

Statement of the Case.

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Labor Relations Act took a step further by providing that the Board could order reinstatement of employees even though there had been no violation of any previous order of the Board or of a court. It thus removed the doubt which would otherwise have arisen by defining and, as we think, enlarging the Board's authority to take affirmative action so as to include the power to order "reinstatement" of employees. But an authority to order reinstatement is not an authority to compel the employer to instate as his employees those whom he has never employed, and an authority to award "back pay" to reinstated employees is not an authority to compel payment of wages to applicants for employment whom the employer was never bound to hire.

Authority for so unprecedented an exercise of power is not lightly to be inferred. In view of the use of the phrase "including reinstatement of employees," as a definition and enlargement, as we think it is, of the authority of the Board to take affirmative action, we cannot infer from it a Congressional purpose to authorize the Board to order compulsory employment and wage payments not embraced in its terms.

CONTINENTAL OIL CO. *v.* NATIONAL LABOR
RELATIONS BOARD.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE
TENTH CIRCUIT.

No. 413. Argued March 11, 1941.—Decided April 28, 1941.

Decided upon the authority of No. 387, *Phelps Dodge Corp. v. National Labor Relations Board*, *ante*, p. 177. P. 214.
113 F. 2d 473, modified and remanded.

CERTIORARI, 311 U. S. 637, to review in part a judgment sustaining in part an order of the National Labor Relations Board, 12 N. L. R. B. 789.

Mr. John P. Akolt, with whom Messrs. James J. Cosgrove, Elmer L. Brock, E. R. Campbell, and Milton Smith were on the brief, for petitioner.

The Board has no power to order reinstatement unless the status of "employee" exists at the time of the entry of the Board's order, and unless the employee has not, in the meantime, obtained any other regular and substantially equivalent employment. *Mooresville Cotton Mills v. Labor Board*, 94 F. 2d 51, 66; *Standard Lime & Stone Co. v. Labor Board*, 97 F. 2d 531, 535; *Labor Board v. Carlisle Lumber Co.*, 99 F. 2d 533, 537, 538; *Labor Board v. Hearst*, 102 F. 2d 658, 664; *Labor Board v. National Motor Bearing Co.*, 105 F. 2d 652, 662; *Labor Board v. Botany Worsted Mills*, 106 F. 2d 263, 269; *Phelps Dodge Corp. v. Labor Board*, 113 F. 2d 202.

The Board made no finding that the employee had not obtained substantially equivalent employment. One who becomes a proprietor of a business does not retain his status as an "employee."

The power of the Board to require affirmative action is remedial, not punitive. *Consolidated Edison Co. v. Labor Board*, 305 U. S. 197; *Labor Board v. Fansteel Metallurgical Corp.*, 306 U. S. 240; *Republic Steel Corp. v. Labor Board*, 311 U. S. 7.

In connection with the reinstatement, the Board ordered that Jones should be reimbursed for his earnings loss up until the time when offer of reinstatement was made. It can not be proper to require an employer to subsidize a business venture and protect a former employee against the losses in the business venture in which he has voluntarily engaged.

The evidence shows a transfer of Moore, but no discharge. There is no finding of any discharge, but there is a finding of a discriminatory transfer. Such a finding, not in conformity with any charge in the complaint, is not sufficient to justify any reinstatement relief.

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Moore's employment at the penitentiary at a wage of \$70 per month, plus room and board, was regular employment substantially equivalent to his former employment. He therefore could not be considered an employee within the reinstatement provisions of the Act. *Labor Board v. Carlisle Lumber Co.*, 99 F. 2d 533, 537.

Mr. Thomas E. Harris, with whom *Solicitor General Biddle* and *Messrs. Robert B. Watts, Laurence A. Knapp, Mortimer B. Wolf*, and *Morris P. Glushien* were on the brief, for respondent.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

In its petition the Continental Oil Company challenged various provisions of an order of the Labor Board which the Circuit Court of Appeals had enforced, but we brought here only so much of the case as pertained to the reinstatement of two men, Jones and Moore, 311 U. S. 637. Continental's contention is that reinstatement was precluded because neither man remained an "employee" within § 2 (3) of the National Labor Relations Act. The decisive question, however, as we have ruled in the *Phelps Dodge* case, *ante*, p. 177, is whether reinstatement will "effectuate the policies" of the Act. We therefore remand the case for an exercise by the Board of its judgment on that issue, in light of our opinion in the *Phelps Dodge* case.

Remanded.

MR. JUSTICE ROBERTS took no part in the consideration or disposition of this case.

The CHIEF JUSTICE and MR. JUSTICE STONE reiterate the views expressed by them in the *Phelps Dodge* case.

MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, and MR. JUSTICE MURPHY are of opinion that the Board's order should be affirmed for the reasons set forth by them in the *Phelps Dodge* case.