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Sick Leave Benefits: The NLRB Reexamines The Rights of Disabled Employees During a Strike

In *E.L. Wiegand Division, Emerson Electric Co.*,[1] the National Labor Relations Board (Board) held that an employer may no longer require disabled employees on sick leave to disavow strike activity in order to receive employee disability benefits. The Board went on to hold, however, that once the disabled employee shows affirmative support for the strike, he runs the risk of forfeiting his right to disability benefits. In *Emerson*, the Board completely reexamined the rights of disabled employees in the context of a labor dispute and expressly overruled its prior decision in *Southwestern Electric Power Co.*[2]

In *Emerson*, management and the union,[3] which represented Emerson's approximately 1,100 employees, were engaged in negotiations for a new collective bargaining agreement that was to begin on November 1, 1977. Union representatives were unable to come to terms with the company and called an economic strike[4] to begin the moment the existing contract was to expire. The strike was effective and the plant was completely closed from November 1 to February 28, 1978, at which time an agreement was reached beween the company and the union.

On the day before the strike was to begin, twenty-three of the company's employees were physically disabled and could not report to work. Each had previously been receiving "sick and accident" benefits pursuant to Emerson's employee disability benefits plan.[5] When the strike began,

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1. 246 N.L.R.B. No. 162, 103 L.R.R.M. 1073 (Dec. 19, 1979).
2. 216 N.L.R.B. 522, 88 L.R.R.M. 1342 (1975).
3. The union representing the employees was the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Local 1020. It was found to be a labor organization within the meaning of § 2(5) of the National Labor Relations Act, 29 U.S.C. § 152(5) (1976).
4. Strikes are divided into two categories. An unfair labor practice strike is one caused or prolonged by the unfair labor practices of the employer. All employees who leave their jobs to strike are entitled to reinstatement. An economic strike is one over wages, hours, working conditions, or other conditions of employment. The employer is free to replace striking employees in an economic strike. 2 J. JENKINS, LABOR LAW § 7.25 n.40 (Supp. 1974).
5. Emerson's disability benefits plan is a form of self-insurance. Employees who were unable to work because of illness continued to receive 60% of their weekly income. Disabled employees were eligible for up to 39 weeks of benefits, depending upon their seniority with

the company terminated these benefits, despite strong union protest that the disabled employees were not participants in the strike and were not receiving union strike benefits.[6]

Several of the disabled employees recovered during the strike while others remained disabled until it was over. Most decided to remain silent and inactive, but many of the disabled employees joined the picket line or publicly expressed their support for the strike.[7] The day after the strike ended, the company resumed payment of "sick and accident" benefits to those employees who remained disabled.[8]

A complaint was brought by the General Counsel of the Board, based upon charges filed by the union alleging that Emerson's withholding of benefits to those employees who remained disabled during the strike was a coercive act in violation of sections 8(a)(1) and (3) of the National Labor Relations Act (NLRA).[9] General Counsel argued that the company's termination of disability benefits was an unlawful restraint upon the rights of all employees to engage in concerted activities.

The Administrative Law Judge (ALJ) agreed.[10] He reasoned that, since the twenty-three employees were physically unable to work, they could not consciously withhold their services and, thus, should not be considered strikers. Furthermore, he viewed these benefits as a form of deferred compensation that disabled employees were entitled to receive by virtue of their previous employment relationship, irrespective of the strike action.[11] He concluded that the disabled employees should not be required

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the company. 103 L.R.R.M. at 1074 (Member Jenkins, dissenting).

6. The union did not automatically provide the disabled employees with strike benefits because of its uniform policy that no strike benefits would be paid unless the individual participated in the strike. However, once the union realized that the company was not going to provide benefits to disabled employees, it waived this requirement on December 12 and began paying strike benefits to all disabled employees, regardless of their participation in the strike. *Id.* at 1075 n.16.

7. The Board pointed out that at least seven of the named disabled employees were present on the picket line or among the strikers during the course of the strike. Two more were seen on the picket line after recovery. *Id.* at 1074 n.5.

