CHAPTER 7

RIGHT OF MANAGEMENT TO DISCIPLINE FOR REFUSAL TO CROSS A PICKET LINE

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The task and responsibility of all parties in any discipline case present varying degrees of complexity and, in some cases, varying degrees of personal involvement. I do not minimize the difficulty of company representatives who actually make decisions of the kind under review here, and I fully respect the challenge to unions in representing the members of the bargaining unit. Indeed, in a major nationwide publication several years ago, the author suggested that labor relations in general posed the most complex, highly structured areas of responsibility facing all of those who participate in industrial problems. Dean McConnell, of the New York State School of Industrial and Labor Relations, once referred to the jokester who had taken liberty with Kipling's verse—you are familiar with it: "If you can keep your head when all those about you are losing theirs and blaming it on you, you'll be a man, my son." The modern version, when applied to labor relations, is: "If you can keep your head when those about you are losing theirs, you do not understand the problem."

There are those, on the other hand, who think that these issues are not difficult. I recall a member of the union committee who approached me sometime back, at the conclusion of an arbitration hearing, and remarked: "I do not understand why you took so long to decide our last grievance. We gave you the answer at the arbitration hearing." But his view is the exception. A labor relations representative from management, recently retired after many years of practical experience both as a union representative and later for management, told me one time that the most difficult decision he faced was what to do with a long-service employee, with a good record, who suddenly turns to his foreman with defiance and says, "I ain't going to do it; it's not my job." Simple facts, difficult decision. And when we have before us contract

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provisions to be interpreted in the light of public law and deeply embedded, long-established traditions, the task becomes even more complex.

This issue of the right of management to discipline for failure to cross a picket line brings before the company, the union, and the arbitrator all of the different variables found in the interpretation of the extremely broad phrase "just cause," past practice, the application of a no-strike clause if it exists, the degree to which overlapping public law becomes part of the interpretive process, and often, to add to the task, the lack of clear-cut guidelines for the arbitrator's decision.

Obviously, if the parties have negotiated a clause such as the following, the problem is minimized:

> "Employees may not be required to pass a picket line in the performance of their duties or to arrive at their work place, provided such picket line has been officially recognized by the local union or international union. Refusal to cross such picket lines shall not be considered a violation of this agreement."

And then, of course, an operative fact of significance is whether the picket line is located at the plant where the employee in question works, or if it is one involving his bargaining unit or a stranger unit, at that plant or elsewhere. But preliminarily, let's examine some of the decisions chronologically.

One of the first opinions which gave any real definition to this problem of requiring an employee to cross picket lines of stranger unions was the case of *Waterfront Employers' Association of Pacific Coast,*[1] where the arbitrator met the issue squarely and interpreted significant arbitration decisions as the backdrop for his award. The case involved picketing by foremen of a stevedore company who desired to be represented by the International Longshoremen's and Warehousemen's Union. The company refused to recognize the union as the bargaining agent for these "walking bosses." The problem arose when the nonforemen members of the Longshoremen's Union refused to cross the picket line of the "walking bosses" and report for work. Arbitrator Clark Kerr, in attempting to arrive at a just resolution of this problem, quoted extensively from the landmark arbitration award of Wayne L. Morse in *Encinal Terminal*:[2]

[1] 8 LA 273 (1947).
[2] 4 LRRM 1117 (1939).

"In the absence of an express agreement that the longshoremen would pass through the picket line of another union on strike, it is to be implied that both parties to the agreement of October 1, 1938, knew or should have known that the longshoremen would not pass through such a picket line. There are certain basic tenets of unionism, a knowledge of which can be reasonably charged to all employers. As pointed out by counsel for the union at the hearing, one of the cardinal principles of unionism is that a union will not permit itself to be used as a means of breaking the strength of another union which at the time is out on strike.

"The 'sanctity of picket lines' is basic in the teaching and practices of American unionism. The Arbitrator is compelled by the record in this case and by a careful analysis of the agreement to accept the view that the Waterfront Employers Association knew or should have known when they entered into the agreement of October 1, 1938, that if a strike situation involving such facts as existed at the Encinal Terminal on February 18, 1939, should arise, the longshoremen under the agreement would not be expected or required to go through the picket line.

"Arbitrator Morse then noted that 'there are "picket lines" and picket lines' and that 'each case must be considered on its own merits and must be judged in the light of surrounding facts and circumstances individual to the case.' "

To determine the "legitimacy" or "illegitimacy" of a strike, Morse established tests which would be controlling on the arbitrator's decision as to whether to require the employees to cross the picket line and which was, in fact, determinative in this case. The tests of propriety of observing picket lines, as interpreted by Arbitrator Kerr, are as follows:

" (1) Is it a 'good faith labor dispute'?

" (2) Is it a 'hot cargo' dispute?

" (3) Is it a jurisdictional dispute?

" (4) Is it a demonstration picket line?

" (5) Is it a collusive picket line?"

Arbitrator Kerr concluded:

"The Impartial Chairman finds this case to be most nearly like the Encinal case—picket lines growing out of a 'good faith labor dispute.' If a picket line is ever legitimate in accordance with the Encinal decision of Wayne L. Morse, it must be in this type of case—where the longshoremen have no demands of their own, and the union has been certified as bargaining agent and is attempting to make that certification meaningful."

