



January 1955

Major Developments in Recent Decisions of the National Labor Relations Board

James R. Webster

Recommended Citation

James R. Webster, *Major Developments in Recent Decisions of the National Labor Relations Board*, 9 Sw L.J. 259 (1955)

<https://scholar.smu.edu/smulr/vol9/iss3/1>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Law Review by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

SYMPOSIUM ON LABOR LAW*

MAJOR DEVELOPMENTS IN RECENT DECISIONS OF THE NATIONAL LABOR RELATIONS BOARD†

James R. Webster‡

FOR the purposes of this article any decision that has been rendered during the past year is regarded as "recent," and those decisions which have given the law on a particular point a new cloak or complexion or which have opened up a new port-hole upon the sea of labor relations are regarded as "major."

The topics or points which will be discussed on which there have been some major and recent decisions of the Board are as follows:

- I. Pre-election statements, speeches and conduct of an employer or union.
- II. A union's choice between a representation proceeding and a refusal to bargain charge.
- III. Representation Petitions filed within the certification year.
- IV. New consequences of violence during strikes.

These, of course, are not all the major developments within the past year, but a discussion of too many different topics—too great a variety of subjects—might lead to confusion.

*The articles comprising this symposium are based upon addresses before the Fifth Annual Institute on Labor Law presented by the Southwestern Legal Foundation in cooperation with the S.M.U. School of Law at Dallas, Texas, on March 17 and 18, 1955.

†This article does not treat the areas covered independently by other articles in this symposium.

‡Attorney, National Labor Relations Board, Sixteenth Regional Office, Fort Worth, Texas.

I

PRE-ELECTION STATEMENTS, SPEECHES AND CONDUCT

We must keep in mind in dealing with this question the three different consequences of such conduct or statements. It can result in either (1) grounds for setting aside the election, or (2) grounds for an unfair labor practice charge, or (3) the conduct or statements can be neither of these and therefore be permissible.

In reviewing the law, or the evolution of the law, on such speeches and conduct, it is seen that for many years in the Board's history, any "colored" statement or any interrogation constituted an interference within the meaning of section 8 (a) (1) or rather section 8(1) of the Act. In 1947, the Taft-Hartley Act, or the Labor-Management Relations Act of 1947, was enacted; and in it was inserted paragraph 8(c) as a dead-end sign to the avenue the law was taking on statements and speeches. Section 8(c) provided that, "The expressing of any views, arguments, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit." It is very significant to notice that this section refers only to grounds for unfair labor practices and not to grounds for setting aside elections.¹ Then coming up to more recent times, in the *Peerless Plywood Company* case² and the *Livingston Shirt Company* case,³ both of which were decided in December, 1953, the Board clearly differentiated the consequences of pre-election speeches. In the *Livingston Shirt* case, the Board held that a non-coercive pre-election speech would not constitute an unfair labor practice, even though equal opportunity to address the employees on company time and property was denied the union—in the absence of a broad "no solicitation" rule. In the *Peerless Plywood* case, a representation case, the Board decided

¹ *General Shoe*, 77 N.L.R.B. 124 (1948); *Sparklett Drinking Water Corp.*, 107 N.L.R.B. 1462 (1954).

² 107 N.L.R.B. 427 (1953).

³ 107 N.L.R.B. 400 (1953).

that a pre-election speech which contained no coercive or promising language could constitute an interference with the election of the type warranting the setting aside of an election where delivered within 24 hours prior to the election. The Board stated in this case that, "Last minute speeches by either employer or unions delivered to massed assemblies of employees on company time have an unwholesome and unsettling effect and tend to interfere with that sober and thoughtful choice which a free election is designed to reflect." Also in this decision the Board stated that a non-coercive speech made prior to the 24-hour period before an election would not interfere with a free election.