8. E.L. Wiegand Div., Emerson Elec. Co., No. 6-CA-10781 (Ad. Law Judge Thomas A. Rucci, Mar. 16, 1979).

9. 29 U.S.C. § 158(a)(1), (3) (1976). Section 8 provides, in relevant part:

> (a) It shall be an unfair labor practice for an employer—
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> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7];
>
> (2) . . .
>
> (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. . . .

10. No. 6-CA-10781 (Ad. Law Judge Thomas A. Rucci, Mar. 16, 1979).

11. *Id.* The Administrative Law Judge refused to conclude that *Southwestern* precluded his decision. He read *Southwestern* along with Indiana & Michigan Elec. Co., 236 N.L.R.B.

to disavow the strike in order to collect benefits.

Prior to its decision in *Emerson*, the Board viewed an employer's termination of employee disability benefits during a strike in a different fashion. In *Southwestern Electric Power Co.*,[12] the employer treated six of its employees on sick leave at the beginning of the strike as strikers and discontinued payment of disability benefits. The majority of the Board[13] framed the issue as "whether the [employer's] belief that the [employees] ratified and supported the strike was *reasonable*."[14] If so, "[i]n the absence of any indication whatsoever that the six employees did not support the strike, it was entirely *reasonable* for [the employer] to assume that they did."[15] This decision placed the burden upon the employee to show that his employer's actions were unreasonable.

The majority in *Southwestern* relied heavily upon two previous Board decisions in framing this issue and deciding the case. In *Marathon Electric Manufacturing Co.*,[16] the Board concluded that an employer was justified in considering disabled employees on strike since none of those employees made any attempt to disassociate themselves from illegal strike action taken by their bargaining representatives. This decision placed a burden or duty on the disabled employee to inform his employer of his desire to work or risk the implication that his sympathies lay with the strikers. In a subsequent decision, *Bechtel Corp.*,[17] the employer classified employees on leave of absence at the time the illegal strike began as strikers and terminated disability benefits. The Board relied upon its decision in *Marathon* to reach this result, stating: "The [employee] could have informed the [employer] that he had been on leave and disassociated himself from the strike . . . [but] by keeping silent, the [employee] . . . in effect ratified the strike conduct."[18]

986, 98 L.R.R.M. 1332 (1978), in which the Board held that an employer violated § 8(a)(1) and (3) of the NLRA by promulgating a policy of refusing to pay employees accumulated leave pay until they returned to work. In relying on these two Board decisions, the Administrative Law Judge in *Emerson* found that there was no general Board rule that the "mere expression of opinion concerning the merits of strike action by persons who are in no conceivable sense capable of engaging in strike action suffices to make strikers of people who simply are not."

12. 216 N.L.R.B. at 522, 88 L.R.R.M. at 1342.

13. Members Kennedy and Penello; Acting Chairman Fanning dissented in part.

14. 216 N.L.R.B. at 522, 88 L.R.R.M. at 1342 (emphasis added).

15. *Id.* (emphasis added).

16. 106 N.L.R.B. 1171, 32 L.R.R.M. 1645 (1953), *enforced*, 223 F.2d 338 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 981 (1956). In *Marathon*, the union struck the employer in violation of a no-strike clause, and the employer countered with a lockout. A number of employees who were not at work on the day of the walkout because of illness were terminated by the employer.

17. 200 N.L.R.B. 503, 82 L.R.R.M. 1161 (1972).

18. *Id.* at 512.

In his dissent in *Southwestern*,[19] Chairman Fanning sharply criticized the majority's view of the issue. He stated that an employee's section 7[20] right to join in or refrain from concerted activities includes the right to refrain from declaring a position on the strike while medically excused.[21] In Chairman Fanning's opinion, this section 7 right was "dismissed from consideration [by the majority] . . . in favor of a nebulous 'belief' by the Employer that medically excused Employees who do not specifically disavow a protected strike of their unit necessarily support it."[22] The majority's "reasonable belief" standard remained the Board's official stance on this issue, but Chairman Fanning's dissent opened up a new question concerning the section 7 rights of disabled employees that would not be conclusively answered until *Emerson*.

