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PARTIAL STRIKES AS UNPROTECTED ACTIVITY
UNDER THE LMRA

When labor and management struggle for supremacy at the bargaining table, each has a number of alternative economic weapons with which to threaten the other. For instance, employees may strike or picket—these are weapons which the Federal Government has deemed it necessary to protect. But unions have also attempted to engage in activity toward which no federal policy is clearly discernible; included in this category are partial strikes such as slowdowns, "quickie" stoppages, refusals to work overtime or weekend strikes. The NLRA1 (Wagner Act) was primarily aimed at discouraging employer anti-unionism2 and did not provide for union unfair labor practices or define acts of employees which were unprotected. Although §8(b)3 of the LMRA4 (Taft-Hartley Act) partially filled this gap, there still exists a great area of employee activity which is neither an unfair labor practice nor within the broad scope of §7,5 which provides, inter alia, that, "Employees shall have the right . . . to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection." Indeed, in passing the LMRA Congress apparently intended to allow elasticity in the interpretation of this section because it was believed that an inclusion of some activities as unprotected may lead courts to exclude others not specifically mentioned.6 Thus the courts and the NLRB engrafted a number of broad exceptions onto the section—in general, employee activity is unprotected if it is for an unlawful purpose, by an unlawful means, or is contrary to the legislative scheme of Congress.7 This classification that activity is unprotected

3. For an analysis of the cases involving union unfair labor practices under §8(b), see Walsh, Union Unfair Labor Practices, 1 Labor L. J. 1095 (1950).
4. 61 Stat. 136 (1947), as amended, 29 U. S. C. § 141 (1952). Title I of the LMRA is the amended version of the NLRA, 49 Stat. 449 (1935), as amended, 29 U. S. C. § 151 (1952). Hereinafter all references to the statute will be by section number only, sections 1 through 17 consisting of the NLRA as amended by the LMRA.
7. See Gregory, Unprotected Activity and the NLRA, 39 Va. L. Rev. 421, 424 (1953); Petro, Concerted Activities—Protected and Unprotected, 1 Labor L. J. 1155, 1219-1221 (1950), and 2 Labor L. J. 3, 67 (1951); Note, 3 Utah L. Rev. 358 (1953). See generally, Cox, supra note 5.
is significant because an employer does not commit an unfair labor practice if he discriminates against employees who are engaged in unprotected activity; they are laid bare to retaliation such as discharge or suspension.\(^8\)

Besides the protected-unprotected question, it is also helpful to draw a distinction between a strike which is caused by unfair labor practices of an employer and one which is engaged in by employees who wish to exert economic pressure for the purpose of collective bargaining. The distinction is often crucial because an unfair labor practice striker is usually entitled to reinstatement—even though it may be necessary for the employer to discharge a replacement in order to do so; however, the economic striker may be replaced at any time and is not entitled to “bump” a replacement in order to be reinstated.\(^9\) It is only a natural conclusion then that the economic striker would seek a mode of strike activity which would lessen the possibility of his being replaced. This factor, plus the more important advantage of being able to gain some take home pay while economic pressure is being applied against the employer, accounts for the strong propensity of unions to engage in partial strikes as a bargaining weapon.

The problem of whether a partial strike is protected or unprotected presents a conflict between the right of the employer to direct his working force and the right of employees to engage in concerted activities as provided for in § 7.\(^{10}\) It may arise in a great many different contexts and for clarity it is necessary to distinguish between the sympathetic and the primary partial strike. While both deal with the problem of the employer’s right to control his working force, the former is not for the immediate purpose of enhancing the bargaining power of the sympathetic strikers, but is to promote the interests of the primary striker and although the selfish interest exists, it is certainly more remote;\(^{11}\) on the other hand, the primary partial strike is for the purpose of exerting direct pressure on the employer in order to strengthen the bargaining power of his union.