With reference to interrogation of employees, the Board in October, 1953, announced in its decision in the *Walmac Company case*,⁴ originating in San Antonio, Texas, that an employer did not engage in interference (an unfair labor practice) by polling each of its six employees as to whether or not they desired union representation. Each employee was asked to choose one or the other alternative on a slip of paper as to whether he desired to represent himself or whether he desired to have the union represent him. In this case the Board found no other acts of coercion or threats or promises. The Board held that this act of polling did not constitute an unfair labor practice, and in so doing it reached a decision at variance with Board precedent, but not at variance with the tenor of decisions of some Circuit Courts of Appeals.⁵ Some other decisions issued from the fall of 1953 to July, 1954, carrying forward Chairman Farmer's statement to the Labor Law Section of the American Bar Association that the Board would be "going through a period of readjustment," are the *Blue Flash Express case*,⁶ and the *National Furniture Manufacturing Company case*.⁷

⁴ 106 N.L.R.B. 1355 (1953).

⁵ NLRB v. Ozark Dam Construction Co., 190 F. 2d 222 (8th Cir. 1951); NLRB v. Montgomery Ward & Co., 192 F. 2d 160 (2nd Cir. 1951); NLRB v. Atlas Life Insurance Co., 195 F. 2d 136 (10th Cir. 1952); NLRB v. Caroline Mills, Inc., 158 F. 2d 792 (5th Cir. 1947); NLRB v. Hinds & Dauch Paper Co., 171 F. 2d 240 (4th Cir. 1948); NLRB v. England Bros., Inc., 201 F. 2d 395 (1st Cir. 1953); NLRB v. Winer, Inc., 194 F. 2d 370 (7th Cir. 1952).

⁶ 109 N.L.R.B. No. 85 (1954).

⁷ 106 N.L.R.B. 1300 (1953).

In the *Blue Flash Express* case, the employer, upon receiving a request for recognition from a union, asked each of the employees whether they had signed the union authorization card. Although each employee answered in the negative, the Board found that there was no credible evidence of acts or statements of threats or promise. The Board held that interrogation was not, per se, an unfair labor practice. In reaching this decision, the Board pointed out that it was following the decision of the Court of Appeals for the Tenth Circuit in the *Atlas Life Insurance Company* case,⁸ a case originating in Tulsa, Oklahoma. In the *Blue Flash* case the Board stated that, "We are not holding in this decision that interrogation must be accompanied by unfair labor practices before it can violate the Act. We are merely holding that interrogation of employees by an employer as to such matters as their union membership or union activities, which, when viewed in the context in which the interrogation occurred, falls short of interference or coercion, is not unlawful."

The per se doctrine as to interrogations was expressed in the old Board case of *Standard-Coosa-Thatcher*,⁹ but subsequent to that decision the courts of six circuits condemned its rationale, as previously mentioned. In the *Blue Flash* case the Board announced the test to be as follows: "The test is whether, under all the circumstances, the interrogation reasonably tends to restrain or interfere with the employees in the exercise of rights guaranteed by the Act." It stated the time, place, the personnel involved, the information sought, the employer's conceded preference, must be considered. The fact as to whether or not the employees thought reprisals might be administered is not controlling—that is, the fact that the employees gave false answers when questioned, although relevant, is not controlling. The employees had no reason to believe that economic reprisal might be visited upon them by respondent.

Although this decision gave to employers more freedom in the interrogation of employees as to their union activities, the Board

⁸ NLRB v. Atlas Life Insurance Co., 195 F. 2d 136 (10th Cir. 1952).

⁹ 85 N.L.R.B. 1358 (1949).

issued a caution that employers should not consider it a license to engage in interrogation.

The *National Furniture Manufacturing Company* case is a case involving objections to an election predicated on the ground that the employer's attorney made a statement eleven days before the election, in the presence of a number of employees, that, "it would not make any difference whether the union won the election or not, the company would not recognize it." The attorney testified that he stated only that the unit was not a recognized and valid unit. Also in this case the employer mailed to its employees a series of letters, one of which stated that the employer would be forced to shut down his plant or move out of the city if he met the demands published by the union. After noting that two other companies in the area had moved out of town and another had shut down, the letter urged the employees to vote against the union and prevent a strike which the union was sure to get if they won the NLRB election. The Board pointed out that the statements were privileged under section 8(c), and further, that they did not constitute an interference with the election; that the statement of the attorney was merely the expression of a legal point of view.

