

Keco Industries, Inc. and Ruben F. Lima. Case 9–CA–17923

January 25, 1991

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
CRACRAFT, OVIATT, AND RAUDABAUGH

On October 16, 1985, the National Labor Relations Board issued a Decision and Order,¹ finding that the Respondent did not violate the Act by refusing to reinstate four strikers who engaged in certain strike misconduct. The Board reversed the administrative law judge's decision with respect to Ruben F. Lima. The Board cited *Clear Pine Mouldings*,² which held that strikers will forfeit their right to reinstatement when they engage in "misconduct . . . that, under the circumstances existing . . . may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act."³ Applying this test, the Board found that Lima forfeited his right to reinstatement. The Board therefore dismissed the complaint. Thereafter, Lima sought review of the Board's decision in the United States Court of Appeals for the District of Columbia Circuit.

On May 19, 1987, the court issued its decision.⁴ The court granted the petition for review and remanded the case to the Board for further consideration of "whether the Board's application of the *Clear Pine Mouldings* rule is rational, based on substantial evidence, and consistent with the Board's own precedents."⁵

The Board accepted the remand and the Charging Party and the Respondent filed statements of position.

The Board has reconsidered its Decision and Order in light of the court's decision, the entire record, and the statements of position, and has decided to affirm its conclusion that the Respondent did not violate the Act by refusing to reinstate Lima.

The facts concerning Lima's strike misconduct are as follows. On the third day of the strike, less than an hour before noon, while strikers were picketing in front, the Respondent's guards twice briefly observed Lima behind the plant in the vicinity of the gate being used by nonstrikers. Lima was walking on railroad tracks off the Respondent's property. While none of the guards came closer to Lima than about 25 yards, they saw a gun stuck in his waistband on both occasions. One of the guards summoned the police and then went to the front of the plant where he saw Lima, but no gun. Thereafter, Lima got into his car and drove

to a parking lot across the street. The police arrived and conducted a search, but no gun was found on Lima's person, in his automobile, or in the area.

Before the judge, Lima denied ever carrying a firearm on the picket line and stated that he was in the habit of carrying only a leather knife case. He did not claim that he was carrying another object that might have been mistaken for a gun from a distance.

The judge credited the testimony of the Respondent's guards and discredited Lima's. He found that Lima had a gun stuck in his waistband on the two occasions the guards observed him in the rear of the plant in the vicinity of the gate used by nonstriking employees.

The issue in this case is whether Lima's conduct "under the circumstances existing . . . may reasonably tend to coerce or intimidate employees in the exercise of rights protected by the Act."⁶

In resolving this question, we start with the proposition that a gun is an inherently dangerous weapon.⁷ We also note that a picket line is often a place where tempers can flare and emotions can run high. Indeed, in the instant case, rocks were thrown, at least one person was physically assaulted, tires were slashed, and verbal abuse was common. Finally, we note that Lima was standing in the vicinity of the gate used by nonstrikers. In a strike situation, this area is often a focal point for the venting of anger and frustration. The inherent danger of a gun becomes particularly acute when a striker with a gun stands at a place where nonstrikers enter the plant.

Concededly, there is no evidence that any employee saw Lima with a gun. However, the test is not whether employees are in fact coerced or intimidated by the gun.⁸ Rather, as noted above, the test is whether the gun "may reasonably tend to coerce or intimidate employees." Applying this test, we find that the carrying of the gun, in the circumstances of this case "may reasonably tend" to intimidate employees. The fact that

⁶ *Clear Pine Mouldings*, supra at 1046.

⁷ "First, a gun is an article that is typically and characteristically dangerous; the use for which it is manufactured and sold is a dangerous one, and the law reasonably may presume that such an article is always dangerous even though it may not be armed at a particular time or place. In addition, the display of a gun instills fear in the average citizen; as a consequence, it creates an immediate danger that a violent response will ensue. Finally, a gun can cause harm when used as a bludgeon." *McLaughlin v. U.S.*, 476 U.S. 16, 17–18 (1986) (footnote omitted).

⁸ *Roto Rooter*, 283 NLRB 771, 772 (1987). See also *NLRB v. W. C. McQuaide, Inc.*, 552 F.2d 519, 527 (3d Cir. 1977):

Rather than focus on either the subjective intent of the striker or the perception of the "victim," we adopt an objective standard to determine whether conduct constitutes a threat sufficiently egregious to justify an employer's refusal to reinstate. . . . That no one was in fact coerced or intimidated is of no relevance. The test of coercion and intimidation is not whether the misconduct proves effective. The test is whether the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act [citations omitted].

¹ 276 NLRB 1469 (1985).

² 268 NLRB 1044 (1984), enfd. mem. 765 F.2d 148 (9th Cir. 1985).

³ Id. at 1046 (quoting *NLRB v. W. C. McQuaide, Inc.*, 552 F.2d 519, 527 (3d Cir. 1977)).

⁴ *Ruben F. Lima v. NLRB*, 819 F.2d 300 (D.C. Cir. 1987).

⁵ Id. at 303. Judge Williams dissented. He found that the record supported the Board's decision to deny Lima reinstatement. Id. at 304–306.

it did not in fact do so on the day in question is irrelevant.

We do not pass on the issue of whether the carrying of a gun would constitute misconduct per se, i.e., whether it would tend to coerce or intimidate employees in all circumstances.

Further, state gun control laws are not controlling here. The legality of Lima's conduct under state laws

is not dispositive of what are separate and distinct issues raised under the National Labor Relations Act.⁹

Accordingly, we affirm our earlier disposition of this case. The Respondent did not violate the Act by discharging Rubin S. Lima.

ORDER

The complaint is dismissed.

⁹ *Catalytic, Inc.*, 275 NLRB 97, 98 fn. 13 (1985).