purposes, or to do other lawful acts, even though by them interstate commerce is crippled . . . the courts unite in disclaiming any power under this or any other law to interfere with legal and peaceful strikes."

[14]It appears that the board in making its order for reinstatement took the position that the Fansteel Corporation did not defend with clean hands. This is rather an unusual application of this doctrine. (McClintock, Equity (1936) section 24). If it is said that the board and not the Union is the party plaintiff under the procedure of the Labor Act, it supports the criticism of the onesided nature of the obligations the Act imposes. If the board is regarded as the complaining party, it places a government agency in the position of condoning a sit-down strike. See Fansteel Metallurgical Corporation et al., 5 N. L. R. B. No. 124. C. C. H. Labor Service, paragraph 21, 760.

case. The court in the *Fansteel Case* interprets the Labor Act to mean that employees may engage in such unlawful activity not mentioned in the Act as to disqualify themselves for reinstatement. The final decision on this question is one of law for the court, and not a matter of administrative discretion. The court said it was forced to its conclusion to avoid placing its approval on a sit-down strike. This in itself appears to be a sufficient ground for the decision.

It may be objected that public policy is too uncertain a ground to be set up as a reason for a decision. It has been characterized as an unruly horse for the courts to ride. Nevertheless, public policy has been the basis for the formulation of principles of the common law as well as the guide in the interpretation of statutes. Furthermore, the social implications of a sit-down strike are being considered here as a ground for the court's decision as distinguished from the more strictly legal considerations set out above.

After the sit-down strike at Akron, Ohio, in 1936, there appeared an epidemic of disorders in connection with sit-downs in several parts of the country. Probably the most publicized were the strikes in the automobile industry in Michigan. A flood of comment broke forth in the newspapers and magazines. Some of this tended to condone the sit-down strike as a legitimate weapon in the hands of labor. Much of the comment was strongly opposed to this revolutionary method of procedure. The Nation in March of 1937[15] in an editorial spoke as follows:

"Whoever you are—judge, corporation head, newspaper publisher—you must recognize that the stake these workers have in their livelihoods and the stake the nation has in healthy and decent industrial conditions are far greater than your narrow and static legalism. You cannot chase those men out as you would chase out a trespasser from your back yard."

In the same month an editorial in Collier's said:[16]

"If a cook or a store clerk or a farm laborer should attempt a sit-down strike, his or her employer would call the police or the sheriff, and somebody would be quickly arrested for trespass. The trespasser would be tried and, if the judge felt well that day, would be put under bond to behave himself. Some confused leaders, however, have adopted the idea that trespass and violence are sound union strategy. So they imported the recent French invention—the sit-down strike. They forget that the French radicals who advertised this strike were actually revolutionists.

[15] (1937) 144 The Nation, March 27, p. 340.
[16] (1937) 99 Collier's, March 6, p. 70.

They seized their employer's property and would have retained it if they could. . . . Actually the sit-down strike is a serious menace to labor organization. Certainly no one familiar with the history of unions in this country can see anything but disaster to labor in this new method. . . . Neither on moral, legal or practical grounds can the lawlessness of the sit-down strike be defended. A prudent regard for their own future will lead the responsible leaders of labor to abandon this suicidal strategy without hesitation or delay. . . . Meanwhile, unless we want to invite reaction, state and city officials will not waste time hesitating to enforce the law. In the long run, law impartially administered is the only defense of a free and democratic people."

The following is from The Nation, April, 1937:[17]

"We believe that the American people will come to accept the sit-down with limitations, as a legitimate technique, just as we expressed last week that American law would eventually sanction it."

In March, 1937, this expression of view is found in The New Republic:[18]

"Despite the hysteria of the daily press, the American labor situation has not changed in its fundamental aspects. The sit-down is an immensely effective form of strike and is undoubtedly here to stay."

In the same issue of The New Republic in a somewhat apologetic tone is the following:[19]

"It is also wrong to suppose that responsibility for the sit-downers rests with the C.I.O., or even with unions in general. Of the several hundred sit-down strikes in the past few weeks, many have occurred spontaneously among unorganized workers, and many more in unaffiliated unions or those owing allegiance to the A. F. of L. It is a well known fact that even in C.I.O. groups such as the automobile workers, it was the rank and file who themselves adopted the sit-down technique, and the leaders had to accept a fait accompli."

In The New Republic for March 24, 1937, Dean Leon Green sums up the case for the sit-down strike as follows:[20]

"This in brief is the case for the sit-down strike. It rests upon four fundamental propositions:

1. Employees have an interest in the industrial relation distinct from any property interest or interest of personality. Such interest is a valuable one of the same dignity as that of property and is given the recognition and protection of the courts as property.

[17](1937) 144 The Nation, April 3, p. 369.
[18](1937) 90 The New Republic, March 31, p. 225.
[19]Idem.
[20]Green, The Case for the Sit-Down Strike, (1937) 90 The New Republic, March 24, p. 199.

2. Disputes between employers and employees with respect to industrial relations involve economic and political questions outside the jurisdictions of the courts; the problems involved are of such great difficulty administratively that courts will not undertake to adjudicate them but will leave them to other agencies of government and to the parties themselves in absence of such agencies.

3. Courts will not prejudice the issues between industrial employers and employees by assuming jurisdiction of issues incidental to the main dispute in absence of physical violence or fraud directed against the persons or property of the parties.