These decisions rendered in October, 1953, and on July 30, 1954, represent the limit to which the door to interrogations has been opened. A few cases that have followed these "door opening" cases have tested the size of the opening in the door. Many unions were frightened by the impact they thought the *Blue Flash Express* decision would have, and many employers did not take seriously the caution announced by the Board in that decision.

Most significant among these more recent cases are the *Sears, Roebuck & Co. case*,¹⁰ decided in August, 1954; *Richards & Associates*,¹¹ decided in September, 1954; *Gilbert, Inc.*,¹² decided in December, 1954; *Graber Manufacturing Co.*,¹³ decided in January, 1955; and *Rein Co.*,¹⁴ decided in February, 1955.

¹⁰ 109 N.L.R.B. No. 102 (1954).

¹¹ 110 N.L.R.B. No. 23 (1954).

¹² 110 N.L.R.B. No. 231 (1954).

¹³ 111 N.L.R.B. No. 20 (1955).

¹⁴ 111 N.L.R.B. No. 89 (1955).

In the *Sears, Roebuck & Company* case the Board held interrogation to be a violation of section 8 (a) (1). In this case there was discrimination, and also statements of threats. One employee was told that if he continued in his "actions," meaning his union activities, he "more or less" would lose his job, and should think of his family and his age before continuing. Another salesman was told that the employer would find anything he could to ruin his record and that he would be unable to get a position elsewhere. Another employee was told that he could not arrange a vacation for three weeks as he had done the prior year.

In the case of *Richards & Associates*, the Board held that the employer violated the Act by making a pre-election speech which contained an "implied" and "veiled" threat of reprisal against employees who joined the union. In this case the employer polled all employees as to their union sentiments by distributing ballots among them; the ballots were of different color for the different departments. The employees purportedly voted in secret. The Board also found discriminatory discharge of five active union adherents.

The trial examiner found, and the Board adopted these findings, that "Respondent's speech was unlawfully coercive in that it contained an implied threat that the Respondent will close his business before he will deal with the union, and in that it contained a veiled threat of reprisal against employees who join the union."

The next case giving some insight as to the extent to which an employer may legally interrogate is that of *Gilbert, Inc.* This decision is noteworthy in that it shows how tightly the Board is drawing its caution announced in the *Blue Flash Express* case. In this case the Board found no violations of the Act other than the interferences constituting violation of section 8 (a) (1). There were allegations of refusals to bargain and allegations of discrimination, both of which the Board found to be without merit. However, the Board did find the employer violated the Act by repeatedly questioning and polling the employees about their union membership and activities; and stated that although the employer may have acted in good faith the successive questioning

and polling necessarily appeared coercive to employees. In the same case, the Board found that the employer did not violate section 8 (a) (1) of the Act by statements made in a speech announcing application to the Wage Stabilization Board for a wage increase and announcing that under the union the employees would be permitted to work only 40 hours a week instead of the existing 45 hours. The Board found that the announcement of a planned wage increase was not designed to defeat union organization and the discussion of a 40-hour week was no more than a "prediction." This case was decided in December, 1954.

Another recent decision along the same vein is the *Graber Manufacturing Company* case decided in January, 1955. In this case the Board found only acts of interrogation and interference. There were no other unfair labor practices. The Board found that the employer engaged in interference by his interrogations, which were not limited to ascertaining the union's majority status, but which pertained generally to the employees' union activities and union membership. The Board found that systematic questioning of many employees by employer's top officials, accompanied by other statements of interference, clearly tended to restrain employees in the exercise of their self-organizational rights. The other statement of interference was in the nature of a supervisor's remarks to an employee that he would be sorry if the union came to the plant. In view of the extensive interrogation of employees this statement was not purged by the employer's later general statement to employees that employees would maintain their jobs whatever happened. Another act of interference was the employer's request to employees that they remove their union buttons. The Board found that the employer did not engage in an interference by granting a general wage increase two weeks before the election, despite the fact that no such increase had ever before been granted, because the increase was part of a new personnel policy resulting from a study instituted prior to the organizational campaign, and because the union did not protest the granting at the time, and because the union did not object to the election or file charges based on the raise.

