

Although it may be said that one who either misrepresents or mistakenly gives the wrong age has no reasonable ground for relying upon the effect of the incontestability clause, third party beneficiaries and creditors may have justifiably relied on the face value of the policy, and this reliance should be taken into consideration.

To hold that an age adjustment falls within the scope of the statutory incontestability clause would tend to increase the security function of insurance.¹⁵ The age of an applicant is a fact which can be established by investigation, just as any other fact, and more easily so by an insurance company, with its staff of trained investigators, its experience in such matters, and the resources at its command. As a matter of social policy, the true age of the insured ought to be ascertained as early as is conveniently possible, in fairness to both the insurer and the insured. To make certain that the statutory incontestability clause would have such an effect, it is submitted that the legislature might specifically indicate the extension of the incontestability clause, and the exceptions thereto.

Labor Law—Validity of NLRB Instatement Orders—[Federal].—Two workers who had applied at the respondent's plant for employment were refused jobs because of their activities in a labor union. The National Labor Relations Board ordered the respondent to hire the workers with back pay from the date of the refusal to hire.¹ On a petition to the Circuit Court of Appeals for the First Circuit to secure the enforcement of the board's order, *held*, that the order was a valid exercise of the authority conferred upon the board by the National Labor Relations Act.² Order affirmed. *NLRB v. Waumbec Mills, Inc.*³

Previous to this decision the Circuit Court of Appeals for the Second Circuit in two cases⁴ held that under Section 8(3)⁵ of the act a refusal to hire because of union activities is not an unfair labor practice, and that under Section 10(c)⁶ the court would lack

¹⁵ "The value of a clause declaring a policy incontestable lies to no slight degree in the definiteness of the protection accorded to the holder. The good that it promises is in part a state of mind. . . . Alike for insured and for his beneficiaries, there is to be the peace of mind that is born of definiteness and certainty." Cardozo, C. J., in *Killian v. Metropolitan Life Ins. Co.*, 251 N.Y. 44, 49, 166 N.E. 798, 800 (1929).

¹ *Waumbec Mills, Inc.*, 15 N.L.R.B. 37 (1939). The board had earlier ruled that discriminatory refusal to hire was an unfair labor practice. *Montgomery Ward & Co.*, 4 N.L.R.B. 1151 (1938); *Algonquin Printing Co.*, 1 N.L.R.B. 264 (1936); *NLRB Ann. Rep.* 73 (1939).

² 49 Stat. 449 (1935), 29 U.S.C.A. § 151 et seq. (Supp. 1939).

³ 114 F. (2d) 226 (C.C.A. 1st 1940).

⁴ *NLRB v. Nat'l Casket Co.*, 107 F. (2d) 992 (C.C.A. 2d 1939); *Phelps Dodge Corp. v. NLRB*, 113 F. (2d) 202 (C.C.A. 2d 1940).

⁵ "It shall be an unfair labor practice for an employer— . . . (3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . ." with a proviso for a closed shop agreement. 49 Stat. 452 (1935), 29 U.S.C.A. § 158 (Supp. 1939).

⁶ "If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board . . . shall issue . . . an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act." 49 Stat. 453 (1935), 29 U.S.C.A. § 160 (Supp. 1939).

power to order reinstatement⁷ of workers unfairly refused employment. But in the light of the legislative history of the act it would appear that these decisions were not justified and that the present decision is in accordance with the legislative intent.⁸ The Senate Committee report recommending passage and explaining the act states that it assures against "loss of the opportunity for work" because of union activity.⁹ Since a cease and desist order would be ineffective to remedy the injury to those discriminated against, the act must have contemplated use of reinstatement orders.

Furthermore, the interpretation of Section 8(3) to include discriminatory refusal to hire as an unfair labor practice which justifies an order of reinstatement with back pay under Section 10(c) is necessary to effectuate the policy of the act. The policy is to protect labor organizations through preventing discrimination by employers against union members. To protect only union workers who are already in the service of the employer is not sufficient to attain this end. Where no union organization exists in the plant the employer may effectively prevent the unionization by refusing to hire union sympathizers. Where a union exists in the plant an employer's discrimination against union men will in the long run result in destruction of the union because normal labor turnover with no new hiring of union men will result in a continual decrease of union employees. Moreover, employees would hesitate even to join labor organizations for fear of being seriously handicapped in seeking future employment.

The Supreme Court has not as yet determined the constitutionality under the Fifth Amendment of an interpretation of the National Labor Relations Act which will permit issuance of reinstatement orders; but an interpretation of the act which permits issuance of reinstatement orders has been declared constitutional,¹⁰ and there would appear to be no greater denial of due process or equal protection in the case of reinstatement orders.¹¹ Both types of orders may result in dismissal of non-union employees who would not have been employed but for the employer's discrimination against union men. Both types of orders result in forcing employers to employ men whom they would not otherwise employ. While the reinstatement order requires employment of a worker who, as shown by his previous employment, meets the employer's approval except for his organizational affiliations, the reinstatement order has no other effect since a successful complainant must prove that except for his union membership he would have been hired.

