

Principles in Collision: Labor Union rights v. Employee civil Rights

Barry Winograd

Arbitrator and mediator in Oakland, California

Member of the National Academy of Arbitrators

Adjunct faculty of the law schools at the University of California, Berkeley , and the
University of Michigan

In fall 1968, two black African-American workers at the Emporium department store in San Francisco, California were fired after they picketed and urged a customer boycott of the store. The employees hoped their actions would put pressure on the store because of what they claimed was a pattern of discrimination in denying better job assignments to minority workers. For years, black workers had been employed mostly in the storeroom area, and had difficulty getting higher paying jobs selling to the public or as supervisors. Arguing that this was improper, the workers mounted a campaign to change the store's practices, leading to the boycott and the firings. Seven years later, after administrative hearings and appellate review, the U.S. Supreme Court upheld the firings.

As much as any other case, the resolution of this dispute reveals much about basic principles of labor relations in the United States. In the U.S., a single union that demonstrates majority support is granted legal status as the exclusive representative for company employees, and, as such, has the sole authority to negotiate with the employer over the wages, hours, and other terms and conditions of employment for the represented employees. This authority is granted under the National Labor Relations Act, the main law governing labor relations for private employers in the US. [1] Typically, the union's representation involves the operations of a single employer, and serves a group of employees with common interests. In contrast, in other legal regimes in Europe and elsewhere, two or more unions often represent an employer's workers, utilizing direct negotiations, or, in other instances, workplace councils based on proportional representation. The Emporium case illustrates the stark contrast between the U.S. model of exclusive representation and other approaches.

In the background of the dispute was the union that represented the employees, the Department Store Employees Union, one of the most progressive in San Francisco. [2] As the official representative for Emporium employees, the union had negotiated a collective bargaining agreement regulating key terms and conditions of employment. The agreement included a provision barring discrimination against employees on the basis of race. The agreement also included a grievance procedure that permitted the union to challenge violations of the agreement. Under this provision, if a grievance was not resolved by the parties, it could be presented to an arbitrator for final and binding

resolution. A third provision relevant to the dispute was a “no strike” clause prohibiting strikes, picketing, boycotts, or other concerted activity by the union and employees during the life of the agreement.

Prior to the employees' picketing and boycott activity, they raised their claims internally within the union, beginning in spring 1968. The union responded with an investigation, which confirmed discriminatory actions by the employer. By September 1968, the union was moving forward with grievances to challenge the employer's practices. Over the next several weeks, however, the black workers came to believe that the union's efforts were too slow and too narrow in their focus. Instead of agreeing to the union's plan of relying on grievances and arbitration seeking better job assignments for individual employees, the minority workers demanded that the store's president meet with them to settle the dispute for all minority employees as a group.

A few weeks later in November 1968, to back up the employees' demands with economic leverage, the workers announced that they would picket the store to advocate a customer boycott. When the picketing and boycott began, leaflets were distributed asking customers not to shop at the Emporium. In the leaflets, the workers characterized the store as a “20 th Century colonial plantation.” In often harsh language, the employees criticized the store's treatment of minority employees as racist. Soon after the pickets appeared, the employees were warned by the company that they would be dismissed if it continued. Union representatives also urged that the employees stop their protest actions in order to keep their jobs. A week later, after the picketing resumed, the employees were fired.

In 1975, the United States Supreme Court, the highest court in the country, upheld the firings. [3] In a curious historical twist, the Supreme Court decision was written by its first African-American justice, Thurgood Marshall, who, before his judicial appointment, was a pioneer attorney in the civil rights struggle for equal rights. Indeed, it was the civil rights movement, and the mass protests that it organized, that forced the U.S. Congress in 1964 to pass a national law prohibiting discrimination in employment practices. [4] By 1968, this law formed a key backdrop for considering how the firings of the two Emporium workers should be handled.

To protest the firings, a charge was filed with the National Labor Relations Board. The Board is the federal agency that enforces labor law rights for private sector employees in the US by considering claims of unlawful labor practices. Where warranted, the Board's staff of attorneys prosecutes alleged violations. A separate branch of the Board includes its trial examiners, or hearing officers, who serve as judges for complaints presented by the Board's staff.

The charge on behalf of the workers was initiated by a San Francisco civil rights group, not by the union. After an investigation, the Board issued a formal unfair labor practice complaint against the store alleging that it interfered with a legally protected right of U.S. workers to engage in collective action, particularly when rights of equal employment are at issue. The complaint went before a trial examiner for determination.

