

NATIONAL ASSOCIATION OF MANUFACTURERS  
OF THE UNITED STATES

(C O P Y)

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RE-EMPLOYMENT OF STRIKERS

Special Memorandum by  
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The question of the legal obligation of employers to reemploy strikers is, of course, extremely important in relation to the cotton textile strike which is now being brought to an end. What I have to say is, however, equally applicable in other industries under present industrial conditions and in the present state of the law.

The President of the United States has urged employers in the cotton textile industry to take back strikers "without discrimination". The President does not define or qualify this term. Its probable interpretation in case of later controversy therefore becomes important. We can all remember Section 7 (a), the "plain meaning" of which it was said nobody could alter; the meaning is still a matter of controversy. It seems especially important, therefore, that employers agreeing to take back strikers "without discrimination" should have a clear conception of what the term means to them when agreed upon.

The important point to be remembered is that such obligation as any employer has to reemploy a striker arises, not from the law, but from the agreement of the individual employer, made either directly or through such agency as he may have authorized to bind him.

The foregoing proposition is as true today as it was before enactment of Section Seven of the Recovery Act. Nothing in Section 7 places a legal obligation on any employer to reemploy a striker, even though the employer has agreed to abide by the Section and is so doing. Section 7 speaks in terms of the rights of employees, not of persons who have voluntarily severed the employment relationship. The only thing in Section 7 which has any bearing whatever is the provision which forbids the employer to make it a condition of employment that an employee or an applicant for employment shall not hold union membership. This is as applicable in the matter of reemployment as of initial employment.

We know that, irrespective of strict legal obligations, employers in the cotton textile industry are sincerely desirous of carrying out the fair intendment of the President's request. We must, therefore, endeavor to place upon the phrase used a construction which will not only be in the public interest but which can be defended before the bar of public opinion.

Does the agreement to reemploy strikers without discrimination mean that the employer is obligated to reemploy every person who was in his employ immediately prior to the strike, irrespective of the present needs of the business, irrespective of whether a portion of the strikers have been replaced, and irrespective of whether particular strikers have resorted to acts of violence? Or does it mean that the employer may lay down reasonable tests, essential to his own protection, the protection of loyal employees, and development of future harmonious employment relations in his plant? Any other interpretation than the latter would clearly be contrary to public policy, conducive to future discord, and violative of the rights of innocent persons who have been employed in the meantime or who have stayed at their tasks while others quit them. It would be unfair to President Roosevelt to interpret the phrase as contemplating such a result.

In the light of the foregoing observations, I am of opinion that unless and until the phrase is further clarified, an employer is fully justified in putting the following construction upon it:

(A) The employer who agrees to take back strikers without discrimination may not refuse to reemploy an applicant merely because

- (1) the applicant belongs to a union;
- (2) the applicant has been a striker; or
- (3) the applicant has engaged in peaceful and lawful union activities, such as lawful picketing or peaceful and proper attempts to persuade others either to join the union or to withdraw from employment, or both.

(B) On the other hand, no employer is obligated to take back more men than the present needs of the business justify. It can not be said that all persons voluntarily relinquishing their employment retain an equity in it which automatically entitle them to reinstatement when a strike is ended. The employer is therefore as free to limit the number of men reemployed, to the needs of his business, as he would have been to reduce the number of employees prior to the strike in order to adjust his operations to his market.

Nor is there any obligation to reemploy those strikers who have

- (1) struck in violation of a contract;
- (2) engaged in acts of violence;
- (3) engaged in acts which, while falling short of actual violence, amount to coercion, intimidation or unlawful restraint against those who did not wish either to join the union or to participate in the strike;
- (4) engaged in deception of others, causing them to withdraw from or remain out of employment, by misrepresenting the Government's relief policy, and falsely representing that the Government would provide relief funds to all strikers without inquiring into their necessities;

- (5) in connection with the strike, violated any local law or ordinance, or any injunction or restraining order duly issued by any court of competent jurisdiction; or
- (6) In connection with the strike, committed any acts which, had they been committed in the regular course of employment, would have been just grounds for discharge.

(C) Finally, and this is one of the most fundamental of all propositions, there is no obligation to reemploy any man who has voluntarily severed his employment relation if to reemploy him necessitates the discharge of a person who has been employed to take his place. Whatever may be the equity of the striker, the equity of the other is greater and clearer. This was never more obvious than in a time of national emergency due to widespread unemployment. As Mr. Justice Brandeis has so well pointed out, there is no such thing as an absolute right to strike. This right, like all others, is a qualified one, and where people voluntarily sever their employment relationships, they cannot well be heard to complain if others supplant them.

I have discussed this whole matter at some length, not only because of its immediate application in the cotton textile industry, but because the phrase, "without discrimination", has been used many times in recent months by the National and regional labor boards, and has been incorporated in many agreements negotiated under their auspices. It seems, therefore, that a complete discussion is not only warranted, but is essential in order that employers generally may be able to make it clear when entering into such undertakings, that there are definite limitations implied by them in the use of the term.