

To: Labor/Community/Religious Coalition in Support of the
Striking Newspaper Workers

From: Ellis Boal

Re: Picket Line Conduct And Its Effect On Reinstatement Rights

Date: November 21, 1995

Any picket line forces the public to choose sides in a labor dispute. Honoring the line or crossing it, "whichever choice they [make, gives] support to one side or the other."¹ There is no neutral stance.

As a practical matter the NLRB and courts indulgently note a certain "animal exuberance" in labor disputes² which, like intemperate acts accompanying any other protected activity,³ is condoned.

For instance the NLRB returned a worker to work with pay who lied to his employer, in the grievance procedure, and to the NLRB under oath about the incident for which he was fired. Everyone knew he was lying, but that wasn't what he was fired for.⁴

But if individual strikers engage in conduct the NLRB thinks is out of bounds it will deny reinstatement.

In an economic strike, a striker can be replaced but not fired.⁵ If DNA honestly believes -- based on specific evidence a specific striker committed misconduct -- it need not ever take

1 Tube Craft Inc, 287 NLRB # 51, ___ n 7, 127 LRRM 1234 (1987).

2 Milk Wagon Drivers Union v Meadowmoor Dairies, 312 US 287, 293, 61 S Ct 552, 7 LRRM 310 (1941); NLRB v Southwestern Bell, 694 F2d 974, 976-78, 112 LRRM 2526 (CA5, 1982); Associated Grocers of New England v NLRB, 562 F2d 1333, 96 LRRM 2630 (CA1, 1977).

3 National Steel Corp Great Lakes Steel Division, 236 NLRB # 115, 98 LRRM 1551 (1978), aff'd 625 F2d 131, 104 LRRM 3156 (CA6, 1980).

4 ABF Freight System v NLRB, ___ US ___, 114 S Ct 835 (1994).

5 NLRB v International Van Lines, 409 US 48, 93 S Ct 74 (1972).

him or her back, unless the striker shows affirmatively he or she did not do it.⁶

NLRB standards are pretty severe. In an economic strike, mere peaceful blocking of ingress and egress to the plant is sufficient to deny reinstatement. In a 1987 case the employer was privileged to discharge picketers who in a pattern of several occasions delayed plant deliveries by standing in the drive facing non-employee truck drivers until the police came.⁷ In other cases, a mere verbal threat of violence while drunk in front in a scab's home in front of his family was cause to bar reinstatement,⁸ as was a threat to cut a guard with a knife after attempting to slash a tire.⁹

The NLRB will not deny reinstatement for misconduct that the employer itself does not rely on.¹⁰

But the newspaper strike appears to be more than an economic strike. The NLRB local office charges that DNA precipitated it by bad-faith bargaining. DNA president Frank Vega expects the NLRB to rule against DNA, but says he will drag out the final decision in the courts.¹¹

If the charge is upheld it will mean that the papers will have to fire scabs and reinstate strikers who unconditionally offer to return.¹² If DNA contracted with any scab and breached the contract by bringing strikers back, the scab could sue DNA.¹³

For many years the NLRB treated picket line conduct differently in an unfair labor practice strike than an economic strike.

6 NLRB v Burnup & Sims Inc, 379 US 21, 85 S Ct 171 (1964); General Telephone Co of Michigan, 251 NLRB # 99, 105 LRRM 1288 (1980).

7 Tube Craft Inc, 287 NLRB # 51, 127 LRRM 1234 (1987).

8 Georgia Kraft Co, Woodcraft Division, 275 NLRB 636, 119 LRRM 1157 (1985).

9 Pacific Mutual Door Co, 278 NLRB # 120, 122 LRRM 1019 (1986).

10 Cornell Iron Works, 296 NLRB # 81, 132 LRRM 1181 (1989).

11 Raphael: "Analysts: Numbers add up to strikers losing to papers," Crain's Detroit Business, 10/16/95, p 25.

12 Chesapeake Plywood Inc, 294 NLRB # 5, 133 LRRM 1013 (1989).

13 Belknap v Hale, 463 US 491, 103 S Ct 3172 (1983).

According to the leading Thayer case, even if an employee committed misconduct the NLRB would take the employer's misconduct into account and "balance" it against that of the employee. Misconduct could be condoned, depending on the seriousness of what the company did and what the striker did.¹⁴

The balancing is necessarily subjective. There is no hard-and-fast list of condonable conduct. In a 1964 case the employer engaged in provocations including trying to destroy the union, arming itself, bargaining in bad faith, firing workers, evicting them from company housing, and used surveillance and espionage. All of this caused members to engage in normally unprotected conduct, including mass picketing and demonstrating at scab homes. On orders from a court of appeals, the NLRB held these acts were attributable no less to the company than to the union which accepted the unlawful company challenge and returned those participants to work. Others who physically and violently assaulted scabs or threatened their families lost.¹⁵

As to threats unaccompanied by physical gestures, the NLRB uses a supposedly "objective" test, whether under the circumstances acts may reasonably tend to coerce and intimidate people, whether employees or supervisors. Accordingly threats may now warrant denial of reinstatement, even if intended or reacted to casually by the actual participants.¹⁶

The NLRB reconsidered Thayer in Clear Pine Mouldings although no holding emerged. Two of the four members rejected balancing, asserting that it condones employee misconduct which should never be a proper element of labor relations. The other

14 NLRB v Thayer Co, 213 F2d 748, 34 LRRM 2250 (CA1, 1954), cert denied 348 US 883 (1954); Coronet Casuals, 207 NLRB # 24, 84 LRRM 1441 (1973); Hedstrom Co, 235 NLRB 1198, 98 LRRM 1119 (1978).

