

THE PARTIAL STRIKE

The various forms of concerted refusal by employees to do only part of their assigned tasks have been designated "partial strikes."¹ Such activities create a conflict between the employer's interest in directing his work force and the employees' "right" under Section 7 of the National Labor Relations Act to engage in "concerted activities for . . . mutual aid or protection."² This comment will review the doctrines developed by the National Labor Relations Board and the courts in dealing with the problems raised by the partial strike with a view to determining whether they represent an appropriate accommodation of the conflicting interests involved.

I

The first partial-strike cases involved employees seeking changes in the conditions of their own employment. The Board's decision, in 1936, in *Harnischfeger Corporation*,³ and that of the Court of Appeals for the Seventh Circuit, in 1939, in *C. G. Conn, Ltd. v. National Labor Relations Board*,⁴ represent conflicting resolutions which have had considerable influence in subsequent cases. In *Harnischfeger*, the employer discharged stewards of the union who ordered its members to refuse to work overtime as a protest against the management's refusal to bargain. The Board held that the work-stoppage was protected under Section 7 and, therefore, that the discharges violated Sections 8(1) and 8(3) of the Wagner Act.⁵ The management's unfair labor practice in refusing to bargain might in itself have justified protection, but the Board rested its decision on the finding that the employees' activity caused less harm to the employer than a full strike. The Board did indicate, however, that there was a limit to the protection afforded by Section 7 by stating that the question was whether the conduct, although concerted in part, was "so indefensible" under all the circumstances as to justify discharge.

In the *Conn* case, the Seventh Circuit, overruling a Board reinstatement order, held that employees who refused to work overtime until the employer accepted their wage and hour demands could be discharged. The court, speaking through

v. Simmons, — F. 2d — (C.A. 7th, No. 11,011, decided June 15, 1954). It is to be hoped that the Supreme Court will soon resolve the disagreements stemming from its Nugent opinion.

¹ See Kelsey, *Partial Strikes*, New York University Sixth Annual Conference on Labor 281 (1932); 25 A.L.R. 2d 315 (1952); *Partial Strikes under the NLRA*, 47 Col. L. Rev. 689 (1947).

² National Labor Relations Act, § 7, as amended, 61 Stat. 140 (1947), 29 U.S.C.A. § 157 (Supp., 1953). Those cases of partial work-stoppages accompanied by a tort or resulting in a breach of a collective bargaining agreement will not be discussed in this comment. See *NLRB v. Sands Manufacturing Company*, 306 U.S. 332 (1939); and *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939).

³ 9 N.L.R.B. 676 (1938).

⁴ 108 F. 2d 390 (C.A. 7th, 1939).

⁵ Though *Harnischfeger* was decided under the Wagner Act, its relevance is not diminished. Section 7 of the Taft-Hartley Act continues to give the employee the right to "engage in . . . concerted activities for . . . mutual aid or protection" while Sections 8(a)(1) and 8(a)(3) continue to make it an unfair labor practice for the employer to interfere with this right. *Automobile Workers Union v. Wisconsin Employment Relations Board*, 336 U.S. 245 (1949).

Judge Major, in effect withdrew protection from all partial strikes, indicating that the employees had only two alternatives when the employer refused to comply with their request: they could continue work and negotiate further, or strike in protest. Like the sitdown and slowdown, this "strike on the installment plan" was not a "legitimate" work-stoppage because the employees attempted to continue working on their own terms.⁶

In *Pinaud, Incorporated*,⁷ the Board recognized the force of the contention that an employee could not be permitted to dictate the terms of his employment. But it did not abandon completely the position it had taken in *Harnischfeger*—that the employees' competing interest must be recognized. The Board ruled that the employer, prior to discharge, must give the employees an election either to work as instructed or go on a full strike.⁸

