

HELMUT DOSCH, PETITIONER, VS. NATIONAL LABOR RELATIONS COMMISSION AND NORTHWEST AIRLINES, INC., RESPONDENTS.

G.R. No. 51182. July 05, 1983

Ponente: GUERRERO, J.

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GUERRERO, J.:

This is a petition for review seeking to set aside the decision of the National Labor Relations Commission in NLRC Case No. RB-4220 reversing the award made by the Labor Arbiter ordering petitioner's reinstatement by private respondent Northwest Airlines, Inc. with full backwages and other benefits decreed by law.

The antecedent facts of this case are as follows:

Petitioner Helmut Dosch, an American citizen, married to a Filipina, was the resident Manager of Northwest Airlines, Inc. (Northwest, for short) in the Philippines. He has to his credit eleven (11) years of continuous service with the company, including nine (9) years as Northwest Manager with station at Manila. On August 18, 1975 he received an inter-office communication from R.C. Jenkins, Northwest's Vice President for Orient Region based in Tokyo, promoting him to the position of Director of International Sales and transferring him to Northwest's General Office in Minneapolis, U.S.A., effective the same day. The full text of the inter-office communication is reproduced below:

"NORTHWEST ORIENT Interoffice Communication

To: H. Dosch, Manager-Philippines Date: August 18, 1975

From: Vice President, Orient Region Location: Tokyo

Subject: Transfer

Dear Helmut:

You have completed nine (9) years of service in the Orient, and in accordance with usual practice, it is now the Company's intention to transfer you to the General Office in Minneapolis to broaden your experience base considering that your assignment in the Philippines has continued for several years longer than is normal for our overseas managers.

The Company feels that there is need for an executive with your experience to fill the position of Director of International Sales reporting directly to the Vice President for Sales. The Company has therefore decided to promote and transfer you to this position effective today, August 18, 1975. Your monthly compensation will be upgraded and the proper payroll adjustment will be made in due course effective today.

To implement the foregoing decision of the Company and in order to effect a smooth turnover, Mr. L.J. Gilbert, Jr. shall, effective today, August 18, 1975, take over your functions and responsibilities as Manager.

You are expected to report to your new assignment on September 15, 1975. You shall, however, be afforded sufficient time, which in this case shall not extend beyond September 15, 1975, within which to wind up your

affairs in the Philippines. During this transition period, you will be on vacation leave for ten (10) days and thereafter on travel and relocation status with pay. Please see that the Company house you presently occupy will be made available to your successor by September 10, 1975.

We wish you success in your new assignment.

Very truly yours,

(Sgd.) R. C. JENKINS"

Petitioner, acknowledging receipt of the above memo of August 18, 1975, expressed appreciation for the promotion and at the same time regretted that "for personal reasons and reasons involving my family, I am unable to accept a transfer from the Philippines" in his letter dated August 28, 1975 which reads:

"R.C. JENKINS - V.P., O.R. August 28, 1975

H. DOSCH

TRANSFER

This is to acknowledge receipt of your memo of August 18, 1975, on the subject.

While I sincerely appreciate the company's confidence in my abilities as a manager, which reflects itself in my promotion to the position of Director of International Sales, I regret that at this time, for personal reasons and reasons involving my family, I am unable to accept a transfer from the Philippines.

I would, therefore, prefer to remain in my position of Manager-Philippines until such time that my services in that capacity are no longer required by Northwest Airlines.

(Sgd.) H. DOSCH"

Petitioner tried to resume his duties as Manager, through a memorandum to the Manila Staff which reads:

"MANILA STAFF Sept. 4, 1975

H. DOSCH MNL

RESUMPTION OF DUTIES Letter No. 454/75

It gives me great pleasure to announce that I advised Mr. Jenkins by letter dated August 28, 1975, that, for personal reasons, I have declined to accept the promotion to the position of Director of International Sales at the General Office.

Accordingly, upon return to work from an authorized vacation of ten working days, I am resuming my duties and responsibilities as Manager-Philippines effective today, September 4, 1975.

I know you will join me in thanking Mr. L.J. Gilbert for taking my place as Acting Manager-Philippines during my absence from the office.

(Sgd.) H. DOSCH"

Telegrams were also sent by petitioner to Mr. Nightingale, Director for Finance and to Mr. Jenkins, clearly stating petitioner's desire to remain as Manager-Philippines of Northwest.

On September 9, 1975, the Vice President for the Orient Region of Northwest advised petitioner that "in view of the foregoing, your status as an employee of the company ceased on the close of business on August 31, 1975" and "the company therefore considers your letter of August 28, 1975, to be a resignation without notice."

On September 16, 1975, Northwest filed a Report on Resignation of Managerial Employee (Form No. 74-3, Revised September 1974), i.e., Helmut Dosch, before Regional Office No. IV (Manila) Department of Labor, copy thereof furnished petitioner.