15 Kohler Co, 148 NLRB 1434, 57 LRRM 1148 (1964), aff'd 345 F2d 748, 58 LRRM 2847 (CAD, 1965), cert denied 382 US 836 (1965); see also Harowe Servo Controls, 250 NLRB # 120, 105 LRRM 1147 (1980); Newport News Shipbuilding Co v NLRB, 738 F2d 1404, 116 LRRM 3042 (CA4, 1984); Fansteel Metallurgical Corp v NLRB, 306 US 240, 59 S Ct 490, 4 LRRM 515 (1939); Mosher Steel v NLRB, 568 F2d 436, 98 LRRM 2010 (CA5, 1978).

16 Clear Pine Mouldings, 268 NLRB 1044, 115 LRRM 1113 (1984), enf'd 765 F2d 148, 120 LRRM 2631 (CA9, 1985); Roto Rooter, 283 NLRB # 117, 125 LRRM 1055 (1987); Tube Craft Inc, 287 NLRB # 51, 127 LRRM 1234 (1987); but see Land Air Delivery Service, 286 NLRB # 107, 130 LRRM 1015 (1987).

two NLRB members disagreed, and cited Thayer as good law.¹⁷ An appeals court noting the split still seemed to endorse Thayer.¹⁸

The NLRB later held the issue whether provocation can ever justify misconduct so as to require reinstatement after a strike is still open; where it sees misconduct by both the employer and an employee it still tries to balance them.¹⁹ A 1991 case is an example. The company illegally fired a worker for union activity. But on the way out the door, the worker told a supervisor he would return at closing time and kill him. When he returned, ostensibly to take his carpool riders home, he never left his car, the police asked him to leave, and he did. The NLRB ordered reinstatement, noting it traditionally takes into account the emotional reactions of employees provoked by unlawful employer conduct. But a court of appeals reversed. It agreed the company unlawfully fired the worker and that provocation can be a defense. But it said threats of physical violence are never justified.²⁰

Violence toward scabs is theoretically treated more severely than violence toward the company.²¹ But strikers' rights to strike are just as important as scabs' right to scab.²²

If a worker is fired illegally and later commits misconduct, the NLRB may order backpay from the date of the firing to the date of the misconduct.²³

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- 17 Clear Pine Mouldings, 268 NLRB 1044, 115 LRRM 1113 (1984), enf'd 765 F2d 148, 120 LRRM 2631 (CA9, 1985); Mohawk Liqueur Co, 300 NLRB # 46, ___ n 3, 137 LRRM 1018 (1990).
- 18 MPC Plating v NLRB, 953 F2d 1018, 139 LRRM 2259 (CA6, 1992).
- 19 Axelson Inc, 285 NLRB # 118, ___ nn 8, 11, 129 LRRM 1344 (1987); cf Dotson partial dissent; American Gypsum Co, 285 NLRB # 16, ___ n 4, 128 LRRM 1105 (1987).
- 20 Precision Window Mfg Inc, 303 NLRB # 141, 140 LRRM 2321 (1992), rev'd 963 F2d 1105, 140 LRRM 2321 (CA8, 1992).
- 21 Clear Pine Mouldings, 268 NLRB 1044, 115 LRRM 1113 (1984), enf'd 765 F2d 148, 120 LRRM 2631 (CA9, 1985); Roto Rooter, 283 NLRB # 117, 125 LRRM 1055 (1987); Mosher Steel v NLRB, 568 F2d 436, 98 LRRM 2010 (CA5, 1978); Chesapeake Plywood Inc, 294 NLRB # 5, 133 LRRM 1013 (1989).
- 22 Chesapeake Plywood Inc, 294 NLRB # 5, 133 LRRM 1013 (1989).
- 23 Lear-Siegler Management Service, 306 NLRB # 84, 139 LRRM
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Unprotected strike conduct could become protected if DNA settled with a promise of no reprisals. Once it settles it cannot go back on its word.²⁴

Also, if DNA condones misconduct of nonstrikers and scabs it may not use a double standard to refuse reinstatement to strikers who engage in equal or lesser misconduct.²⁵

In this regard the orchestrated incident at Sterling Heights Gate 3 in the early morning of September 3 may be recalled. DNA dispatched a truck with a driver and two passengers -- on apparent orders of DNA executives -- to crash the gates at high speed into a crowd of peaceful picketers. Two minor injuries ensued. Macomb County Prosecutor Carl Marlinga is investigating DNA for possible charges of felony assault, including assault with intent to murder. DNA execs have not been fired or disciplined.

To recap then, five defenses are possible to charges of misconduct: (1) the conduct was "animal exuberance" accompanying any strike, (2) the employer's unfair labor practice provoked the strike, (3) there was some sort of immediate provocation at the time of the incident, (4) DNA's condonation of misconduct by its own people necessarily protects strikers who did equal or lesser conduct, and (5) DNA may settle the strike promising no reprisals.

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1353 (1992).

24 White Oak Coal Co, 295 NLRB # 64, 131 LRRM 1802 (1985);
United Parcel Service, 301 NLRB # 140, 137 LRRM 1107 (19-91);

25 Aztec Bus Lines Inc, 289 NLRB # 125, 131 LRRM 1214 (1988);
Chesapeake Plywood Inc, 294 NLRB # 5, 133 LRRM 1013 (1989).