In 1949 the Supreme Court in the *Briggs-Stratton* case⁹ approved the approach taken in the *Conn* case. The employer had petitioned the state labor board to order the union to cease employing the unannounced and intermittent work-stoppages which it had called twenty-seven times during the five months which followed a collapse of collective bargaining negotiations. The Court held that since the union's activity was neither protected nor proscribed by the Act, Congress had not precluded the exercise of state power in this area. Accordingly, the state board could issue a cease and desist order. The Court concluded that not every form of concerted activity is protected by Section 7; that regardless of the

⁶ But cf. *NLRB v. Good Coal Co.*, 110 F. 2d 501 (C.A. 6th, 1940), where the Court of Appeals for the Sixth Circuit enforced the Board's reinstatement of employees who refused to work on Labor Day, indicating that their refusal to work was protected since it "involved a controversy concerning the terms, tenure or conditions of employment." *Ibid.*, at 503. And in *Armour & Co.*, 25 N.L.R.B. 989, 996 (1940), the Board, in dictum, cited with approval its position in *Harnischfeger Corporation*, 9 N.L.R.B. 676 (1938).

⁷ 51 N.L.R.B. 235 (1943). Cf. *Mt. Clemens Pottery Co.*, 46 N.L.R.B. 714 (1943), *enf'd* in part, *NLRB v. Mt. Clemens Pottery Co.*, 147 F. 2d 262 (C.A. 6th, 1945).

⁸ But cf. *Firth Carpet Co.*, 33 N.L.R.B. 191 (1941), *enf'd*, *Firth Carpet Co. v. NLRB*, 129 F. 2d 633 (C.A. 2d, 1942), where the Board held that employees could be discharged "for insubordination" for refusing to be temporarily assigned to another task because they feared that the transfer was a subterfuge for bringing in non-union men to replace them. The Board might have considered the activity personal in nature and, therefore, not "concerted activity for mutual aid or protection," though such a position was not articulated in its order. But consult *The New Personnel and Policies of the National Labor Relations Board*, 55 Harv. L. Rev. 269, 270 (1942), where the observation is made that there was a major change in Board membership at this time.

Cf. *Home Beneficial Life Insurance Co. v. NLRB*, 159 F. 2d 280 (C.A. 4th, 1947), in which the Fourth Circuit considered a partial strike under the Wagner Act. Insurance agents were discharged when they violated a company rule requiring them to report in at the home office every morning. The agents had decided to come only every other day, though the employer had previously turned down their request to change the rule. The court, holding that the partial strike was not protected, said, through Judge Soper: "The statute, (§ 7), expressly recognizes the right of employees 'To engage in concerted activities' but does not and could not confer upon them the right . . . to defy the authority of the employer to manage his business while remaining in his service." *Ibid.*, at 284.

⁹ *Automobile Workers Union v. Wisconsin Employment Relations Board*, 336 U.S. 245 (1949).

objectives of a tactic, in terms of federal law there is an area of misconduct which the states may control. The *Conn* case was cited for the limitation it placed upon the application of Section 7 in denying protection to a "comparable" work-stoppage, while reference was made to the "so-indefensible" test set forth in *Harnischfeger* to indicate that the Board, too, recognized qualifications on the protection afforded by the Act. *Harnischfeger* was distinguished, however, on a factor on which the Board did not rely in its opinion—that the work-stoppage was in a "context of anti-union animus" on the employer's part; that the drastic remedy of discharge outweighed any possible damage to the employer and was tainted by anti-union motives. Mr. Justice Jackson, building on the Seventh Circuit's identification of partial strikes with sitdowns and slowdowns, declared that to protect these "quickie strikes" would require the protection of sitdowns and slowdowns. Furthermore, the Court reasoned, if the activity were protected, the employer would be helpless to resist while the employees would not suffer the corresponding economic pressure engendered by a full strike.¹⁰