8. Id. at 320.
10. For an analysis of NLRB and court decisions on partial strikes, see Comment, 21 U. of Chi. L. Rev. 765 (1954).
11. For example: A clerk deliberately neglects processing merchandise orders which he mistakenly believes had been re-routed from his employer’s strike-bound plant in another city. See NLRB v. Montgomery Ward & Co., 157 F. 2d 486, 496-497 (8th Cir. 1946). Non-striking employees honor hits and run picket lines around their employer’s plant, resulting in frequent interruption of operations. See Pacific Telephone Co., 107 N. L. R. B. No. 301, 33 L. R. R. M. 1433 (1954).
Thus, although in both instances the employer may suffer from some amount of interference, the primary partial striker seeks a more direct benefit. It is this type of strike as a well planned and repetitive tactical maneuver for the purpose of exerting pressure at the bargaining table with which this Note is primarily concerned.

I. UNION PARTIAL STRIKE TACTICS

The Briggs-Stratton decision is by far the most influential ruling in the field of partial strikes. There, the union, without notice to the employer, called twenty-six "quickie" stoppages in a four and one-half month period with the avowed purpose of exerting strong economic pressure upon the employer by interfering with his production plans and delivery commitments. Since the dispute arose under the Wisconsin Peace Employment Act, the State Board assumed jurisdiction and issued a cease and desist order against the activity. On certiorari, the Supreme Court, in a 5-4 decision, affirmed the Wisconsin Court and held that the State Board properly had jurisdiction because such intermittent stoppages are neither forbidden as unfair labor practices under § 8, nor are they protected activity within the scope of § 7, and thus, since no federal statute preempted the area, the state legislation would apply. Although the majority approvingly pointed out that the employer harbored no anti-union sentiments and sought the most peaceable remedy by requesting a cease and desist order against the union rather than resorting to methods of self-help such as discharge or suspension, it is implicit that the Court would have held the union activity to be unprotected even if the employer had retaliated. It is worthwhile to note that the decision permitted the application of a state remedy which allowed a cease and desist order as opposed to the federal act that would have permitted the employer to use only methods of self-help.

13. The Court relied on the legislative history of the LMRA to show that § 7 does not insulate all union conduct from employer retaliation; furthermore, § 13, which reaffirms the right to strike, is narrower in scope than § 7. Id. at 254-264.
Section 13 provides: "Nothing in this subchapter, except as specifically provided herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."
14. Since the employer was not informed of the union demands which the intermittent stoppages were designed to enforce or what concessions he could make to avoid them, it is tenable to argue that the tactics could have been union unfair labor practices under § 8(b)(3). See Roumell & Schlesinger, The Preemption Dilemma in Labor Relations, 18 U. of Det. L. J. 17, 28 (1954). See Textile Workers, CIO, 108 N. L. R. B. No. 109, 34 L. R. R. M.
Since the Supreme Court in the Briggs-Stratton case had impliedly criticized slowdowns, it is not surprising that the NLRB held such a partial strike activity to be "indefensible" and thus unprotected. The Board reasoned that an employee is unfaithful and may be discharged for breach of his employment contract if he attempts to work and draw wages at the same time that he exerts economic pressure against his employer. Fortunately, this rationale has not often been applied to other types of partial strikes, for as Justice Frankfurter has pointed out, although in a different context:

"[T]o float such imprecise notions as 'discipline' and 'loyalty' in the context of labor controversies, as the basis of the right of discharge is to open the door wide to individual judgment by Board members and judges."

A slowdown is distinguishable from a partial stoppage such as a refusal to work overtime or a weekend strike even though in both instances reasonable orders of the employer are being frustrated. The main distinction is in the detriment the employee must suffer to exert economic pressure. In the slowdown the employee draws full pay for reduced production, but in the partial stoppage he usually suffers loss of wages commensurate to the time not worked. Prior to the Briggs-Stratton case, the NLRB had steadily maintained that partial stoppages were protected. Activities such as a refusal to work overtime were insulated against employer retaliation. The Board reasoned that this means was tantamount to a total strike and could not be rendered unprotected in the name of plant discipline. Typical of the NLRB's viewpoint was Harnischfeger

1059 (1954), which reaches that result under somewhat similar facts.