Another case is the *Rein Company* case, decided in February,

1955. In this case, which was a representation case and an objection to an election case, the Board found that the employer interfered with the election by stating in a pre-election letter to employees that it had the legal right to discontinue existing benefits after the election, that it would start negotiations from scratch if the petitioning union won the election, and that it did not feel bound to offer any pre-existing benefits in any contracts which the union might thereafter negotiate. By such statements the employer threatened to discontinue existing employee benefits, prior to bargaining, if petitioner were certified as bargaining representative. The Board set the election aside. As this was not an unfair labor practice case, we cannot be certain as to whether or not the Board would have found this conduct to have constituted an 8 (a) (1) violation, although we get a hint of the Board's thinking along that line from the Board's use of the word "threaten."

What conclusions can be drawn from the trend of the recent decisions? The Board has made it clear that when it opened the door to interrogation in its *Walmac* decision and in its *Blue Flash* decision, the door was opened only wide enough to permit the passage of non-coercive interrogation. It was not opened wide enough to pass, and still blocks out, interrogation committed in a setting of threats or promises, or containing implied or veiled threats. Even in this conclusion we are still using words which are elastic, but we have in artillery terms "bracketed" our target. Let us look at three more "bracketing" decisions.

With reference to the 24-hour speech rule, where the employer delivers a speech within the 24 hours, on company time and property and where the speech is informal and non-partisan in character, this would not constitute grounds for setting aside the election. This was the decision of the Board in the *National Petrochemicals Corporation* case¹⁵ decided in March, 1954.

In the *Texas City Chemical Company* case,¹⁶ decided in July, 1954, the question arose as to whether or not a speech delivered within the 24 hours was on company time. It was delivered in the

¹⁵ 107 N.L.R.B. 1610 (1954).

¹⁶ 109 N.L.R.B. No. 13 (1954).

evening, and the employees on the evening shift were released from their duty and were paid for their time while attending this dinner given by the employer. The Board held that this speech was on company time since the evening shift employees were paid to attend the speech.

In the *Underwood Corporation* case,¹⁷ decided in June, 1954, the intervening union made a speech during the employees' lunch hour from outside the company property over loud speakers beamed to the employees. This was made within the 24 hours of the election, but the Board held that it did not violate the *Peerless Plywood* doctrine in that it was made on employee time and attendance was voluntary.

By a decision in September, 1954, the Board announced a new rule with reference to the use of sample ballots in campaigning prior to an election. Prior thereto, either the employer or the union had been permitted to distribute sample ballots with markings as to how they wished the employees to mark their ballots at the election. But in this decision of the Board in the *Allied Electric Products* case,¹⁸ the Board stated that "in the future it will not permit the reproduction of any document purporting to be a copy of the Board's official ballot, other than one completely unaltered in form and content and clearly marked 'sample' on its face." The Board's objection to the altering of ballots for distribution in campaigning was based on the fact that they "tend to suggest that the material appearing thereon bears this agency's approval." This rule has been followed by the Board in several cases thereafter, and perhaps the most recent is that of the *Memphis Furniture Manufacturing Company* case.¹⁹ In this case the union which circulated the marked sample ballot attempted to prove that it did in no way mislead the employees and that they clearly understood it to be union propaganda. The Board decided that, nevertheless, the rule announced in the *Allied Electric Products* case would be followed and the election was set aside.

¹⁷ 108 N.L.R.B. No. 199 (1954).

¹⁸ 109 N.L.R.B. No. 177 (1954).

¹⁹ 111 N.L.R.B. No. 31 (1955).

Also, in the *Wilmington Castings Company* case,²⁰ where both the union and the company circulated separately altered ballots, the Board set the election aside, holding that the wrongful conduct of one party did not neutralize the other party's interference with the employee's freedom of choice.