A year after this Supreme Court decision, the Board in *Kennametal, Inc.*,¹¹ held that an employer was guilty of an unfair labor practice in discharging employees when they stopped working for two hours in order to present their demand for higher wages. The Board did not explicitly consider the defensibility of the conduct, simply asserting that the activity was "concerted" and "for mutual aid and protection." But the Court of Appeals for the Third Circuit, speaking through Judge Goodrich, followed the *Harnischfeger* logic in enforcing the Board's reinstatement order:

[W]hat the workmen did was more reasonable and less productive of loss to all concerned than an outright strike [and t]he language of the Act does not require and its purposes would not be served by holding that dissatisfied workmen may receive its protection only if they exert the maximum economic pressure and call a strike.¹²

Shortly thereafter, in *Elk Lumber Co.*,¹³ the Board arrived at the same view concerning slowdowns as had the Supreme Court and Seventh Circuit, holding that such a response to the employer's refusal to agree to wage demands was unprotected. The Board did not specifically refer to their language that slowdowns are unprotected but, accepting Judge Major's reasoning that all partial

¹⁰ The Court further held that if the union was not protected under Section 7 it could not be protected under Section 13 of either the original or amended Act. That section reads: "Nothing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right." National Labor Relations Act § 13, as amended, 61 Stat. 151 (1947), 29 U.S.C.A. § 163 (Supp., 1953).

¹¹ 80 N.L.R.B. 1481 (1948), enf'd, *NLRB v. Kennametal, Inc.*, 182 F. 2d 817 (C.A. 3d, 1950), cited with approval in *Buzza-Cardozo*, 97 N.L.R.B. 1342 (1952), enf'd in part, *NLRB v. Buzza-Cardozo*, 205 F. 2d 889 (C.A. 9th, 1953), and in *NLRB v. Southern Silk Mills*, 33 L.R.R.M. 2628 (C.A. 6th, 1954).

¹² *NLRB v. Kennametal, Inc.*, 182 F. 2d 817, 819 (C.A. 3d, 1950).

¹³ 91 N.L.R.B. 333 (1950).

strikes are attempts by employees to work on their own terms, found that the activity was "indefensible."

Recently in *Pacific Telephone Co.*,¹⁴ the Board relied on the *Conn* and *Briggs-Stratton* cases, holding that it was not an unfair labor practice for an employer to discipline employees who refused to cross "hit-and-run" picket lines surrounding their own offices and established by another union at the same company. The picket lines were set up intermittently to support a series of short-term economic strikes called successively at each of the company's more than two hundred offices. Only the employees who refused to cross the picket lines petitioned the Board; their activity was held unprotected because they had knowledge of the "hit-and-run" tactic of the primary strikers which, in itself, was declared unprotected activity because of its similarity to the quickie strikes in the *Briggs-Stratton* situation. It is difficult to see how the Board could have evaluated the primary activity in any other way in light of the Supreme Court's resolution of the quickie-strike problem. There appears to be no significant difference between harassing the employer by a series of surprise short-term work-stoppages by all the employees in one plant and having groups of employees at different parts of the company stop work at irregular intervals.

In summary, *Kennametal* indicated that the Board would protect at least some partial stoppages. The Third Circuit's opinion in that case suggests that some circuit judges may still favor protecting those partial stoppages which they find result in less harm to the employer than a full strike. Yet *Elk Lumber* and *Pacific Telephone*, following the *Briggs-Stratton* decision, imply that the Board may have accepted the logic of the *Conn* case as the solution to partial strikes over conditions of employment. If this is true, the *Kennametal* case could be explained as an exception to a general rule of no protection; in light of the Supreme Court's justification of the result in *Harnischfeger*, it might be argued that although the employer had not committed an independent unfair labor practice, the drastic remedy of discharge so outweighed the harm to the employer as, in itself, to justify protecting the employees.¹⁵

II

Board Member Murdock, dissenting in *Pacific Telephone*, insisted that since the employees' refusals to cross the picket lines were "traditional" sympathetic

¹⁴ 33 L.R.R.M. 1433 (1954).