The company maintained that the above decision was in error, and by agreement with the union, this issue was reheard in *Waterfront Employer's Association of Pacific Coast,*[3] by Arbitrator Arthur C. Miller, who held:

> "The contract dated June 16, 1947, between the Waterfront Employers Association of the Pacific Coast and the International Longshoremen's and Warehousemen's Union, as interpreted in awards under prior contracts which are made a part thereof, obligates each of the parties to refrain from economic action resulting in a work stoppage during the life of the contract. An exception to these mutual obligations to refrain from work stoppages was first established in the Award of Arbitrator Wayne L. Morse of March 2, 1939, in the Encinal Terminals case [4 LRR Man. 1117] which interpreted the contract as granting to the ILWU and its members the right to stop work in observing the legitimate picket lines of other unions (including those affiliated with it) if such other unions are engaged in a bona fide labor dispute with employers. The definition of legitimate picket line in this and subsequent awards excluded picket lines which are collusive, such as picket lines established for the purpose of enabling the longshoremen to effect a stoppage of work in support of some demand of their own Union. The basic dispute in the present controversy is the dispute between the ILWU and the Waterfront Employers over the demands of the ILWU for recognition and the right to represent the walking bosses and foremen, who are members of that Union, in collective bargaining. Success in the prosecution of these demands would strengthen the bargaining position of the Union and thereby inure to the gain and advantage of all of its members as well as to the advantage of the group more directly affected. The picket lines which have been established and maintained by walking bosses and foremen and the conduct of longshoremen in stopping work by refusing to pass these picket lines are all actions taken by members of the ILWU in cooperation for the purpose of enforcing the demands of that Union upon the Waterfront Employers. In view of these circumstances I further find and determine that the picket lines established and maintained by the walking bosses and foremen are not legitimate picket lines established or maintained by another union in support of its own demands, within the ruling of the Encinal Terminal case, but on the contrary are, according to the ruling in that case, collusive picket lines, in that they are established and maintained for the predominant purpose of enabling the longshoremen to stop work in support of the demands of their own Union."

Arbitrator Miller went on further in this opinion and held, with deference to Arbitrator Morse's decision in *Encinal Terminal,*[4] that:

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[4] *Supra* note 2.
[3] 9 LA 5 (1947).

"Arbitrator Wayne L. Morse, by the Award of March 2, 1939, in the Encinal Terminals case, established a limited exception to the mutual obligations of the longshore contract that the parties refrain from work stoppages. He there ruled that longshoremen may stop work in refusing to pass the picket lines of another Union engaged in a labor dispute, but only in those situations in which both the picket line and the labor dispute are found to be legitimate. . . .

Limitations on Right

"Of crucial importance in the present case is the limitation that to come within the exception, a picket line must be 'legitimate' in that it must not be 'collusive.' . . .

"Thus, the Encinal award, while granting the longshoremen a measure of freedom from the contractual restraint against work stoppages, to permit them to conform to traditional union principles in observing the legitimate picket lines of other unions, was carefully limited against possible abuse. It was never intended to sanction such conduct when picket lines are established as part of a collusive plan or strategy having as one of its objects either the securing of some specific gain or advantage to the longshoremen themselves, whether individually or collectively as a union organization, or the use of the economic force of the longshoremen as an aggressive weapon on behalf of some affiliated union or group."

These two opinions fairly state the posture assumed by arbitrators at this particular point in labor law development. However, from these early days of *Encinal Terminal* and the longshoremen decisions, arbitrators' opinions and awards have frequently taken different views.

Another 1947 arbitration opinion of interest is *New England Master Textile Engravers Guild.*[5] In this case, the company operated under a contract with a no-strike provision therein. This contract also had a holiday-pay clause which provided in part:

"All said employees shall receive compensation for such holidays, although not worked, at straight time rates. In the event, however, that said employees shall work on any of the said holidays, they shall be compensated at time and one-half rates in addition to their holiday pay at straight time rates. Should a holiday fall within the employee's vacation period, the employee will receive an extra day of vacation with pay."

The problem in this case arose when a stranger union, the Friendly Society of Engravers, called a strike against the guild. Thereafter, the employees of the company who were members of

[5] 9 LA 199 (1947).

the United Textile Workers refused to cross Friendly Society's picket line. One of the paid holidays fell during the period when the Friendly Society of Engravers was on strike and when the members of the United Textile Workers did not report for work. Upon settlement of the strike by the Friendly Society and the return to work of members of both unions, the Textile Workers requested that the guild pay its members for the holiday when it fell during the period when the Friendly Society was on strike. The guild refused to make such payment, giving rise to an instant dispute. In sustaining the company's position in this grievance, Arbitrator Saul Wallen held:

> ". . . that the absence of the members of the United Textile Workers of America from their jobs for the period beginning May 21st was due to their concerted action in honoring the picketing lines of the Friendly Society of Engravers. The contract between the Guild and the United Textile Workers forbids stoppages of work during its life. This mass absence must therefore be considered a violation of the contract. Said violation occurred during the period and between May 21st and June 16th, and was in effect on Memorial Day. In the arbitrator's view, neither fairness nor logic supports the Union's claim that holidays falling during the period in which this violation took place should be paid for by the employer. . . .
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> "The fact is that they chose to stay away from work. They cannot claim the benefits of the contract during a time when by their own choice it was inoperative in an important respect."