In *Emerson*, the Board expressly overruled *Southwestern* and adopted Chairman Fanning's position.[23] The majority held that, under section 7 of the NLRA, a disabled employee is entitled to refrain from expressing an opinion on the merits of an ongoing strike, as long as his disability continues. In rejecting *Southwestern*, the majority concluded that an employer may not rely on speculative grounds to justify termination of existing accrued disability benefits. They reasoned that to allow an employer to terminate these benefits, solely because of strike conduct by others, would unjustly penalize those employees who had not yet acted in support of the strike.[24] The majority adopted the result reached by the ALJ—that the company committed section 8(a)(1) and (3) violations of the NLRA.

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19. 216 N.L.R.B. at 522, 88 L.R.R.M. at 1342 (Chairman Fanning, dissenting).

20. 29 U.S.C. § 157 (1976). Section 7 provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerned activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

21. Chairman Fanning also criticized the majority's reliance on *Marathon* and *Bechtel*. He argued that those cases dealt with violations of no-strike provisions and were distinguishable. "Cases where the Board has sanctioned the discharge of presumed strikers in the context of strikes in violation of no-strike provisions are inapplicable." 216 N.L.R.B. at 523, 88 L.R.R.M. at 1343. *Marathon* and *Bechtel* are discussed at notes 16-18 *supra*, and accompanying text.

22. *Id.* at 523 n.5, 88 L.R.R.M. at 1342 n.5.

23. Chairman Fanning and Member Truesdale; Member Jenkins dissented in part; Member Penello dissented.

24. The majority analogized this situation to the situation in Coronet Casuals, Inc., 207 N.L.R.B. 304, 84 L.R.R.M. 1441 (1973), and stated that, "before an employer may rely on an honest belief that a striking employee engaged in [picket line] misconduct, it must obtain proof that the specific employee engaged therein, and may not rely on conduct of other strike participants." 103 L.R.R.M. at 1073-74 n.3.

However, they limited the impact of the ALJ's conclusions in one significant respect. The ALJ viewed Emerson's disability benefits as a form of deferred compensation that disabled employees were entitled to regardless of subsequent strike participation. The majority was not willing to go that far and concluded that "while disabled employees need not affirmatively disavow the strike action, neither can they participate in the strike without running the risk of forfeiting benefits prospectively."[25] Thus, any disabled employee who affirmatively supports the strike has enmeshed himself in the activity to such an extent as to terminate his right to continued disability benefits.

Member Jenkins, in a partial dissent, agreed with the majority's abandonment of *Southwestern*.[26] However, he adopted the view taken by the ALJ that the employer should be required to provide continued benefits *even if the disabled employees support the strike*.[27] His dissent raised three interesting criticisms of the majority's limitations on employee rights to disability benefits after they support the strike during sick leave. After noting that Emerson's disability benefits plan was in the form of compensation for past services,[28] Member Jenkins concluded that these benefits were in the nature of accrued benefits, "fully vested upon the commencement of the employee's actual disability."[29] He would hold that nothing short of total recovery would terminate the employer's fully vested obligation to continue payment of benefits to all employees on disability prior to and during the strike.

The second criticism dealt with the majority's failure to define properly a "striker" in the context of the disabled employee who subsequently shows public support for the strike.[30] Due to the circumstances beyond his control, the disabled employee, unlike active employees, is never given the option to work.

> The fact that a disabled employee, through some manner of participation in the picketing, may have expressed a certain degree of support therefor is insufficient to render him a striker, due to the inherent inability of the disabled employee to do that act which is the *sine qua non* of striker status: the voluntary withholding of services from the employer in support of a labor dispute.[31]

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25. 103 L.R.R.M. at 1074. An employee's actions in support of the strike may not be used to deprive him of any benefits for sick leave *prior* to the supportive action. *Id.*

26. *Id.* Member Penello submitted a separate dissenting opinion expressing his continued support for the Board's decision in *Southwestern*, in which he participated. *Id.* at 1075.

27. *Id.* (emphasis added).

28. *Id. See also* note 5 *supra*, and accompanying text.

29. *Id.*

30. *Id.* at 1075. *See also* note 7 *supra*, and accompanying text.