Section 8(b) (3) provides that it shall be an unfair labor practice for a labor organization or its agents “to refuse to bargain collectively with an employer...."


16. Elk Lumber Co., 91 N. L. R. B. 333, 26 L. R. R. M. 1493 (1950). See Note, 60 Yale L. J. 529 (1951). For the view that the slowdown should not only be unprotected, but should be included as a union unfair labor practice under § 8(b), see Note, 29 Ind. L. J. 284, 295 (1954).

The LMRA defines strike as "any strike or other concerted stoppage of work by employees... and any concerted slowdown or other concerted interruption of operations by employees." 61 Stat. 161 (1947), 29 U. S. C. § 142(2) (1952).


Corp.20 where the employer, who had previously refused to bargain with the union, was ordered to reinstate with back pay three discharged employees who had instigated a concerted refusal to work overtime. It was immaterial that the employer suffered economic injury and disruption of operations because of the activity—total strikes create much more difficulty and since they are protected, certainly a refusal to work overtime belongs in the same category.21

The Board coined a phrase—it can hardly be called a test—now familiar to labor parlance, "The question . . . is . . . whether this particular activity was so indefensible, under the circumstances as to warrant . . . discharge[e] . . . ."22

While the NLRB condoned a refusal to work overtime as protected activity, the courts took the opposite view.23 For instance, in C. G. Conn, Ltd. v. NLRB24 such tactics were unprotected because an employee must either work and negotiate with the employer or strike in protest—he cannot do both. The decision was not based upon the inability of the employer to combat this type of an economic sanction, but upon the theory: that the employees were not engaged in a strike of any sort and were attempting to set their own terms of employment. The rationale insists that the employees must either engage in a total strike or work as directed. Thus, the Board and the courts had expressed diametrically opposed views in the area of partial strikes, but in cases arising after the Briggs-Stratton decision, the Board has made it quite clear that partial stoppages are not only unprotected, but may be unfair labor practices.

The difference between these two classifications is fundamental. Even though all activity which constitutes a union unfair labor practice is unprotected,25 the converse of that proposition is not necessarily true.26 The main distinction is in the available remedies while discharge and suspension or other self-help measures

20. 9 N. L. R. B. 676, 3 L. R. R. M. 316 (1938).
21. Where employees were engaged in a spontaneous work stoppage to present a wage grievance, a similar argument was relied upon—"The language of the Act does not require and its purposes would not be served by requiring that dissatisfied workmen may receive its protection only if they exert the maximum pressure and call a strike." NLRB v. Kennametal, Inc., 182 F. 2d 817, 819 (3d Cir. 1950), 19 A. L. R. 2d 562 and note.
24. 108 F. 2d 390 (7th Cir. 1939).
25. See Roumell & Schlesinger, supra note 14, at 32.
employer are permitted against both unprotected activities and union unfair labor practices, the latter is also subject to a cease and desist order and other broad remedial powers of the NLRB.\textsuperscript{27} In \textit{Textile Workers, CIO}\textsuperscript{28} the Board held that a labor union is guilty of an unfair labor practice, and thus subject to a cease and desist order, for refusing to bargain in good faith under § 8(b)(3), if its employees engage in partial and "quickie" work stoppages during a bargaining impasse.\textsuperscript{29} The Board spoke clearly on the reasons for its unique holding:

"We think it clear that such unprotected harassing tactics were an abuse of the union's bargaining powers—"irreconcilable with the Act's requirement of reasoned discussion in a background of balanced bargaining relations upon which good faith bargaining must rest"\textsuperscript{30}—which impaired the process of collective bargaining that Congress intended not only to encourage but to protect."\textsuperscript{31}