The next significant development in this area occurred in the 1950s in various court decisions and NLRB orders. The most notable of these decisions came from the Supreme Court in *NLRB* v. *Rockaway News Supply Co.*[6] This decision established an employer's right to discipline or discharge employees for their failure to cross a stranger picket line and report for work. *Rockaway News* was decided after the 1947 amendments to the National Labor Relations Act. I quote the following proviso to Section 8 (b) (4) which appears in the NLRA as amended:

> "*Provided,* that nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act. . . ."

[6] 345 U.S. 71, 31 LRRM 2432 (1953).

In *Rockaway News,* the Court considered a labor contract which provided that "no strikes, lockouts, or other cessations of work or interference therewith shall be ordered or sanctioned by any parties hereto. . . ." It noted that if the language was considered ambiguous, that such ambiguity was dispelled by the evidence that the employer had rejected the union's proposal to insert a clause in the contract to state that "no man shall be required to cross a picket line." The Court in brief ruled that it was not an unfair labor practice to discharge employees for refusal to cross the picket line under these facts and contract provisions.

Redwing Carriers, Inc.[7] confirms the board and court rulings that an individual's right to cross a picket line under the Act may be waived by the employee's bargaining representative. Note the following significant language in *Redwing*:

> ". . . where it is clear from the record the employer acted only to preserve efficient operation of his business, and terminated the services of the employees only so that it could immediately or within a short time thereafter replace them with others willing to perform the scheduled work, we can see no reason for reaching different results solely on the basis of precise words, i.e., replacement or discharge, used by the employer, or the chronological order in which the employer terminated and replaced the employees in question."

Moving on into the 1960s, we find the case of *United States Pipe and Foundry Company*[8] in which Arbitrator Paul N. Lehoczky held that where there was a contract provision which allowed members of one union to honor the picket lines of members of a striking stranger union, then those employees of the company whose union was not involved in the strike and who elected voluntarily not to report for work did not breach the collective bargaining agreement, and their absence was excused. He further held that if the company elects to continue to operate its business in such a strike situation, it may do so with those employees who have reported for work. The company may also put these returning employees in positions which might previously have been manned by workers of greater seniority. Arbitrator Lehoczky said:

> "The Company had no disagreement with the USW [the union which represented those employees who elected not to report for

[7] 137 NLRB 1545, 50 LRRM 1440 (1962).
[8] 64-3 ARB 9182.

work] and since it had declared that it would operate during the strike (s), there was no reason to consider [the employee's] absence in any light other than a self-imposed, voluntary, Agreement-excused absence from work. His job had to be filled and it was filled by a less-senior employee. There is no reason to assume that the Company must hold a job open for a voluntary absentee for an indefinite period which was already stretched to almost two months."

The arbitrator did say, however, that the company erred when it based an employee's right to a job on the time the employee had crossed the picket line and returned to work. He held that since the contract allowed for this type of absence, the employer violated the contract by imposing restrictions on those employees who elected to honor the picket line.[9]

In the 1965 decision of *Hess Oil and Chemical Corporation,*[10] Arbitrator Henry W. Hoel decided that when an employer is not restricted in his contract as to making employees cross picket lines of stranger unions, he may lawfully discharge an employee for his refusal to cross the picket line. Arbitrator Hoel held in part:

". . . there was no strike in progress at the Company refinery on either of the two occasions when grievant refused to cross the picket line. It was merely a picket line to inform the public that in the opinion of the Building and Trades Council the Company was paying sub-standard wages to the temporary employees used in the turn-around. There were, at most, only two pickets and for a part of the time, only one. There was no solicitation of the Company employees, no threats of violence, no mass picketing and no reason to fear for the health and safety of any employees who wished to cross the picket line."

It is interesting to note that Arbitrator Hoel distinguished between a picket line and a strike and left the door open as to whether he would discipline an employee who refused to cross the picket line of a striking union. Also interesting are the different tests he employed to determine the reasonableness of requiring an employee to cross a picket line, particularly the test as to whether an employee would be subject to harm or serious injury if he were required to cross a picket line and whether there was violence or a threat of violence on the picket line. This is the test which pervades the most recent arbitration decisions on this issue and one to which the majority of arbitrators now subscribe.

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[9] For another decision directly on this point, see *United States Pipe and Foundry Co., Bessemer Plant,* 65-1 ARB 8041.

[10] 45 LA 826 (1945).

A particularly noteworthy arbitration was that of *ARO, Incorporated.*[11] In this case, the company entered into a contract with a union council which represented 13 unions (including the International Association of Machinists). Among the signatory unions was the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, District 57. Grievant was a member of the latter union. The contract provided for arbitration in the event grievances arose during its term, and prohibited strikes, work slowdowns, or stoppages by the union and lockouts by the company.

During the term of the contract, the IAM went on strike after severance from the Boilermakers was denied. The strike lasted eight days. During those eight days, the grievant failed to report for work and was discharged by the company. Thereafter, he applied for unemployment compensation with the Tennessee Department of Employment Security. His claim was denied because his failure to report for work constituted a voluntary quit of his employment.

The grievant also filed unfair labor practice charges, because of his discharge, with the NLRB. The regional director denied grievant's claim on the ground that the no-strike clause in the labor agreement prevented grievant's refusal to cross the picket line from being justified. Grievant's appeal of the regional director's decision was denied for the same reason.