The Report was contested by the petitioner and the parties were conciliated by Regional Office No. IV, Manila but failed to agree on a settlement. The case was thus certified to the Executive Labor Arbiter, National Labor Relations Commission, for compulsory arbitration, in the following wise and manner:

"Pursuant to P.D. 442, as amended, and its implementing rules and regulations (I) have the honor to transmit complaint – Case No. R04-10- (illegible)

COMPLAINANT/S HELMUT DOSCH

Address: c/o Atty. A.D. Valmonte

Don Pablo Bldg.

114 Amorsolo St., Makati, Rizal

RESPONDENT/S NORTHWEST AIRLINES, INC.

Address: 1020 Roxas Blvd., Manila

and hereby certifies the following issue(s) for arbitration:

1. Illegal dismissal.
2. x x x
3. x x x
4. x x x
5. X x x

The following issue(s) have been settled:

1. x x x
2. x x x
3. x x x
4. x x x

Attached herewith is the record of the case consisting of THIRTY ONE (31) pages

Original Signed:

Officer-In-Charge

February 3, 1976."

After hearing, Labor Arbiter Sofronio A. Ona rendered the decision dated December 29, 1976, the dispositive portion of which reads:

"IN VIEW OF THE FOREGOING, respondent Northwest Airlines, Inc. of 1020 Roxas Boulevard, Manila is hereby directed to reinstate complainant Helmut Dosch of Makati, Rizal c/o Atty. A. D. Valmonte, Don Pablo Building, 114 Amorsolo Street, to his former position with full backwages without deduction whatsoever from

the time his salary was withheld by the respondent until actual reinstatement, without loss of seniority rights and other benefits recognized by law, including attorney's fees equivalent to 10% of the total monetary benefits the petitioner may recover, to take effect 10 days from receipt of this Decision.

SO ORDERED.

Manila, Philippines, December 29, 1976."

Respondent Northwest appealed from the Labor Arbiter's decision to the National Labor Relations Commission (hereinafter referred to as NLRC) assigning the following errors: (a) the Labor Arbiter erred in not holding that petitioner had "resigned" his employment; (b) assuming *arguendo* that petitioner "did not resign," the Labor Arbiter erred in not holding that petitioner could be dismissed for failure/refusal to comply with the valid transfer order and for the employer's loss of trust and confidence of his employee; (c) the Labor Arbiter erred in impliedly holding that prior clearance was required to effect the termination of petitioner, a managerial employee; and (d) Labor Arbiter erred in awarding reinstatement, backwages, and attorney's fees.

Petitioner filed his Reply to the appeal, supporting the findings of the Labor Arbiter and furthermore questioned the propriety of raising for the first time on appeal the issue whether or not petitioner's refusal to comply with the transfer order constitutes a just and sufficient cause to dismiss him.

The decision en banc of the NLRC reversed the Labor Arbiter's decision and dismissed the case for lack of merit, holding that:

"The hiring, firing, transfer, demotion and promotion of employees has been traditionally identified as a management prerogative. This is a function associated with the employer's inherent right to control and manage effectively its enterprise. The free will of management to conduct its own business affairs to achieve its purpose cannot be denied. This exercise finds support not only in actual management practice but has become a part of our jurisprudence in labor relations law where, in a number of cases brought before the Supreme Court, the highest tribunal ruled in one of these cases (*Roldan vs. Cebu Portland Cement Co.*, C.A.-G.R. No. 24276-R, May 20, 1960, citing *Gregorio Araneta Employees Union vs. Roldan*, G.R. No. L-6843, July 20, 1955; *Philippine Steel Metal Workers Union vs. CIR*, G.R. No. L-3587, Dec. 11, 1951), pertinent portion of the decision reads as follows:

'x x x Questions affecting the direction and management of personnel are matters which the management itself must resolve. Thus the Court has steadfastly held that the determination of the qualifications and fitness of workers for hiring and firing, promotion or reassignment on rotation system, are the exclusive prerogatives of management. The management has also the right to discharge employees when there is need to reduce personnel because of the precarious condition of the enterprise or as a result of that closing of a section therein' (*Morabe, The Law on Dismissal*, 1962 ed., p. 55 citing *Pampanga Bus Co., Inc. v. Employees Association of the Pampanga Bus Co., Inc.*, Case No. 17-V, Decision, August 10, 1946).

x x x

In the light of all the foregoing, We find that petitioner's transfer and promotion is a valid exercise of management's prerogative. It is our view, therefore, that respondent's decision to consider him resigned from his job after he defied management's order to transfer and promote him to a new position at the general office at Minnesota, U.S.A. is justified and warranted. x x x."

Petitioner now comes to Us for review of the decision.