There has been one recent change in the Board's waiver policy; that is, the policy pertaining to the waiving of certain interferences as grounds for objections to the results of an election. In the *Great Atlantic and Pacific Tea Company* case²¹ the Board issued the rule that all conduct which occurred prior to the issuance of a notice of representation hearing or occurring prior to the execution of a consent election agreement would be deemed waived by either party as a basis for objecting to the results of the election. In September, 1954, in the *F. W. Woolworth Company* case,²² the Board saw fit to amend this doctrine by changing the date, or cut-off date, for the waiver from the date of issuance of notice of hearing to the date of the issuance of the Board's Decision and Direction of Election, or issuance of an amended Decision and Direction of Election. This change was made because of the lapse of time that occasionally occurs between Notice of Hearing and the Board's Decision and Direction of Election. The *Woolworth Company* case announced the rule that all matter occurring prior to a Decision and Direction of Election would be deemed waived by the parties. All conduct that might form the basis for an objection to the election that occurs after that date or after the execution of the consent election agreement could be used as the basis for an objection to the election.

It is immaterial that the objecting party had no actual knowledge of the acts of interference which preceded the cut-off date; nevertheless, he is deemed to have waived any acts of interference as basis for an objection to the election that occurred prior to such cut-off date.²³

²⁰ 110 N.L.R.B. No. 266 (1954).

²¹ 101 N.L.R.B. 1118 (1952).

²² 109 N.L.R.B. No. 23 (1954).

²³ Lone Star Gas Co., 105 N.L.R.B. 725 (1953).

II

A UNION'S CHOICE BETWEEN A REPRESENTATION PROCEEDING AND
A REFUSAL TO BARGAIN CHARGE

Another important development with reference to the employment of representation procedures is that announced by the Board in December of 1954, in the *Aiello Dairy Farm* case.²⁴ In this case the union requested recognition of the employer and offered to submit cards for inspection under certain conditions; that is, that some impartial person be selected to check the cards against the payroll, or on the condition that the employer agree in writing to sign a contract in the event the cards showed a majority for the union. The union had previously filed a representation petition, and the employer, rather than check the cards, suggested that they let the employees decide at a Labor Board election. A consent election agreement was signed. The union filed objections to the election following its loss of the election, and the election was set aside based on unfair labor practices committed between the execution of the consent election agreement and the date of the election. After the election was set aside, the union withdrew its petition and filed unfair labor practice charges, including a refusal to bargain charge. The Board stated as follows:

Had the union earlier filed its charge of refusal to bargain, the Board under its long-standing practice would not have conducted the representation election until the charges were disposed of. Nor would the Board have accepted a waiver of such a charge as sufficient reason for permitting the election to proceed. A reason for this is that although either a representation proceeding or an unfair labor practice proceeding alone might be, in the light of the particular circumstances, the procedure appropriate for establishment of the union's status, both cannot at once be appropriate because they are based on fundamentally different premises. Thus, for the Board to proceed upon a representation petition requires the Board to find that a question of representation exists, to be resolved by an election. On the other hand, a charge of unlawful refusal to bargain under section 8 (a) (5) of the Act must allege in effect that there is no question of representation and that

²⁴ 110 N.L.R.B. No. 205 (1954).

the union involved is in fact the exclusive representative, with whom the employer is legally required to bargain. The basis of the two proceedings are thus mutually inconsistent.

The Board in this decision overrules its holding in the *M. H. Davidson Company* case.²⁵ In the *Davidson* case the Board found that the unfair labor practices which preceded the election made the election a nullity, and further added the grounds that in fact there was no real question of representation existing prior to or at the time of the representation election, since the union did represent a majority of the employees in an appropriate unit.

Thus, it is seen that the union must choose between proceeding with a representation petition or proceeding with an unfair labor practice charge. Does this mean that a union has the choice of proceeding with either a representation petition or with an 8 (a) (5) charge upon being refused recognition? There are several cases of the Board which indicate that an employer may insist upon a representation election to prove the union's majority by a secret ballot.

In the last few months of 1953, the Board handed down three important decisions with reference to a union's use of authorization cards to prove its majority. The first of these three was the previously mentioned *Walmac Company* case, of San Antonio, Texas, in which the Board found that an employer may normally refuse to check the authorization cards; that is, he may refuse to accept such evidence of proof of majority and insist upon an election as the method of proving majority. There was no evidence that the company had in any way misconducted itself or engaged in any unfair labor practice other than certain interrogations which the Board found to be isolated and therefore of not sufficient severity to warrant a Board Order. The Board stated, "We deem it unnecessary to decide whether the union in fact represented a majority of the employees at any time during the event here reviewed." In the same vein are the Board's decisions in the *Page Boy Company* case,²⁶ and the *Flint River Mills*.²⁷ And following

²⁵ 94 N.L.R.B. 142 (1951).