¹⁵ Cf. the Board's General Counsel's opinion in Administrative Decision No. 513 (1952), cited in Kelsey, *op. cit. supra* note 1, at 286 n. 7. *Aurora Wall Paper Mill Inc.*, 73 N.L.R.B. 188 (1947), and *Phelps Dodge Copper Products Corp.*, 101 N.L.R.B. 360 (1952) are cases of unprotected partial strikes over conditions of employment. The Board in these cases did not have to determine whether the concerted activity was "indefensible" since its purpose was not within the protection of Section 7. In *Aurora Wall Paper Mill*, *supra*, there had been a "wild-cat" strike by a minority group of employees over conditions already settled through collective bargaining by the recognized union. In *Phelps Dodge*, *supra*, the union called a slowdown while engaged in collective bargaining. The Board decided in both cases that the activity, though over conditions of employment, was in derogation of collective bargaining, and therefore, unprotected.

responses to the interests of other workers, the refusals deserved protection, regardless of whether the primary work-stoppages are protected activity. This criterion—the “traditional” nature of the activity—was used by the Board after 1949 to avoid the *Briggs-Stratton* result in the sympathy partial-strike context and confine the notion that partial strikes are indefensible to partial strikes over conditions of employment.

Before the *Briggs-Stratton* decision the Board had made no distinction between primary and sympathy partial strikes, protecting the activity in both situations on the principles developed in *Harnischfeger* and *Pinaud*. In 1941, for example, it held in *Niles Fire Brick Company*¹⁶ that an employer had no right to discharge employees who refused to take over an operation left vacant by the demotion of a union leader. The activity was classified as in the nature of a partial strike and permissible under the rule of *Harnischfeger*. The order also noted that the employer was guilty of an unfair labor practice in attempting to replace the union leader. Another consideration was introduced for the first time: the dilemma raised by the emergency with which the employees had been confronted—whether to support what they felt were the rights of another employee, or to do work which they thought had wrongfully been taken from him.¹⁷

In *Rapid Roller Co. v. National Labor Relations Board*¹⁸ the Seventh Circuit, speaking through Judge (now Justice) Minton, enforced a Board order denying an employer the right to discharge non-union employees in one department for refusing to act as “strikebreakers” in another. But four months later, in *United Biscuit Co. v. National Labor Relations Board*,¹⁹ the same circuit court, through Judge Major, followed the reasoning of the *Conn* case. He argued, in dictum, that the company’s salesmen who refused to ride with substitute deliverymen because of a strike of regular drivers “had the undoubted right to strike with their fellow employees, but they had no right to remain as employees unless they were willing to perform their duties wholeheartedly and efficiently.”²⁰

The Court of Appeals for the Eighth Circuit adopted the broad *Conn* approach to a sympathy partial strike in *National Labor Relations Board v. Montgomery Ward & Co.*²¹ The court upheld the discharge of clerical workers who refused to process orders from another Ward plant, in which their union had called a strike. The Board, evidently still reluctant to accept the doctrine of the *Conn* case, had protected the activity, accepting the trial examiner’s findings that the rule of *Pinaud* governed the case. However, the court preferred the unequivocal position that the purposes of the Act are not served by protecting employees

¹⁶ 30 N.L.R.B. 426 (1941).

¹⁷ By 1944 the Board had not changed its position when a similar controversy arose. *Gardner-Denver Company*, 58 N.L.R.B. 81 (1944). The Board ordered the reinstatement of an employee who had refused to take over an operation vacated by a dischargee.

¹⁸ 126 F. 2d 452 (C.A. 7th, 1942).

¹⁹ 128 F. 2d 771 (C.A. 7th, 1942).

²⁰ *Ibid.*, at 776.

²¹ 157 F. 2d 486 (C.A. 8th, 1946).

who have engaged in a partial strike. It also noted that the refusal to process orders was secretive and did not come to the supervisor's attention until two days after it occurred, but the significance of this fact was not explained.