The grievant then took the discharge to arbitration. Arbitrator James P. Whyte held:

> "At the outset it should be noticed that nothing in the Contract permits absenteeism because of picketing. On the contrary, Art. XI, Sec. 1 not only contains a no-strike clause but also provides that violation of the no-strike proviso is complete and immediate cause for discharge. This portion of the Contract would apply had Grievant's own Union, the Boilermakers, been on strike. Yet had the Boilermakers been on strike, Grievant's not appearing for work would be at least understandable. Under the circumstances, then, Grievant was on a one-man strike or work stoppage. This conduct was directly contrary to his union's decision to work. Art. XI, Sec. 1 unequivocally provides discharge will result from breach of the no-strike clause. The fact that the strike was by a union other than Grievant's strengthens the reason for his discharge."

Arbitrator Whyte also reiterated the accepted test of whether

[11] 47 LA 1065 (1966).

crossing a stranger picket line would subject the employee to violence and/or fear of personal harm on the picket line. In denying the grievance, he said:

> "Notwithstanding, refusal to cross a picket line because of fear of personal harm or harm to one's family may provide justification for resulting absenteeism. In this case, however, there was no violence or even threat of violence associated with the IAM picket line. The employee who brought Grievant to the plant entrance, by whom Grievant informed the Company of his reason for not crossing the picket line, crossed the line without incident after returning Grievant home. And all other non-striking employees likewise crossed the line within a reasonable time after it was known non-striking Council members were respecting Art. XI, Sec. 1. The conclusion is inescapable that Grievant's fear of crossing the IAM picket line was without foundation and that his failure to cross the line provided no justification for his absence."

On these particular points, Arbitrator Ralph Roger Williams decided *Gulf Coast Motor Lines Incorporated*,[12] wherein he restated the accepted case law in this field, citing the important decisions which held in part:

> "Where a contract contains a no-strike clause, as in the present case, an employee's breach of such no-strike clause by a work stoppage or interruption of service, has been held by the United States Supreme Court to constitute just cause for discharge, and such discharge does not violate Section 7 of the Labor Management Relations Act (NLRB v. Rockaway News Supply Co., 345 U.S. 71, 23 LC 67, 440, 97 L.Ed. 832 [1953]).
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> "The National Labor Relations Board has held that a common carrier may properly discharge an employee for refusal to cross a picket line, despite the fact that such refusal constitutes a protected activity under Section 7 of the Labor Management Relations Act. Redwing Carriers Inc., 137 NLRB 11, 456, and The Cooper Thermometer Company, 154 NLRB 502 (1965), the Board stating in the latter case:
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> " 'The Board has recognized that the employee's protected right must be accommodated to the legitimate employer interest involved, and has held that the employer may lawfully discharge the employee who refused to cross a picket line if the discharge is effected for the purpose of replacing him with another who will.' "

Arbitrator Williams also spotlighted arbitration awards in this area:

> "Other Arbitrators have sustained discharges of employees who re-

[12] 49 LA 261 (1967).

fused to cross peaceful picket lines of other labor organizations. Pilot Freight Carriers, Inc., and Teamsters, Local 391, 22 LA 761, was a case wherein four truck drivers were held to have been properly discharged for refusal to comply with specific directions to cross the picket lines of another union in order to pick up freight. Hess Oil & Chemical Co. and O.C.A.W. (66-1 ARB 8036), 45 LA 826, wherein the employee had been previously warned, as was the Grievant in the instant case. (See also: ARO, Inc., and Metal Trades Council, 66-3 ARB 9088, 47 LA 1065.)"

He held in part in this decision:

"No-strike no-lockout clauses are important and should be observed, and this is especially true where the employer is a common carrier. The clause binds the individual employee as well as his union. The Grievant himself participated in the collective bargaining sessions which culminated in the present Agreement between the parties. His grievance attributes his refusal to obey the order to cross the picket line to two reasons: (1) 'I could not cross because it was against what I believed in, and (2) also for the safety of myself and my passengers on board.' These were insufficient reasons. What he 'believed in' cannot take precedence over the clear mandate of the Agreement 'not to participate in any work stoppage or interruption of service for any purpose or reason whatsoever.' Similarly, the transcript of the evidence in this case contains no proof that the picket line was anything but peaceful."

Another illustration is *Michigan Consolidated Gas Company* [13] where there was a three-hour work stoppage when 60 employees refused to cross a picket line and report for work. For this refusal, the company gave each of the 60 employees a warning notice. Arbitrator Robert G. McIntosh said:

"The Arbitrator is not unmindful of the inter-Union relationship of recognition of one another's picket lines and the concept of unity so that when one is in battle, another will not cross a picket line. On the other hand, however, the Unions enter into contracts and in those contracts they specifically agree that they will cross picket lines. At the plant where the question of crossing a picket line in the face of a contractual obligation appears it seems that the employee either takes the benefit of his contract and crosses, or takes the consequences of his act in violating the contract wherever it is easy to cross it, unless of course there is some real possibility of physical harm to him and not a mere hunch or guess or suspicion. The evidence in this case is clear that this was a peaceful picket line and there was no effort made to stop anyone who did cross or any claim that a person had a fear of harm to himself if he did cross it was certainly not demonstrated in the evidence. The Arbi-

[13] 54 LA 41 (1969).

trator, therefore, is constrained to hold that the grievances should not be sustained."

Whereas, in *Wisconsin Natural Gas Company,*[14] Arbitrator John F. Sembower acknowledged the arbitration precedents in this area, he found, however, that it would have endangered the lives and safety of the company employees to require them to cross another union's picket line because of the potential violence which existed. Therefore, he sustained the grievances of employees who had been disciplined for not crossing the line.