Stated in homely phraseology the decision means that these union strike methods were unfair only because they were so effective as to disturb the balance of bargaining power. Since the opinion gives a tremendous scope to § 8(b)(3), it is conceivable that in the future overly-effective partial strike tactics used to enhance a union's bargaining power, may be unfair labor practices by the circuitous method of applying that section. Such a holding tends to preclude the possibility of collective bargaining but promotes at least temporary industrial peace because if cease and desist processes are available to the employer, he is neither prompted to bargain nor resort to the disrupting remedies of self-help to escape the burdens of the partial strike.\textsuperscript{32} On the other hand, if the strike is only unprotected and is not found to be an unfair labor practice, the em-

\textsuperscript{27} Section 10(c).


\textsuperscript{29} The union tactics included a refusal to work overtime, an unauthorized extension of rest periods, a refusal to work special hours, slowdowns, unannounced walkouts, and inducing employees of a subcontractor not to work for the employer. The Board was also influenced by the fact that the employer was not advised by the union as to what concessions he would have to make to avoid these tactics. See \textit{Textile Workers, CIO}, 108 N. L. R. B. No. 109, 34 L. R. R. M. 1059, 1062 (1954).

\textsuperscript{30} Phelps Dodge Copper Products Corp., 101 N. L. R. B. 360, 368, 31 L. R. R. M. 1072, 1075 (1952). In that case the N. L. R. B. held that it was not an employer unfair labor practice under § 8(a)(5) to refuse to bargain with a union which was engaging in a slowdown.


\textsuperscript{32} In the \textit{Textile Workers} case it is interesting to speculate as to why the employer did not resort to self-help. Was the labor market so sparse that the possibility of replacement was nil if he had discharged the employees? Was it necessary for him to meet certain commitments relative to goods contracted to be sold so that he could ill afford to discharge? Did he fear adverse public opinion if there were discharges?
ployer's only remedy is self-help and he may often find it economically wise to engage in at least some collective bargaining (even if he is not legally obligated to do so) before resorting to discharge and the resulting difficulty of replacement. Thus two purposes of the LMRA—to encourage collective bargaining and to promote industrial peace—are in some degree of conflict. The proper result as to whether an activity should be found an unfair labor practice will depend on whether the tactics used, though they are unprotected, are believed to be so "indefensible" as to militate against the advisability of allowing them to exert any economic pressure. Although the multiple methods of the union in the Textile Workers case may have merited the cease and desist remedy, it is doubtful whether all partial strikes belong in this category, and the NLRB did not imply such a result. It must also be recognized that as a practical matter the cease and desist order requires such a time consuming process that the employer will often be forced to resort to self-help in order to escape immediate economic and operational difficulties.

In view of the preceding cases, it is not surprising that the NLRB held a partial stoppage unprotected even though it was resorted to as a self-help device in retaliation against the employer's unfair labor practices. Although this is the customary result in some other areas of unprotected activity, it seems unsound to demand that employees either engage in a total strike or, if no other self-help method is available, endure the employer's unfair labor practices until a cease and desist order can be obtained.

33. See note 30 supra.
35. The "average median" number of days elapsing between the filing of an unfair labor practice petition and the Board's final decision during the second half of the 1953 fiscal year was 350 days. 18 NLRB Ann. Rep. 3 (1953).
38. However, the First Circuit has recently recognized that the NLRB has the power under § 10(c) to reinstate with back pay unfair labor practice strikers who engage in unprotected activity. See NLRB v. Thayer Co., 213 F. 2d 748, 753 (1st Cir.), cert. denied, 348 U. S. 748 (1954).
39. "It ordinarily may be assumed that the Board, as a part of the process of determining whether reinstatement will effectuate the policies of the Act, will balance the severity of the employer's unfair labor practice which provoked the industrial disturbance against whatever employee misconduct may have occurred in the course of the strike." Id. at 755. See Cox, supra note 5, at 324 n. 24.