After the *Montgomery Ward* case, all the sympathy partial-strike cases came before the Board after the *Briggs-Stratton* decision and, except for *Pacific Telephone*, arose out of a single employee's refusal to cross a picket line surrounding another employer's premises.²² In *Cyril de Cordova & Bro.*,²³ a stockbroker's messenger was discharged when he refused to cross a picket line set up by members of his union, employees of the stock exchange, engaged in an economic strike. The Board held that the employee's refusal to cross constituted "concerted activity for mutual aid and protection." It did not rely on its reasoning in earlier partial-strike cases, but distinguished both the *Conn* and *Briggs-Stratton* situations by elaborating on the factor of emergency alluded to in *Niles Fire Brick*; it stated that the employees' activity was a traditional response to the dilemma whether to help or hinder the interests of other workers. But in protecting the activity, the Board recognized, as it had in *Pinaud*, the employer's right to insist that the employee either go out on a full strike or do all his assigned tasks.

Relying on its reasoning in *de Cordova*, the Board in *Rockaway News Supply Company*²⁴ held that an employee's refusal to cross a picket line was protected although he was not a member of the picketing union. The Court of Appeals for the Second Circuit refused to enforce the Board's order.²⁵ Speaking through Judge Maris, the court conceded that an employee's refusal to cross a picket line is "concerted activity" within the meaning of Section 7, but accepted the rationale of the *Conn* case that the employer's right to direct his working force is paramount. Attempting to strengthen this position, the court argued that it is of no practical difference to the employee whether he is discharged or perma-

²²The proviso inserted at the end of the union unfair-labor-practice section specifically mentions the refusal to cross a picket line. National Labor Relations Act, 1947, at § 8(b)(4), 61 Stat. 140 (1947), as amended, 65 Stat. 601 (1951), 29 U.S.C.A. § 158(b)(4) (Supp., 1953). The proviso reads: "[N]othing 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. . . ." It is not clear what Congress meant to accomplish by adding this proviso, which focuses on the rights of individuals, at the end of a section concerned with union activities. Since the proviso speaks only of unlawfulness, it seems certain that it does not protect absolutely the employee who refuses to cross a picket line surrounding another employer. But see Judge Clark's dissent in *NLRB v. Rockaway News Supply Co., Inc.*, 197 F. 2d 111, 115 (C.A. 2d, 1952); consult Thatcher and Finely, *Respect for Picket Lines*, 32 Neb. L. Rev. 25 (1953), and Note, 62 Yale L. J. 92 (1952). For different views, consult Petro, Taft-Hartley and the "Secondary Boycott," 1 Lab. L. J. 835, 836 (1950); Petro, *The Enlightening Proviso*, 1 Lab. L. J. 1075, 1078 (1950); and Tower, *The Puzzling Proviso*, 1 Lab. L. J. 1019 (1950).

²³91 N.L.R.B. 1121 (1950).

²⁴*Rockaway News Supply Co., Inc.*, 95 N.L.R.B. 336 (1951).

²⁵*NLRB v. Rockaway News Supply Co., Inc.*, 197 F. 2d 111 (C.A. 2d, 1952), *aff'd* on different grounds, 345 U.S. 71 (1953).

nently replaced as an economic striker; especially since, according to the court, support of the partial strike by his union would constitute an unlawful secondary boycott. The Supreme Court affirmed the Second Circuit's decision on other grounds, avoiding the partial-strike problem; however, although it did not consider the question of union support, the Court appeared to agree with the Second Circuit that there was no difference between discharge and replacement.