One of the latest cases in this field is *United Telephone Company of Ohio,*[15] which involved the suspension of a union president for failing to cross the picket line of another union and return to work and his failure to tell the other members of his union to do likewise. The arbitrator held very simply that where a no-strike, no-lockout provision was in force between the company and the union and where a stranger union was picketing the company's premises and no violence or threats of violence attended the picket line, the company's employees must cross that picket line or face severe disciplinary measures.

In *NLRB* v. *Allis-Chalmers Manufacturing Co.,*[16] the issue was whether a union which threatened and imposed fines and brought suit for their collection against members who crossed the union's picket line and went to work during an authorized strike against their employer committed an unfair labor practice. Under 8 (b) (1) (A), the Court ruled that it was not an unfair labor practice. The union's conduct fell within the scope of the proviso to Section 8 (b) (1) (A) which allowed the union to make its own rules respecting union membership. Under this proviso, the union could expel a member to enforce its own internal rules even though a particular rule limited the Section 7 rights of its members and even though expulsion to enforce it would be a clear and serious brand of "coercion" imposed in derogation of Section 7. The Court held, in effect, that this rule was not invalid and unenforceable on its face and was a proper exercise of the union's right to regulate the internal affairs of its membership.

Arbitrators have taken various positions on this issue. For example, in *Serrick Corporation,*[17] the arbitrator ruled that the

[14] 72-2 ARB 8415.
[15] 72-2 ARB 8521, S. L. Chalfie.
[16] 388 U.S. 175 [No. 216], 65 LRRM 2449 (1967).
[17] 32 LA 994 (1959), Pearce Davis.

discharge penalty was too severe in the case of union officers who failed to cross the picket line set up at the employer's plant by another union. Although the contract contained a no-strike clause and union officers have a duty to exercise aggressive leadership to prevent breach of contract terms, evidence indicated that union officers made a good-faith effort to enter the plant on the first day of the strike, but were barred by mass picketing and some violence. However, since the officers appeared to have made only token efforts to enter the plant on subsequent days when police officers were present to assure access to the plant, no award of back pay was made. In another case, *McKesson and Robbins,*[18] where the contract provided "that employer 'will not discharge or suspend an employee without just cause or shall give at least one warning of the complaint against such employee in writing to the union and employee before he is discharged or suspended,' discharge of an employee who refused to cross a picket line to pick up employer's merchandise was improper, since no advance written warning was given the employee."

Summary

1. If there is a clause in the agreement protecting the employee's right to cross a picket line, the problem is minimized.

2. If there is no such clause, but there is a no-strike, no-lockout clause, the employer does not offend the just-cause provision of the contract by considering the refusal of individuals to cross a picket line as a collective refusal to work or a "strike." But here again, it depends upon how the no-strike clause is worded. If the words refer to a strike or "concerted refusal to work," then arbitrators in the past have indicated that if an individual employee refuses to cross the picket line, he has not violated the no-strike clause. Technically, there is no such thing as a one-man strike.

Comment—

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I'm not sure that I agree with Carl Warns' evaluation of the evidence he talked about in terms of the frivolity on the picket line. I have seen some picket lines that seemed to be rather

[18] 37 LA 847 (1961), John W. McConnell.

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frivolous and could become rather severe and fierce in moments. I recall going to a plant up in north Georgia one time where there seemed to be a great deal of frivolity on the picket line, but I found out as I started in that it was a little more serious than I had anticipated. The next thing I knew I was being very firmly dragged out of the car, and I thought to myself that that might not be one of those frivolous picket lines.

Aside from the issue of discipline for refusal to cross picket lines, I for one feel that there is a substantial difference where it is shown that some risk for the safety of the individual is involved. I don't suppose that many companies would seriously contend that they could expect employees to run any kind of substantial risk to their lives or their person in the performance of their everyday jobs. I think that when you get into that area, you're talking about something that most of us would agree upon.

However, with respect to the general proposition of the employee's obligation to perform his work, assuming the picket line he has to cross is safe, I think it depends upon the contract. If you're talking about a contract that has a no-strike provision in it, it seems to me, as a representative of management clients, that the company strikes the bargain at the bargaining table and, in a large measure, the no-strike clause is the bargain that the company gets. The stability of its labor relations is the one thing that overrides any other considerations that the company gets out of the contract. After all, if it cannot depend upon its employees to perform their work so that the company can carry on its normal operations, then those advantages, if any, it receives when it sits down at the bargaining table are lost.

So it seems to me that if the union—and if you assume that the union can, under *Rockaway News* [1] or under the Labor Board, waive the Section 7 rights of an employee—can bargain to an agreement providing that there shall be no strikes, slowdowns, picketing, interference, or cessation of work, then that is a binding obligation on the union and the members it represents. The company is bound by it; it should live up to the agreement in every respect, and so should the union. Absent violence, it seems to me that the employer should have the right to discipline where there is an agreement that there shall be no strikes, no cessation

[1] *NLRB* v. *Rockaway News Supply Co.*, 345 U.S. 71, 31 LRRM 2432 (1953).

of work, or no interference with the company's normal operation.