²⁶ 107 N.L.R.B. 126 (1953).

²⁷ 107 N.L.R.B. 472 (1953).

these decisions is the more recent *Blue Flash Express* case decided in July, 1954, in which it was found that the employer did not violate the Act by refusing to bargain with the union which did represent a majority of the employees in an appropriate bargaining unit. The evidence did not establish that, in refusing to extend recognition to the union, the employer was motivated by any consideration other than its asserted good faith doubt of the union's majority status.

These cases indicate that an employer may at any time insist upon a Board ordered election, but there is one very important limitation of this right, which has been pointed out by one very recent decision of the Board in the *Pyne Molding Corporation* case,²⁸ decided in December, 1954. In this case it was pointed out that if an employer entertains a bad faith doubt of majority, which bad faith is manifested by his engaging in unfair labor practices in an effort to defeat that majority, then his refusal to bargain with the union or to recognize the union constitutes a violation of section 8 (a) (5), although there has been no representation election. Thus, it may be concluded that an employer may not insist upon a Board ordered election where he does so for the purpose of utilizing that additional time to defeat the union's majority or to interfere with the rights of the employees to be so represented. The distinction between a good faith doubt of a union's majority and a bad faith doubt is also pointed up by the Ninth Circuit Court of Appeals in the *Trimfit of California Company* case,²⁹ decided in February, 1954.

Here we find the same caution warning to employers following the opening of a new door to them, that door being the right to insist upon a Board ordered election, and the caution being that they may not use this procedure as a means of gaining time to commit unfair labor practices. Their insistence upon a Board ordered election must be in good faith as opposed to bad faith. Thus again the Board is not giving an employer a license or a "blank check" to elections. The door is only open to those who

²⁸ 110 N.L.R.B. No. 240 (1954).

²⁹ 211 F. 2d 206 (9th Cir. 1954).

manifest good faith, or rather a more proper way of expressing it is that the door is open to all except those who manifest bad faith.

III

REPRESENTATION PETITIONS FILED WITHIN THE CERTIFICATION YEAR

Another major change in the law has to do with representation petitions filed within the certification year. The case announcing this change is the *Ludlow Typograph Company* case.³⁰ This case permits the filing of the representation petition within the certification year in certain instances, and thereby overrules the Board's prior doctrine that all petitions filed within the 12-month period following certification would be dismissed.³¹ The Board, with Murdock and Peterson dissenting, decided that a petition filed timely with reference to the contract expiration date would not be dismissed although filed within the certification year. It was the reasoning of the Board in this case that this rule would protect the interest of the employees far more than the rule in the *Quaker Maid* case, which "unduly prolongs the protection afforded an employer and an incumbent union by the certification, with consequent damage to the employees' freedom of choice."

IV

NEW CONSEQUENCES OF VIOLENCE DURING STRIKES

Another important recent contribution to labor law has to do with strike violence situations. In December, 1954, the Board decided two cases on this point in the *B.V.D. Company* case,³² and the *Longview Furniture Company* case.³³

The Board has continuously recognized a certain amount of

³⁰ 108 N.L.R.B. No. 209 (1954).

³¹ *Centr-O-Cast*, 100 N.L.R.B. 1507 (1952); *Quaker Maid Co.*, 71 N.L.R.B. 915 (1946).

³² 110 N.L.R.B. No. 206 (1954).