The trial examiner rejected the Board's theory of a violation, instead concluding that the store had not violated federal labor law because the employees' actions were not protected from discipline. The trial examiner found that the employees lost protected status because they were attempting to bargain with the store's president, and, in so doing, they were bypassing the union in its statutory role as the sole bargaining representative of the store's employees. Since the union was the exclusive representative, the trial examiner decided that the protesting workers had no right to compel the store to negotiate with them, rather than with the union, especially since the union was pursuing the issue through the grievance procedure. For this reason, coupled with the contractual ban on strikes and related activity, the trial examiner concluded that the picketing and boycott actions of the workers were unprotected and they could be dismissed.

The decision of the trial examiner was adopted by the National Labor Relations Board, by a three to two vote. [5] By affirming the trial examiner's rationale, the principle of exclusive representation was treated as the determining factor. One of the two dissenting votes on the Board, by the its only African-American member, focused on the importance of civil rights for minority employees as justifying an exception to the principle of exclusive representation that would permit picketing to protest discriminatory practices.

The significance of the anti-discrimination principles emphasized by the dissenting Board member was given weight when the Board's decision was reviewed by the federal court of appeals, which made an effort to fashion a type of balancing test. [6] Two of the three judges on the appellate panel held that the employee picketing would be protected against dismissal if it could be demonstrated that the union was not moving with full and sufficient speed to remedy the problem. To determine if this was the case, the appellate majority remanded the case to the Board for further analysis. The third appellate judge, however, was ready to reverse the firings by affording minority employees an absolute right to protest against race discrimination. In the dissenter's view, enforcing civil rights is a transcendent federal interest that can be invoked without fear of being fired, and regardless of the union's willingness to grieve the employee claims.

The Supreme Court's decision, authored by Justice Marshall, adhered to the original perspective of the Board's trial examiner and the Board's majority. The court found that the principle of exclusive representation served important union and worker interests, particularly by giving employees a single voice that could resist potential employer attempts to divide one group of workers against another. In the court's view, if dissident minority employees had the right to compel management to meet, this could lead to management's manipulation of competing groups of workers, thereby undermining the union's collective strength. As to the question of whether minority employees would be at the mercy of their union, the court reasoned that other remedies remained available for employees who felt that their union was not doing all that it should. The remedies mentioned by the court included the right to mount internal organizing and dissent within the union, as well as law suits for a union's failure to fairly represent the workers and for union participation in discriminatory practices.

One judge dissented from the Supreme Court's decision, finding that protection against discrimination should not be precluded by a union having sweeping power as the bargaining representative. The dissent argued that the alternative remedies were impractical methods of securing prompt relief. According to the dissent, employee protection against discrimination should be available once an employee has sought to raise the issue with the union.

In the 30 years since the Emporium decision, the “one voice rule” that it affirmed has remained a fixture of U.S. labor law. The highest court rejected an appeal that minority workers be given leeway to pursue workplace changes on their own, and also rejected a compromise that would have required a greater showing of union diligence in order to deprive employees of protection against being fired. Whether this resolution of the collision course seen in the Emporium case is correct remains a subject of debate, even if there is little prospect that the rule of law adopted in the case will be changed.

[\[1\]](#) 29 U.S.C. Section 151, et .seq.

[\[2\]](#) Also in the background for 1968 were ever more dramatic political disruptions, internationally in such places as France and Czechoslovakia , and nationally within the US , including the widely televised conflicts that summer at the Democratic Party convention in Chicago . Locally in the San Francisco Bay Area, the civil rights movement, and protests against US involvement in Vietnam , sparked numerous rallies throughout the year. At nearby San Francisco State University , hundreds were arrested in fall 1968 in a series of demonstrations seeking creation of a “Third World Studies” department. A hotly contested presidential election also overshadowed the events at The

Emporium. Richard Nixon was the eventual winner, just days before the firings that gave rise to the case. It is safe to say that, but for the ensuing litigation, the protest launched by Emporium employees would likely be only a fading memory in the context of such a tumultuous year.

[3] *Emporium Capwell Co. v. Western Addition Community Organization* , 420 U.S. 50 (1975).

[4] 42 U.S.C. Section 2000e, et seq.

[5] *The Emporium* , 192 NLRB 1971 (1971). The trial examiner's decision accompanies the Board's decision as an addendum.

[6] *Western Additional Community Organization v. N.L.R.B.* , 485 F.2d 917 (DC Cir. 1973).