⁷ "Reinstatement" is used to designate an order directing an employer to place the complainant in the job he would have received but for the discrimination.

⁸ Along with § 8(3) (the language of which is quoted in note 5 supra), the committee reports on the act sustain the board's ruling that refusal to employ because of previous union activities is an unfair labor practice. H.R. Rep. 1147, 74th Cong. 1st Sess. (1935), at 19; S. Rep. 573; 74th Cong. 1st Sess. (1935), at 11. Furthermore, there is nothing to indicate that the board may not order the hiring of applicants for jobs as part of its power to order "such affirmative action as will effectuate the policies of this Act." H.R. Rep. 1147, 74th Cong. 1st Sess. (1935), at 23-24.

⁹ S. Rep. 573, 74th Cong. 1st Sess. (1935), at 11.

¹⁰ *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

¹¹ The circuit court in the instant case emphasized that what the Supreme Court in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), termed "the normal right of the employer to select its employees or to discharge them" is not interfered with by the reinstatement order. 114 F. (2d) 226, 236 (C.C.A. 1st 1940).

Instatement orders, however, are not proper under all circumstances and in certain situations a congressional grant of power to issue them may not be sustained under the Fifth Amendment. Where an employee, as in the principal case, has actually applied for a job, and where there is substantial evidence to support a finding that he was refused work solely because of his union affiliations,¹² the instatement order should be upheld. But in a recent decision¹³ the NLRB ordered the Nevada Consolidated Copper Corp. to hire four former employees who had not even applied for re-employment because they had heard that the employer was not hiring men who were known to belong to a union. An instatement order should perhaps not have issued in this situation.¹⁴ While an application for a job may seem to be only a formality which causes undue hardship when the complainant is actually blacklisted by the employer, the formality seems necessary to protect employers from groundless claims. To allow any union employee to be instated with back pay upon a showing that he was deterred from applying for a job because he had heard that the employer was discriminating against union men would open the door to frauds. Union workers who had no intention of seeking employment at the time the plant was hiring would be enabled to throw non-union men out of work and penalize the employer by obtaining "back pay." A union man could easily secure other members of the union to testify that he had intended to apply for the job but that he had been deterred by the employer's policy of discrimination—a story which the employer could not easily discredit. However, should the instatement order not be accompanied by an order for "back pay" the hardship on the employer would be to some extent diminished.

An application for work perhaps should not be a prerequisite to an instatement order in those situations where the employer is adequately protected against fraud by other means. Thus, if a plant periodically shuts down and the employer's hiring policy is to call back certain categories of workers, a man in one of these categories may be discriminated against by not being called back.¹⁵ A formal application for work is not necessary in this situation to protect the employer against fraudulent attempts at instatement, since only a limited class of his old employees can qualify for instatement. This reasoning would justify that part of the board's decision requiring the Nevada Consolidated Copper Corp. to rehire with back pay an employee who had not applied for re-employment but who would have been called back by the employer but for his union affiliations.

¹² The problem of evidence in discriminatory hiring is not different from the evidentiary problem in discriminatory discharge. The board has developed regular rules for weighing the usual types of evidence presented and has proved adequate to the task. NLRB Ann. Rep. 65 et seq. (1939); Ward, Proof of "Discrimination" under the National Labor Relations Act, 7 Geo. Wash. L. Rev. 797 (1939).

¹³ Nevada Consolidated Copper Corp., 26 N.L.R.B. No. 113 (1940).

¹⁴ Cf. *Sunshine Mining Co.*, 7 N.L.R.B. 1252 (1938), aff'd in *NLRB v. Sunshine Mining Co.*, 110 F. (2d) 780 (C.C.A. 9th 1940); *Carlisle Lumber Co.*, 2 N.L.R.B. 248 (1936), aff'd in *NLRB v. Carlisle Lumber Co.*, 94 F. (2d) 138 (C.C.A. 9th 1937), and 99 F. (2d) 533 (C.C.A. 9th 1938). In these cases strikers, who by the terms of the act were employees, were not required to apply first for renewal of their jobs to an employer whose discrimination made applications useless, in order to be reinstated with back pay by order of the board.

¹⁵ *Waterman Steamship Co.*, 7 N.L.R.B. 237 (1938), aff'd in *NLRB v. Waterman Steamship Co.*, 309 U.S. 206 (1940); *Atlanta Woolen Mills*, 1 N.L.R.B. 316 (1936).