There are many areas where the union could, I think, legitimately claim that the union and its members have a legitimate interest to protect. Certainly, the crossing of a picket line of a stranger union or a brother union is an act that most union members do not prefer to do. On the other hand, there are other things they don't prefer to do, and when they sit at the bargaining table, they have a right at that point to spell out in the agreement a picket line clause specifying that an employee shall not be subject to discipline or to discharge for refusal to cross a lawful primary picket line. But if they agree that there will be no strike or no interference with work, then it seems to me that this is the employer's bargain and he should be able to rely upon it.

I think that employees are bound by what the union bargains away. When you get into what I consider to be the principles enunciated by the Board in *Redwing* [2] and adopted by the district circuit, the question of business necessity—is it necessary in the operation and to continue the operations of the business to discharge the employee involved and to replace him?—is an area that troubles me considerably, as a management representative. I don't feel comfortable having the Labor Board looking over the shoulder, in terms of what is a necessary decision in the operation of a business, so that you get to the point where the Board really becomes the judge of what is necessary. I do think that that principle has more efficacy where there is no no-strike agreement. But if you have a no-strike clause in the contract, in my opinion that is binding, and to then second-guess and go beyond that in terms of business necessity is erroneous.

On the other hand, I can conceive of times when it would not be necessary—when it would really be penal in nature, beyond that which is required—to take the most strenuous form of discipline against one or perhaps more employees who might have failed to cross a picket line where there was not substantial injury to the company's business, where the company was not completely inconvenienced, and where the company could not show any business necessity so far as its normal operations were concerned.

It seems to me that the problem there is that most companies

[2] *Redwing Carriers, Inc.*, 137 NLRB 1545, 50 LRRM 1440 (1962).

get into this area when they thought, "What do we do? We've got these people, or this man, who has refused to cross the picket line. We were not terribly harmed. We did manage. We used some alternative means to get the job done." The question then arises, what do you do? Do you do anything? And the problem you face is if you don't do anything now, what are you going to be faced with next time when the circumstances may be significantly different, or just slightly different but really different after all? So I think that one of the problems you get into, even where you can't really say that you have been substantially interfered with, is: What's going to happen next time?

We all know what's going to happen next time if you get into an arbitration over the matter. The union, through its counsel, is going to point out, rightfully, that on another occasion other employees had refused to cross a picket line and had received no discipline. So you get back to the problem: Are you waiving substantial rights that the company really has to protect for the continuous and normal operation of the business? I do think that where there is not a no-strike clause in the agreement, you have a different proposition.

There can be other and somewhat related situations. I recently was involved in a case where union members claimed that they had a right not to answer their telephones for a call-in. This involved maintenance people. Although the mill was shut down and people were needed to come in and repair it and get it operating again, these people claimed that they had a right, in the privacy of their homes, to refuse to answer those calls at 1 and 2 o'clock in the morning for call-ins, because this was an invasion of their privacy. I could see no difference between the right to refuse to answer your phone and the right to refuse to come in once you did answer it. And yet here, again, this could be a legitimate union principle. Cut down on the work, overtime, spread the work, employment—the various things are numberless that the union could contend are legitimate objectives of the union. On the other hand, the company's business must go on also.

It seems to me that when an employee goes to work, he undertakes an obligation, as someone had said, to make himself available for employment on the job. But there are other areas, perhaps in jurisdictional matters, where the union's legitimate

interest might be claimed to override the interests of the employer in terms of carrying out the everyday work of the company.

In summary, insofar as this management representative is concerned, I had thought and I still believe *Rockaway News* to be good law. I think that the employer has a right to discipline an employee for failure or refusal to cross a picket line. When there is a contract commitment—an agreement that there shall be no interruption of work—I believe that the question of business necessity does not enter into the picture. You have arrived at a fair, square, collective bargaining agreement, open and across the table. That, it seems to me, is the rule by which you have to live.

Where there is no no-strike agreement, I think that you have to view each situation on balance—whether or not the employer was really retaliating, was vindictive, was attempting to suppress legitimate union objectives; whether or not there was a suppression of Section 7 rights that overrode any interest of the company. On the other hand, if there is genuine business necessity, I think that under Board law and under the Supreme Court you now find that those interests of the company have to be considered and balanced against the rights of the employees under Section 7 of the Act. This pretty well sets forth my views with respect to this particular issue.

Comment—

JEROME A. COOPER *

Having had some small part as a trial lawyer in breathing judicial life into the arbitral process in *Lincoln Mills,*[1] and having had likewise some part as a trial lawyer in securing the sanctity and income-producing quality of that process for arbitrators in two of the trilogy cases, I had believed that I had done my share, and that it would not be incumbent on me to display my ignorance at meetings such as this—but I'm game.

Since I'm third and last in the session and certain parts of the anatomy must be tiring on your part, I feel sort of like Adlai Stevenson, who once started a meeting, as I recall, in his learned and, I've always thought, beautiful way, saying, "I'm delighted to

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[1] *Textile Workers* v. *Lincoln Mills,* 353 U.S. 448, 40 LRRM 2113 (1957).

be here and to meet with you on this occasion. We start this little enterprise together; I hope we'll be able to finish it together."

I think it's a little difficult for a person who has always been on one side of the arbitration process to divorce himself from the arena and to look at the problem as a whole. It gives you kind of an ambivalent attitude toward things to preach neutrality and fairness, justice and propriety, and proper solutions to things when you know that your major role in life is to insist that your side is always right.

