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# LABOR

## LABOR BOARD BACK PAY ORDERS

The National Labor Relations Board, having found petitioner had wrongfully discharged employees, ordered reinstatement of employees with back-pay, less monies received by them, during period of discharge, from labor upon work relief projects. The Board further ordered petitioner to make payment of this deducted amount to the

fiscal agencies of government which had supplied funds for the work relief projects. On petition for writ of certiorari, held: order should be enforced with reimbursement provision eliminated. Such provision is punitive and therefore exceeds power granted to Board by Congress. *Republic Steel Corp. v. NLRB*, 61 S. Ct. 77 (1940).

The Board in ordering reimbursement to WPA relied upon section 10(c) of the NLRA which provides that the Board shall order "such affirmative action, including reinstatement of employees with or without back-pay, as will affectuate the policies of this act." 49 STAT. 454 (1935), 29 U.S.C.A. 160(c) (Supp. 1938). Such order was thought to redress a public loss and deny employer opportunity of shifting to government the burden of supporting wrongfully discharged employees. *In re Republic Steel Corp.*, 9 NLRB 219 (1938). A similar order was upheld in *Union Drawn Steel Co. v. NLRB*, 109 F. (2d) 587 (C.C.A.3d, 1940) upon the basis that the order was reasonable, but the validity of another was denied upon the ground that WPA is not charity and an employer should not be compelled to assume the burden of public improvement. *NLRB v. Leviton Mfg. Co.*, 111 F. (2d) 619 (C. C. A. 2d, 1940). *Cf. NLRB v. Tovrea Packing Co.*, 111 F. (2d) 626 (C.C.A. 9th, 1940). The decision in the principal case was primarily based upon the doctrine that an NLRB order must not be punitive. *NLRB v. Remington Rand*, 94 F. (2d) 862, 872 (C.C.A. 2d, 1938). The words "penal" and "penalty" have been used in various senses. Strictly and primarily, they denote punishment, whether corporal or pecuniary, imposed and enforced by the state for a crime or offense against its laws. *Huntington v. Atrill*, 146 U. S. 657, 666 (1892). But they are also commonly used as including an extraordinary liability to which the law subjects the wrongdoer in favor of the person wronged, not limited to the damages suffered. *O'Sullivan v. Felix*, 233 U.S. 318, 324 (1914). The court in the principal case seemed to regard the NLRB order as being punitive in the strict sense. The court said, "The Act is essentially remedial. It does not carry a penal program declaring the described unfair labor practices to be *crimes*. The Act does not prescribe penalties or *fines* . . . . *Republic Steel Corp v. NLRB, supra* at p.79. However, in *NLRB v. Remington Rand, supra* at p.872, the court declared punitive, and hence invalid, an NLRB order which required an employer to furnish transportation to certain employees. That order could not have been punitive in the strict sense. The order neither provided for payment of a fine to government nor for corporal punishment. *Cf. U.S. v. Reisinger*, 128 U.S. 398 (1888); *Iowa v. Chicago R. Co.*, 37 Fed. 497 (1889). It would seem, therefore, that an NLRB order is invalid if punitive in either the strict or liberal sense of the word.

Perhaps more satisfactory decisions would be rendered if courts discarded the "punitive-remedial" test and relied only upon a test based upon the legislative intent, as expressed in floor debate by Senator Walsh, Chairman of the Committee on Education and Labor which considered the bill, that the Act and orders thereunder should go no further than the employer-employee relationship. See 79 CONG. REC. 7659 to 7661 (1935). This test would adequately cover the situation in the principal case. P. C. M.