The contrary result reached by the Board and the Second Circuit in the *Rockaway* case exemplifies the conflict of opinion which existed until recently between the Board and the circuit courts in relation to sympathy partial strikes. On one side was the general position that these work-stoppages, short of full strikes, cannot be protected. The Board, on the other hand, after the *Briggs-Stratton* case, developed the position that such partial strikes are protected because they are a traditional response to the dilemma whether to act in accord with or against the interests of other workers. Against the Board's position it might be argued that there is no basis for distinguishing partial strikes over working conditions from those created by the refusal to do the work of another, handle "hot goods," or cross a picket line—an emergency or dilemma may be presented to the employees in both cases. But there may be a significant difference between the two situations. In the sympathy situations the employees must refuse to do part of their assigned tasks if they are not to hinder the interests of others, whereas in the working-condition cases, the employees are faced at most with the problem of deciding which from among a whole arsenal of tactics is best calculated to achieve their ends.

However, in *Snow Auto Parts Company*,²⁶ the Board, under new leadership, recently reversed its former policy, apparently concluding that there is no significant difference between sympathy partial strikes and those over conditions of employment. In that case it upheld the employer's right to discharge a deliveryman for refusing to cross a picket line around a customer. And the Board made it clear that the sole basis of its decision was the employee's "refusal to do the job for which he had been hired and a direct disregard of his employer's instruction."²⁷

²⁶ 107 N.L.R.B. No. 78, at page 2 (1953).

²⁷ The trial examiner's findings in *Snow Auto Parts Co.*, 107 N.L.R.B. No. 78 (1953), indicate that certain forms of partial strikes might be unprotected because a full strike under the same circumstances would be unprotected. The Board explicitly stated that it avoided any such consideration in arriving at its decision. The trial examiner concluded that the employee could be discharged because his activity was neither concerted nor for mutual aid or protection. Impetus for this view came from Judge Major's opinion in *NLRB v. Illinois Bell Telephone Co.*, 189 F. 2d 124 (C.A. 7th, 1951). The Seventh Circuit declined to enforce a reinstatement order for employees who refused to cross a picket line, surrounding their plant, established by a union other than their own. The court held that the refusal was neither "concerted activity" because the employees acted on their individual initiative, nor for their mutual aid since all that they could gain from the collective bargaining process had been obtained by a contract between their union and the employer.

The notion that a refusal to cross a picket line is not "concerted activity" received support in *NLRB v. International Rice Milling Co., Inc.*, 341 U.S. 665 (1951), where the Supreme Court held that picketing primary strikers did not encourage employees of other employers to

III

The view first expounded by Judge Major, that a partial strike cannot be protected because it is an interference with the employer's right to govern his working force, has thus become the controlling principle in a variety of situations. The policy of the Act favoring protection of concerted activity is completely subordinated in this area to the interests of the employer.

Of course, Judge Major is correct in assuming that Section 7 of the Act was not meant to give labor *carte blanche* for all its activities. But because protection of concerted activity in Section 7 is phrased in absolute terms, it is difficult to draw the line between protected and unprotected activity. However, the strike is labor's primary bargaining weapon, a form of concerted activity protected by Section 7. To say that a partial strike, although "concerted activity for mutual aid or protection," is *per se* unprotected because it is something other than a full strike seems contrary to the policy of that section. Protected concerted activity is so often a device for achieving labor's ends, at the expense of what management conceives as its best interests, that it seems at best questionable to deny protection to all forms of partial strikes for no other reason than that they, in varying degrees, interfere with these interests.²⁸

engage in a "concerted refusal" to cross their picket line within the meaning of the secondary-boycott provision of the Act. § 8(b)(4)(A), 61 Stat. 141 (1947), as amended, 65 Stat. 601 (1951), 29 U.S.C.A. § 158(b)(4)(A) (Supp., 1951). Though the decision may protect primary strikers who encourage secondary employees not to cross their picket lines, it is a hollow victory for them if the secondary employees are not protected because they are not engaged in "concerted activity."