Section 10(c) provides, inter alia, that in granting remedies against
As has been noted, the clear weight of authority insists that the partial strike is unprotected. The tendency has been to view the problem in terms of absolutes—either an activity was protected and thus completely insulated from employer discrimination or it was unprotected and subject to any degree of retaliation. No compromise between the antithetical concepts of protected and unprotected was sought or discovered, but the weekend strike seemed to merit an attempt to find such a middle ground. In *Honolulu Rapid Transit Co.* the union engaged in that tactic to break an impasse in bargaining negotiations. The employer retaliated by ordering a one day suspension for each weekend violation and when this did not deter the union, the penalty was increased to 15 days. A badly split Board, writing three opinions, held, 4-1, that the employer had not committed an unfair labor practice by suspending his employees. Members Beeson and Rodgers relied on the formalistic reasoning of the *Conn* case that the employees must either strike or work, but Chairman Farmer and Member Peterson, although concurring in the result, attempted to justify the employer’s disciplinary actions without condemning the union’s strike tactics. They believed that the employer’s disciplinary measures were “reasonably calculated to protect his right to carry on his business and . . . not . . . retaliatory in motivation or effect.” Their concurring opinion carries the implication that a different result would have been reached had the employees been discharged instead of only suspended. Member Murdock, believing that the activity should be protected, dissented from both opinions. As he points out, the planned weekend strike presents a problem much different from the slowdown cases of disloyalty and the intermittent stoppages which disrupt complex employer planning. The concurring opinion allows what may be called non-discriminatory retaliation against unprotected activity, for reasonable action clearly occasioned by economic need instead of anti-union motive is not properly termed discrimination; for example, employers may replace economic strikers and, in certain unfair labor practices the Board shall “take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter.”

For the relevancy of the equitable doctrine of “clean hands” to the problem of reinstating workers who have engaged in activities not sanctioned by the LMRA, see *NLRB v. Kingston Cake Co.*, 206 F. 2d 604, 611 (3d Cir. 1953).

situations, engage in lockouts, although these measures, of necessity, injure union effectiveness. However, an insistence that the employer’s sanctions must not be “retaliatory in motivation or effect” may require a search into factors that are often indiscernible. It has been pointed out in a different context, that there is little to be gained by attempting to distinguish “between an intent to destroy a union and an intent to counteract or reduce a union bargaining position.” Where the economic need and the anti-union motive are inseparably interwoven, it would seem that if the sanctions imposed by the employer were stronger than could be “reasonably calculated to protect his right to carry on his business,” the presumption would arise that they were “retaliatory in motivation in effect.” So, in many cases, this test would necessitate and permit an inquiry only into the question of how much force would have been reasonably calculated to defeat the strike tactic. If a type of partial strike is held unprotected only because it is a weapon that is too effective, the proper remedy would be to allow the employer to exert sanctions necessary to combat it, and not any amount of retaliation that he chooses. The concurring opinion is of further significance because it vaguely suggests a “balance of rights” as a whole new approach to the partial strike problem. This intimation is a proper one if the NLRB has accepted the duty of protecting the balance of bargaining weapons, and although it opens the door to individual judgment as to the degree of “indefensibility” exhibited by the varied partial strike tactic, its flexibility is more commendable than a strike or work rule—especially in view of the absence of a legislative mandate.