I'm reminded of a story Judge John Godbold, who is now on the Fifth Circuit Court of Appeals, gave us the other day when he spoke to the Bar Association of Alabama. He said it was the first time that he had had an opportunity to address his former fellow practitioners, and he had mixed emotions about it. He stopped and took a long breath and said, "You know what I mean by mixed emotions. That's best described as how you feel when your teenage daughter comes home from a date at 3 a.m. with a Gideon Bible under her arm." My wife had some qualms about that story, but I said, "If it's good enough for the Fifth Circuit Court of Appeals, it's good enough for me."

One other little footnote to the history of this great system of industrial jurisprudence that has evolved: I'm grateful to have had some little part in it.

You may be interested in a vignette with regard to *Lincoln Mills*. Someone once asked me, "How did you evolve the theory to bring that suit?" And I just said, "Well, it looked like a good thing to do at the time. There wasn't anything else to do." In the *American Manufacturing* [2] case, one of the trilogy in which we had some part, you would be interested to know that after we got through the Supreme Court of the United States rather successfully, we came back and got the weirdest damned arbitration award you ever read. It was so weird, in fact, that the grievant left in disgust, and I don't recall that we ever saw him again.

A bit more seriously to the point: I think you've been told that as far as we practitioners are concerned, the arbitrator, in a case involving an alleged failure to cross a picket line, normally, in our experience, is dealing with the kind of grist that goes through

[2] 363 U.S. 564, 46 LRRM 2414 (1960).

the arbitration mill; namely, the gray areas where the parties have not precisely expressed themselves.

There shouldn't be any arbitration if you have a clear-cut provision in the contract like Carl Warns proposed or like we have in some other contracts I'll refer to in a minute. If the parties are living up to the contract and the contract specifically and clearly says that the failure to cross the picket line shall not subject the employee to discipline or accountability, that ought to end it. Surprisingly enough, in the way the world is put together, it doesn't always end it. We have that kind of language, and management somehow finds a way to challenge its application.

On the other hand, if there's a clear-cut prohibition against respecting a picket line under any circumstances, the union should observe the prohibition, and there ought not to be any arbitration attempted to rewrite the language that the parties have put together. Here again, in this real world in which we live, the parties can't always put together just exactly what they want, and that gives the painful late hours of study to the arbitrator because the parties dump the whole thing in his lap, asking him really to fashion something that the parties together did not create.

I was trying to think of something that I might discuss with you, and I was also renewing my friendship with my old friend, Dr. Marshall, so I can't really recall, to be honest with you, whether or not Carl Warns dwelled on the interesting Fifth Circuit *Amstar* [3] case. That case, for those of you who are lawyers and those of you who are arbitrators and act like lawyers, is a very interesting one in which the union was enjoined in the district court, under the so-called *Boys Markets* [4] doctrine, from peacefully engaging in a work stoppage respecting the picket line of a stranger union. The Fifth Circuit opinion held, in substance, that *Boys Markets* did not apply there because the issue, which was the validity of the union's concerted action, was not a matter subject to the arbitration procedure in the contract, and that's one of the requisites for a so-called *Boys Markets* injunction. It's an interesting opinion.

I'd like to give you one little addendum to that opinion. Dr. Marshall was good enough to mention the two or three cases

[3] *Amstar Corp.* v. *Meat Cutters*, 468 F.2d 1372, 81 LRRM 2644 (5th Cir. 1972).
[4] 398 U.S. 235, 74 LRRM 2257 (1970).

where we were successful; he did not mention the thousands in which we have not been—and I might say parenthetically that his remark that Fred Elarbee and his associates do their job well is just too painfully true.

We had a case in which a *Boys Markets* injunction was issued against the mineworkers in Alabama, whom we are privileged to represent in that district. The concerted activity stopped when the injunction was issued—a temporary restraining order which was later extended. Sometime after that, a dispute arose with another group of people in another mine. They came to the particular mine that had been first struck and put up a picket line, and the employees at that mine again refused to work. So the unions—the local and the international—were cited for contempt of the first injunction order that had been issued, and they were found in contempt. On our motion to reconsider, the court held that, under *Amstar,* the second concerted activity of the union was not subject to injunction under the *Boys Markets* case and could not, therefore, be the basis for a finding of contempt. The contempt citation was dismissed.

All of these situations involved totally peaceful picketing; they were purely questions of law. And may I say that it's difficult, if not impossible, for me to justify violent expression of anybody's rights. I am not embarrassed to say that I simply don't believe in violence. I understand it. I understand why it is caused and why it occurs; I understand my responsibility as a lawyer with respect to those who willingly or unwillingly may be involved in it; and I unhesitatingly assume that responsibility. But that is not my endorsement of the essence of the activity.

As I started to mention a while ago, if the contract doesn't deal with a situation, if it merely has the customary generality providing management power to discipline and an employee's right to challenge discipline when something done to him is allegedly unjust, or improper, that is where the arbitrator's expertise and understanding really come into play. But I do not see how, absent language providing specifically for the consequences of refusal to cross the picket line, discipline for that refusal, absent misconduct, can in any way be declared just or fair or reasonable.

I admit that this is the derivative of a philosophy. Not only have I been privileged to represent labor unions, I also think they are valuable, important, social devices in our culture; and I

believe that picketing, likewise, is a valuable and desirable form of expression of desire or interest or intent in our culture. The problem, I think, gets tough when people inject into that consideration these imponderables that build up in you if you are on one side or the other of such a crucial issue.