The idea that an individual's refusal to cross a picket line is not "concerted activity" seems to be at odds with the principle generally accepted by the circuit judges that an employee's activity is concerted if its purpose bears a reasonable relation to conditions of employment, i.e., if it affects the general interest of the employees. See *NLRB v. Phoenix Mutual Life Ins. Co.*, 167 F. 2d 983 (C.A. 6th, 1948), and *NLRB v. Austin Co.*, 165 F. 2d 592 (C.A. 7th, 1947). Both cases are noted in 19 A.L.R. 2d 566 (1951). If protected concerted activity is to depend upon the agreement of at least two parties it leads to the anomaly that a worker is penalized simply because he failed to get another to join his plans.

There should be little hesitation in concluding that an unfair discharge or demotion of another employee in the same plant directly concerns the sympathetic employee's own working conditions. The same conclusion might at first appear more tenuous if applied to the employee who refuses to handle "hot goods" or cross a picket line around another employer. Yet, his activity directly promotes his interest by protecting his bargaining power. Though between the sympathy striker and his employer there is no present dispute over a collective bargaining issue, the striker's bargaining power will be promoted because by his activity he helps preserve an effective economic weapon which might be employed in the future. Cf. *NLRB v. Peter Cailler Kohler Swiss Chocolates Co., Inc.*, 130 F. 2d 503 (C.A. 2d, 1942).

If future decisions by the Board and courts continue to limit employee activity by whether its purpose is of immediate economic importance to the workers, the protection afforded by Section 7 will be unwarrantedly limited. The Supreme Court has held that some forms of concerted activity, unlawful or unduly harmful to the operation of business, were not meant to be protected by Section 7. However, it does not follow that where the activity directly, though not immediately, promotes employee bargaining power the section can be so limited. It is the affair of Congress whether or not "mutual aid or protection" is to be qualified by the word "immediate."

²⁸ Consult Gregory, *Labor and the Law* 110 (1946).

But to reject the broad denial of protection illustrated by the *Conn* case does not require acceptance of the contrary doctrine announced by the Board in *Harnischfeger*. In *Pinaud* the Board suggested a resolution which protects the employer's interest in directing his working force while preserving the employee's right to concerted activity: that the partial strike be protected unless and until the employer exercises an option to require the employees to go out on a full strike or work as directed. But in order to insure that the employer have an adequate opportunity to exercise this right the rule requires a limitation which has never been formulated by the Board: that the partial work-stoppage be protected only if the employer recognizes its nature within substantially the same period of time in which he would have known of the existence of a full strike had one been called. Such requirement insures that no protection will be extended if the partial strike, any more than would a full strike, deprives the employer, for any substantial period, of the right to direct his working force.²⁹

The *Pinaud* test was applied by the Board in *Rockaway* and criticized by both the Second Circuit and the Supreme Court on the grounds that it can make no practical difference to the employee whether the employer gives him such an option because full economic strikers can be permanently replaced. But there is a practical difference between the status of a dischargee and an economic striker, even if the employee's union cannot give him support. As the Board pointed out, as long as he is not replaced, the striking employee, unlike the dischargee, can demand reinstatement under Section 2(3), and often replacement may not be available to the employer.³⁰

Using the *Pinaud* test, limited by the suggested standard of adequate employer opportunity, different results are obtained than have been reached in the cases of partial strikes over working conditions—the Board's order in the *Conn* case would have been enforced, the decision in *Harnischfeger* was correct although its rationale was inadequate, and the *Kennametal* case need not be justified on the grounds of "anti-union animus." Neither the refusals to work overtime in *Harnischfeger* and *Conn* nor the work-stoppage in the *Kennametal* case was a situation in which employees were able to work on their own terms by using the partial-strike tactic. The employer's rights would have been completely protected if the option suggested by *Pinaud* had been available to him. However, in those cases in which the work-stoppages take the form of "quickie" or "hit-and-run" strikes, or slowdowns, the employer's opportunity to protect him-

²⁹ If the employee's activity was a response to an unfair labor practice, the fact that the employer did not have adequate notice under this test might not be conclusive.