31. *Id.*

Finally, Member Jenkins criticized the majority for ignoring the disabled employee's motives for joining the strike. In his opinion, since the employer committed an unfair labor practice by withholding disability benefits from the employees at the beginning of the strike, those disabled employees who eventually joined the picket line should more properly be classified as unfair labor practice strikers.[32] "A more likely explanation is that [the disabled employee's] strike participation was a protest over the specific unlawful withdrawal of benefits then due him and was unrelated to the economic motives of the other striking employee."[33] Member Jenkins would hold that when an employer unlawfully terminates disability benefits, the Board should *not* presume that the disabled employee's subsequent participation in the strike was unrelated to the employer's unlawful conduct. The majority summarily answered this by stating that they would "not engage in such warrantless speculation . . . ."[34]

In comparing the three approaches that have been taken by Board members on this issue, the majority's approach in *Emerson* is the closest to the overall policy behind the NLRA and is therefore the best. Section 1(b) of the NLRA[35] states that the purpose and policy of the Labor-Management Relations chapter is "to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, . . . [and] to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare. . . ."[36]

The Board's "reasonable belief" standard in *Southwestern* favored management by forcing the employee to show that the employer acted unreasonably in terminating disability benefits. The majority's rule in *Emerson* represents not only an abandonment of the "reasonable belief" standard, but also shifts the burden of proving employee intent to the employer who must now show that he "has acquired information which indicates that the employee . . . has affirmatively acted to show public support for the strike."[37] In the words of the majority, this view "represents a fair accomodation between the rights of employees and the [economic] interests of employers."[38] Disabled employees have the protected

32. *Id. See also* note 4 *supra*, and accompanying text.
33. *Id.*
34. *Id.* at 1074 n.8.
35. 29 U.S.C. § 141(b) (1976).
36. *Id.*
37. 103 L.R.R.M. at 1074. It will be interesting to see just how much evidence the employer must present in future Board cases to satisfy the burden of showing that the disabled employee *supported the strike.* In a footnote, the majority stated that affirmative support for the strike was shown by evidence that an employee worked in the union's office answering telephone calls during the period of his disability. *Id.* at 1074 n.7.
38. *Id.*

right to disability benefits without disavowing the strike while the employer is not obligated to finance a strike against himself once the employee has taken supportive action.[39]

Member Jenkins' approach is similar to the approach taken by the majority in *Emerson*, differing only with regard to the consequences of subsequent strike participation. His view is that the employer should be required to pay the disability benefits even if the employee supports the strike. "[T]he presence of disabled employees on the picket line is insufficient to establish that they are strikers . . ., particularly as [the] choice [to work] was never open to them."[40] But, the majority's limitation upon the employee's right to disability benefits once he publicly supports the strike is a sounder approach. Although neither of the two approaches perfectly outline NLRA policy, the majority in *Emerson* comes closer to striking a balance between the competing economic interests of the employer and employee. It is basically a middle-ground approach to the problem of protecting the employee's section 7 right to remain silent and inactive while at the same time protecting the economic interests of the employer. Member Jenkins would ignore the interests of the employer. He would require that the employer continue to pay disability benefits to employees participating in the strike, in effect, making him "finance" a strike against himself.

The Board's balancing approach in *Emerson* is consistent with Board policy that management and labor not act as completely ungoverned gladiators in the economic arena. "[T]he Board may . . . exercise its duty to strike the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy."[41] The Board fulfilled that duty in *Emerson*.

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39. The Board did not address the situation in which an employee undergoes *elective* surgery in the face of an imminent strike by his unit. From a practical standpoint, upon seeing that a strike is inevitable, an employee could voluntarily elect to have the surgery he has needed in the past and receive disability benefits while his unit participates in the strike. This could raise interesting questions for the Board in the future. Does this employee fall within the protection of the rule in *Emerson* or will the Board view this as a voluntary withholding of service so as to oust the disabled employee from the protection of section 7 of the NLRA?

40. 103 L.R.R.M. at 1075. Member Jenkins further argued that the majority's position could lead to a finding that "a healthy employee who pickets an employer during off-duty hours has thereby relinquished all right to further benefits stemming from his employment relation. The only additional factor present here is that the disabled employee has nothing but off-duty hours." *Id.* at 1075 n.14.

41. NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 33-34 (1967).