³³ 110 N.L.R.B. No. 246 (1954).

animal exuberance in strikers, and has made allowance for, or condoned, certain acts performed as results thereof. Also, it is a Board rule that an employee who engages in acts of violence on the picket line shall not be entitled to the benefits of a remedial order, that is back pay and reinstatement. Of course, these two opposing points of law must meet and clash in certain places and on certain occasions. Name calling has generally been condoned as animal exuberance; also minor misconduct such as that of tripping and shoving a non-striker at the picket line has also been condoned as animal exuberance.³⁴ And, of course, occasionally there are acts of violence in connection with a strike which cannot be attributed to any of the striking employees. It is against such acts of violence and in such situations that two recent decisions have dealt. In the *B.V.D. Company* case there were some rather serious and aggravated acts of violence including dynamiting, cutting of telephone wires, firing of bullets through windows, and threats of physical violence to non-strikers. Nails were thrown on company roadways; the car of respondent's vice-president was forced into a ditch; and eggs were thrown on non-striking employees. Of all the violence, only two employees could be identified as engaging in any of the acts, and that was in the egg-throwing incident. The trial examiner considered the egg-throwing by these two employees, when considered in the context of the entire course of violence, to have been trivial, and he ordered reinstatement for all employees on the grounds that this instance was trivial and the other instances of violence could not be attributed to any of the striking employees. Also, the trial examiner said the evidence failed to disclose a conspiracy on the part of the striking employees to commit violence. The violence was apparently committed by strike sympathizers. The Board found that the striking employees by taking no steps to disavow or repudiate this misconduct are thereby deemed to have approved and ratified the violence. The Board stated as follows:

Whether or not the strikers expressly authorized such conduct, it remains true that they invited and accepted the benefits of it and took no steps to discourage or repudiate it. The fair inference is that at least

³⁴ *The Jackson Press, Inc.*, 96 N.L.R.B. 897 (1951); *Intertown Corp.*, 90 N.L.R.B. 1145 (1950).

those strikers who continued to picket during the violent strike welcomed, approved and ratified such conduct. We do not believe that in these circumstances it would effectuate the policies of the Act to order reinstatement and back pay to such strikers. . . . We do not hold, as stated in the dissent, that strikers who are themselves blameless are responsible for the lawlessness of strangers. But we do say that strikers have no right to protection when they, at the very least, welcomed the aid of criminal elements who took over their strike and desecrated it with violence and terrorism. We are forced to conclude that those strikers who continued to picket not only approved and ratified the violence, but actually invited it. . . . We do not suggest, as the dissent states, that the strikers could have purged themselves only by abandoning their picketing. There were other avenues open to them by which they could have disavowed the misconduct.

The Board did order reinstatement, however, to certain strikers whose support of the strike was only passive, that is, they remained away from work and did not picket or otherwise lend affirmative aid to the strike. The Board did not regard such discriminatees as having approved or ratified the strike violence.

The *Longview Furniture Company* case involved acts of name-calling as distinguished from acts of overt violence. In 1952 the Board found that the employer had violated section 8 (a) (1) and (3) of the Act, and had ordered him to reinstate with back pay certain strikers. Enforcement was sought from the Court of Appeals for the Fourth Circuit Court, the employer contested the validity of the order only insofar as it required reinstatement and back pay of certain strikers who had engaged in name-calling and certain other strikers who were present when another striker assaulted a non-striking employee. The Court held that the four strikers who were present when the assault upon the non-striking employee had occurred had cooperated with that person who committed the assault and thereby forfeited any right they had to reinstatement. The Court remanded the case to the Board to determine which of the employees had banded together in hurling profane, obscene and insulting epithets at non-striking employees and therefore should be denied reinstatement. The Board recognized that in the remand the Court was announcing a new principle, which was that strikers who have banded together or com-

bined with others in hurling a barrage of profane, obscene and insulting epithets at non-strikers in an effort to prevent them from working are not entitled to reinstatement. The Board accepted the remand and did not seek certiorari, but it stated that, "Having accepted the remand, we shall of course, apply the principle laid down by the Court in its decision as a rule of law for this case only." The Board in applying the test found that six employees had acted in concert in hurling a continuous and repetitious barrage of profane and insulting jibes at the non-strikers and thereby combined or banded together in an effort publicly to so degrade and humiliate the non-strikers as to prevent them from going to work. The Board also found that the three other employees engaged in only isolated instances of name-calling and did not join in the repetitive insults of the other six strikers. The Board stated, "These isolated incidents, falling in the area of individual 'animal exuberance,' afford insufficient basis for denial of reinstatement to the three employees."