That almost sounds like arbitrator language, but what I really mean is simply this: I am partisan. I am an advocate, and I think that has to be recognized in the judgments which I make—social judgments, yes; legal judgments, no. I think that I'm required, as a matter of professional competence or incompetence, to make legal judgments apart from my philosophy.

But when it comes to deciding, where the parties haven't dealt with something, whether a particular act is proper and is therefore not subject to punishment, I think philosophy—and feeling—has a great deal to do with it, and I think that's why it takes experience and understanding in arbitrators or judges to decide these things. When they make the decision, it is really a decision somewhat in a vacuum. It is a decision which they fashion, according to their best instincts, that will be fair under the circumstances.

On the nuts and bolts aspect of what a union is supposed to do to live up to a contract, something was said about the obligation of union leaders. I think that has to be looked at very carefully by arbitrators. There is a tendency now, when a work stoppage or a refusal to cross a picket line occurs, to hold an individual or individuals who are in positions of authority, so to speak, (particularly in the local union) to a high measure of accountability—higher than the rank and file. And I can understand how that argument can be made by someone who really doesn't understand the facts of life, particularly about unauthorized work stoppages.

If, for instance, you have a picket line which is being respected by a number of employees in a given organization, and the management of the enterprise affected by the picketing says, "That's wrong and you've got to do something about it," it calls on the union to act. But if you've had any experience in this area, you know that you do not walk out to a group of mad, disgruntled, or upset people who are picketing or respecting a picket line to announce, "You go back to work," and achieve anything.

The local union officers—the key men in the organization, the fellows who've got some tow with the membership—have got to get out there and mingle with the people who may be wrongfully leading the work stoppage, win their confidence, get their ear, and get an opportunity to convince them to get back on the job. And they can't do that by a snap of the fingers. To say that the very people who, by staying out maybe for a shift or two or a day or two, could help resolve the matter in a way that everybody wants it to be resolved, should not do that except at the risk of discipline, is to me a misguided emphasis on technicality, and it is a disregard of the real facts of life on a picket line.

Maybe Fred Elarbee will clear this up, but I believe that toward the end of his remarks he indicated that even if you have no contract provision, you have a necessity for making some sort of balancing of the equities, proprieties, or justice, or the economic needs, to determine whether or not a respecting of a particular picket line is improper or subject to discipline. I just have to reject that. I'm assuming that the language of the contract is not there, and I may have failed to hear what Fred said. But in the absence of contract language, I think you are telling us we're damned if we do and damned if we don't. If you put it in the contract, then clearly you are bound by the language. If you leave it out of the contract, you're still bound by it, and that's not exactly my idea of quid pro quo.

Also, you may remember—those of you who are interested in the First Amendment and constitutional cases related to the First Amendment—the great debate that has raged in the Supreme Court for the past three decades in which Mr. Justice Black was the proponent of the view that when the Constitution says, for instance, that Congress shall pass no law, it means no law. It doesn't mean some laws, or laws that you like or dislike, and you don't balance anything to find out whether or not a given law is prohibited or allowed.

I think that something of that philosophy is applicable here. We need to know what people's rights are, particularly in industrial relations, and the best way to know it is to write clear, simple contracts.

Finally, in closing, I want to admit that I know that writing a collective bargaining agreement is just like getting married.

There isn't any way in the world to provide for every contingency and every problem and every dispute that is going to arise between the parties. If you try to do that in a collective bargaining agreement, it would be even more massive than some of them already are today. So you must rely, it seems to me, on two things: one, the good faith of both parties—a good faith to try to apply the language of the contract—and then, when the problem can't be resolved, a fair third party—an arbitrator—to fill in the gaps. And it's in the interstices of the contract and the contractual relationship, really, that the arbitrator does his most important work.

The contract that I mentioned a while ago—and I'll just give you this as an example and then I'm through—was at a large plant where the Steelworkers Union represents the big, basic P&M unit. Pursuant to the "wisdom" expressed in the Taft-Hartley law (which was to solve problems), a large number of little craft units were carved out of the plant back in the late forties and early fifties, so that now nine tenths of the employees are covered by the basic steel contract and the other one tenth or less are covered by half a dozen craft contracts.

That led to all kinds of problems, particularly at the expiration of the contract if the unions tried to work together jointly. But at times one of the crafts might not have settled, and the steelworkers, being good union people, would not want to go back in because if they did, that would kill the craft's chances of consummating a contract.

So we worked out language that simply says that if the contracts of more than one union have common expiration dates and agreement is not reached at the same time, then a picket line by the union that has not reached its agreement may be respected without liability on the part of the union or the employee.

We don't have any difficulty applying that language. The only time we had any difficulty with it was several years ago when we had applied it and management really didn't like it. In a way, I understood because everybody had settled but one little union, and I thought that the one little union was being rather unreasonable at the time. But it had a right to do what it was doing, and the steelworkers had a right to do what they did, namely, not to cross the picket line.

The result was that when the thing was all settled, the company indirectly penalized a large number of steelworkers by requiring them to take physical exams, which they had never before taken after a strike, relocating them in jobs, and cancelling their insurance. So we had a whole series of some 21 arbitrations, not related to what was in dispute but to these peripheral matters that the management had brought up. We were fairly successful in those arbitrations, and the next time the contract came up for renegotiation, would you be surprised to hear that management suggested that we remove arbitration from the agreement?