³⁰ See Brief for Petitioner at 42, *NLRB v. Rockaway News Supply Co., Inc.*, 345 U.S. 71 (1953). However, protection should extend no further than allowing the employee to become a full economic striker; if he were given only a temporary layoff, he would have the status of an unfair-labor-practice striker, although his employer has not violated the Act. Cf. *Warton & Turner Coal Company*, 105 N.L.R.B. No. 52 (1953). For a contrary view see 62 *Yale L. J.* 92 (1953).

self is inadequate.³¹ In the "quickie" and "hit-and-run" situations the employer cannot adequately guard against future refusals to work which, although planned and repetitious, are unannounced. Although he has knowledge of each work-stoppage as it occurs, he does not have information about the future work-stoppages which are part of the over-all scheme. In the case of the slowdown, it may be some time before the employer is aware that his rate of production has declined as a result of the concerted activity of his employees. In the *Montgomery Ward* case, under this test, the important consideration would be whether the employer had an adequate opportunity to exercise his option when the supervisor discovered the refusal of the clerks to process orders two days after the refusal occurred.

The adequacy of notice of the partial work-stoppage would be a question of fact for the Board in each case. Finding that an employer recognized the existence of a partial strike later than he would have discovered a full strike need not be conclusive. Certainly, the Board should not be bound by any rigid formula, and where the difference in time is not substantial, other factors should be considered: the nature of the business, whether the partial strike has resulted in greater economic harm to the employer than a full strike, and the existence of other reasons for discharging or taking other disciplinary action.

This analysis subjects quickie strikes and slowdowns to a more discriminating test than the vague standard of "indefensibility." These activities would usually be unprotected because they typically give the employer no notice, not on the basis of an assertion that all partial work-stoppages represent attempts by employees to work on their own terms. Whether the test of adequate opportunity will protect employees who threaten the employer with a slowdown depends upon whether the employer has timely information of what to expect. If the employer thinks the harm will be less than a full strike, he has the option of not demanding a full strike. One factor he may consider is that it may be impossible to reduce wage payments to adjust for the reduced output.³² The solution suggested, of course, may put the burden on the employer of risking a full strike by asking the employees for an assurance that they will not engage in a partial work-stoppage. However, the employer has the advantage of being able to require his employees to commit themselves to uninterrupted work or a full work-stoppage, on pain of loss of protection under the Act.³³

³¹ Professor Cox writes: "Collective bargaining can function as a mechanism for pricing labor only if there is some bargaining power on each side. Slow-downs and similar disobedience on the job cost the employees nothing and, if they were protected activities, management would be helpless to resist. Hence such weapons are too effective to permit them to be part of the employees' arsenal." Cox, *The Right to Engage in Concerted Activity*, 26 Ind. L. J. 319, 339 (1953).

³² The fact that a partial strike may represent an attempt to get full pay for less than a full job may not be material if the employer need not pay for the time lost during the stoppage. See *NLRB v. Southern Silk Mills*, 33 L.R.R.M. 2628 (CA. 6th, 1954).

³³ The adequate-notice test was recently applied by the trial examiner in *Honolulu Rapid Transit Co., Ltd.*, 33 L.R.R.M. 354 (1954). He found that a series of week-end economic

The test of employer opportunity is equally appropriate to sympathy partial strikes. Protecting union activity because it is "traditional" is subject to the same objections as not protecting union activity because it is "indefensible." Both standards beg the question of balancing the conflict of interests. As in the case of work-stoppages over conditions of employment, the important consideration is the employer's opportunity to demand a total work-stoppage or continuous, uninterrupted work.

strikes by transit employees was protected activity because, unlike the quickie strikes in the Briggs-Stratton case, *Automobile Workers Union v. Wisconsin Employment Relations Board*, 336 U.S. 245 (1949), the work-stoppages here, although recurrent, were announced and, therefore, anticipated by the employer. On the other hand, the examiner upheld the suspension of employees who either failed to assure the employer that they would continue working on week ends or breached such an assurance. But if the Board follows the logic of the Conn case it should not support the finding that the work-stoppages were protected.