4. Occupation in good faith and peacefully of a plant devoted to industry by employees awaiting the adjustment of differences growing out of the industrial relation is but an incident of the industrial relation and in no sense unlawful."

In April, 1937, the Literary Digest[21] published a statement by William Green, President of the American Federation of Labor, as follows:

"Both personally and officially I disavow the sit-down strike as a part of the economic and organization policy of the American Federation of Labor. . . . Public opinion will not long support sit-down strikes. That means labor loses public support when any part of it engages in sit-down strikes."

In the same month The Review of Reviews quoted Secretary of Commerce Roper in an unofficial pronouncement, as follows:[22]

"Any sit-down strike that undertakes to take over private property is a serious and fundamental thing and, in my opinion, would not be endured by the courts."

Honorable Ernest La Pointe in answer to a question raised by a member of the House of Commons at Ottawa said:[23]

"A sit-down strike in Canada would be entirely illegal and would not only tend to undermine all respect for law and order but would, if proceeded with on any large scale, likely disrupt the business and administration of the country.

"Such a sit-down strike would also likely. tend to create a riot and public disorder, which is contrary to the views of organized labor in this country. Legitimate means of redressing grievances already exist in Canada.

"The sit-down strike shall not be permitted to obtain any footing here. The administration of justice is, of course, committed to the provincial authorities and they are exclusively responsible for it, but the Dominion Government is prepared to utilize all the resources and agencies at its command to the end

[21](1937) 123 Literary Digest, April 3, p. 5.
[22](1937) 95 Review of Reviews, April, p. 14.
[23]Quoted from (1937) 95 Review of Reviews, May, p. 11.

of restraining and eliminating this illegal mode of procedure in Canada."

In the July, 1937, number of Fortune, the result of a survey on the sit-down strike situation is given. In the comment on the tables showing the results obtained is the following:[24]

"Evidently, then, William Green was conspicuously right when he declared that public opinion will not support the sit-down strike. He might have gone further and made the more sensational statement that factory workers themselves oppose sit-down strikes and still been correct, for here are 59 per cent of them, agreeing with the executives that sit-down strikes should be stopped and only 6.2 per cent who propose that labor should use them whether they are legal or not."

Finally as an expression of public opinion is offered the following from the Congressional Digest:[25]

"On April 8, 1937, both the Senate and the House passed S. Con. Res. 7, offered by Senator Key Pittman, Democrat, of Nevada, the text of which reads:

" 'Resolved by the Senate (the House of Representatives concurring), that the so-called sit-down strike is illegal and contrary to sound public policy;

" 'That the so-called industrial spy system breeds fear, suspicion, and animosity, tends to cause strikes and industrial warfare, and is contrary to sound public policy; and

" 'That it is likewise contrary to sound public policy for any employer to deny the right of collective bargaining, to foster the company union, or to engage in any other unfair labor practice as defined in the National Labor Relations Act.' "

Of course, this concurrent resolution had no force as law. The unfair practices on the part of employers as set out in the last two paragraphs were already embodied as law in the National Labor Relations Act. The only significance of the resolution, therefore, was to express the belief of the Congressmen as reflecting the sentiments of their constituents that sit-down strikes are illegal. It may be noted that some states have made the sit-down strike illegal by statute.[26]

Considering the *Fansteel Case* then, from the standpoint of public policy and especially in view of the concurrent resolution of Congress, can it be said that the court was not justified in

[24](1937) Fortune, July, p. 98.
See also 16 Cong. Dig. 151 (1937) for an article by Dr. George Gallup on a nation-wide poll on sit-down strikes. The poll indicated strong popular feeling against such strikes.

[25]16 Congressional Digest, May, 1937, p. 143.

[26]Mass., Acts and Resolves 1937, ch. 436, sec. 8A; Tenn. Public Acts 1937, ch. 160; Vermont, Laws 1937, ch. 210; see C. C. H. Labor Service, par. 354.

refusing reinstatement of the sit-down strikers? It would appear that there was ample ground in public policy to support the court's statement, "We are convinced that petitioner was warranted in discharging the employees, and we are compelled to so hold in order to avoid placing our approval upon such activities as they engaged in."

Just a word further with respect to the function of courts in labor disputes. While much of the litigation may be handled by administrative bodies, still the interpretation of the statute creating the administrative agency as well as the definition of its powers and the limitation of its jurisdiction are questions for the court to decide. During the years when injunctions were issued in great numbers to restrain the activities of labor, the criticism of the labor leaders was that a government of men had displaced a government of laws. Now it is suggested by some who profess to be friends of labor that the whole controversy be taken away from the courts. This would in a large measure inaugurate the system that labor complained of under the rule by injunction. The courts are independent of the executive branch of the government, and coordinate with it in power. In practice, administrative bodies are likely to be more influenced by the executive branch. The personnel of these boards changes to some extent with a change of administration. It should be remembered that the decisions of the labor board as it sometime in the future may be constituted may not be acceptable to organized labor. In that case labor would welcome the right to have the protective features of the law upheld in the courts. It appears that already one faction of labor has criticized some of the board's findings.[27] In the long run labor will profit more under a rule of law than a government of men.

[27]See The New York Times, Feb. 12, 1938, p. 4.