II. Remedies of the Employer

One customary remedy of an employer is the right to replace protected economic strikers; he may not discharge them, but he can permanently replace those who are on strike. Replacement

42. See the NLRB policy statements of Chairman Farmer, reprinted in part at 33 L. R. M. 100 (1954). For the legality of an employer’s lockout generally, see Comment, 51 Mich. L. Rev. 419 (1953).
45. “We are of the opinion, however, that the question presented in this case involves a balancing of the broad statutory right of employees to engage in concerted activities against the employer’s right to carry on his business.” Honolulu Rapid Transit Co., 110 N. L. R. B. No. 244, 35 L. R. M. 1305, 1307 (1954) (concurring opinion).
46. See note 31 supra, and text thereto.
47. See note 6 supra, and text thereto.
48. E.g., NLRB v. Globe Wireless, Ltd., 193 F. 2d 748 (9th Cir. 1951).
49. See note 9 supra.
without discharge is plainly impossible when the employee has not left his work as in slowdowns; it is of little practical significance if there is a refusal to work overtime or an intermittent stoppage, for few employees could be secured to work for such a short time and the resulting confusion would be unthinkable. Replacement is a bit more realistic although certainly difficult where the weekend strike is concerned; for instance, in the Honolulu case, it is possible that weekend bus drivers could have been secured, but it cannot be seriously suggested that such a remedy is an adequate one.

If the employer suffers economic loss due to the constant disruption of production that results from partial strikes, he may call a lockout without committing an unfair labor practice. This method of self-help frustrates the effectiveness of the employee strike tactic, but it may create an adverse public opinion toward the employer.

In the attempt to find a more adequate remedy which would preserve the right of employees to engage in concerted activity without depriving the employer of the right to control his working force, it has been suggested “that partial strikes be protected unless and until the employer exercises an option to require the employees to go out on a full strike or work as directed.” Of course this rule, which allows the employer to force the employee into the status of a full time economic striker who may be replaced, would require that the employer receive timely notice of the intent to engage in a partial strike tactic so that he may intelligently exercise the option.

Such advance notice would insure stability of the employer’s operations and allow him to plan for the difficulties caused by the partial strike. Although the notice factor has never been judicially articulated, the other elements of the option plan have been occasionally suggested by the NLRB, but repeatedly repudiated by the

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50. International Shoe Co., 93 N. L. R. B. 907, 27 L. R. R. M. 1504 (1951). A lockout may be used by the employer even if the union activity is protected, but he must apparently show that it is occasioned by economic necessity. See Koretz, supra note 43, at 254-257.


53. Id. at 773-775.

54. Under this solution all “quickie” strikes, such as in the Briggs-Stratton case, would be unprotected because, by definition and design, the employer has no chance to set his defenses. The slowdown would be unprotected if the employer did not receive prior notice of the decreased productivity. Similarly, sympathy strikes require adequate notice to the employer because the presence of the strike may not be immediately discovered by him.

courts, as a solution to both the primary and sympathetic partial strike. The plan would not be difficult to administer. If ample notice of the tactic were given by the union, the employees would be assured that the employer must exercise his option before they could be discharged. If the option were exercised, and the union chose to go on total strike, the striker would be entitled to his job only if he re-applied before he was replaced, just as any economic striker. Thus, in effect, the plan gives the striker a few days of grace (until a replacement is hired) to ponder the wisdom of his action. This is of tremendous importance when the strike is a spontaneous, temporary, or trigger-like reaction of employees rather than a well thought out, planned and repetitive tactical maneuver; however, these spontaneous stoppages have generally been held protected and so it is unnecessary to invoke the option plan. The efficacy of this solution as applied to a planned tactical strike is inversely proportionate to the possibility of swift efficient replacement, and since the success of a total strike is often dependent upon this same factor, it seems that the plan would not generally accomplish very much. Furthermore, while it tends to save the employee from the possibility of discharge, it does not recognize any degree of "indefensibility" as the "balance of rights" method is equipped to do.

III. CONCLUSION

Of course, the basic question is whether any type of partial strike should be protected. The NLRB has clearly answered in the affirmative as to spontaneous primary partial strikes. But the tactical strike stands on a different footing and the tendency has been to hold it totally unprotected on the basis of the formalistic rule of "strike or work" enunciated in the Conn case. This result is justified in many