With respect to the procedural error allegedly committed by the respondent Commission in taking cognizance of an issue raised for the first time on appeal - that of petitioner's alleged insubordination for refusing to comply

with the transfer order for him to assume the position of Director of International Sales at Minneapolis, U.S.A., which said Commission sustained and ruled in favor of Northwest, reversing the Labor Arbiter's decision, the records disclose that Northwest's theory from the inception of the case to the rendition of the Labor Arbiter's decision was that petitioner was not dismissed, fired or terminated but that he resigned from Northwest. This is plain from Northwest's verified "Report on Resignation of Managerial Employee" in DOL Form No. 74-3 filed on September 16, 1975 with Regional Office No. IV, Department of Labor, wherein Northwest stated that the termination of employment of "Helmut Dosch, Manager-Philippines" was due to "resignation". Petitioner contested this report claiming that he never resigned from the company. In its "Position Paper" dated March 10, 1976 before Regional Branch No. IV, Northwest emphasized that any issue other than resignation of petitioner is irrelevant, thus: "As allegations relative to termination are immaterial in this case, petitioner has no basis to claim that 'there is no legitimate ground, upon which Northwest Airlines, Inc. could have terminated the services of Mr. Dosch' or that petitioner's resignation was 'a circumvention of the law'. In truth petitioner caused his own dissociation from respondent."

We agree with the Labor Arbiter that "(i)n view of the overwhelming evidence to the effect that petitioner did not resign or relinquish his position as Manager-Philippines, this Body is without any alternative, but to declare the sole reason relied upon by respondent--resignation (Exh. 'Q') as baseless and devoid of truth." Indeed, the letter dated August 28, 1975 sent by petitioner to R.C. Jenkins cannot be considered as a resignation as petitioner indicated therein clearly that he preferred to remain as Manager-Philippines of Northwest.

Realizing that its "resignation" theory was weak and flimsy, Northwest abandoned it and contended for the first time that petitioner was guilty of insubordination when he refused to comply with the transfer order. This change of theory on appeal is improper; it is offensive to the basic rules of fair play and justice and violative of petitioner's constitutional right to due process of law. Appellate courts may not entertain questions of law or fact not raised in the lower courts (Sec. 18, Rule 46, Revised Rules of Court), for that would constitute a change of theory not permissible on appeal (*Toribio vs. Decasa*, 55 Phil. 461).

"It is undoubtedly the law, that, where a cause has been tried upon the theory that the pleadings are at issue, or that a particular issue is made by the pleadings, or where an issue is tacitly accepted by all parties as properly presented for trial and as the only issue, the appellate court will proceed upon the same theory. (*Lizarraga Hermanos vs. Yap Tico*, 24 Phil. Rep. 504; *Molina vs. Somes*, 24 Phil. Rep. 45.) It would be unjust and oppressive for the appellate court to adopt a theory at variance with that on which the case was presented to and tried by the lower court. It would surprise the parties, to take them unaware and off their guard, and would in effect, deprive them of their day in court. (*Limpangco Sons vs. Yangco Steamship Co.*, 34 Phil. 597, 605-609).

Since "resignation" was the particular cause alleged by Northwest in terminating petitioner's employment, Northwest is restricted to the ground specified and may not invoke any other cause for the discharge. (56 CJS p. 452, citing *Georgia Coast and P.R. Co. vs. McFarland*, 64 S.E. 897, 132 Ga 639; 56 CJS p. 435, citing *Vicknair vs. Southside Plantation Co.*, 10 La. App. Orleans 43; *Warner vs. Fabacher*, 6 La. App. Orleans, 87).

As indicated earlier, Northwest on appeal to NLRC changed its stand and claimed that petitioner was guilty of "insubordination" when he refused to comply with the transfer order made by Vice President Jenkins dated August 18, 1975. And for such act of insubordination, Northwest claimed it lost confidence in the petitioner.

We must, however, rightly treat the Jenkins letter as directing the promotion of the petitioner from his position as Philippine Manager to Director of International Sales in Minneapolis, U.S.A. It is not merely a transfer order alone but as the Solicitor General correctly observes, "it is more in the nature of a promotion than a transfer, the latter being merely incidental to such promotion." The inter-office communication of Vice President Jenkins is

captioned "Transfer" but it is basically and essentially a promotion for the nature of an instrument is characterized not by the title given to it but by its body and contents. (Cf. *Shell Co. vs. Firemen's Insurance Co. of Newark*, 100 Phil. 757; *Borromeo vs. Court of Appeals*, L-22962, Sept. 28, 1972; *American Rubber Co. vs. Collector of Internal Revenue*, L-25965, June 29, 1975). The communication informed the petitioner that effective August 18, 1975, he was to be promoted to the position of Director of Inter-national Sales, and his compensation would be upgraded and the payroll accordingly adjusted. Petitioner was, therefore, advanced to a higher position and rank and his salary was increased and that is a promotion. (People ex. rel. *Campbell vs. Partridge*, 85 N.Y.S. 833, 899 App. Div. 497; *State ex rel. Wolcott vs. Celebrezze*, 49 N.E. 2d. 948, 141 Ohio St. 627, Vol. 34 Words and Phrases, pp. 564, 565). It has been held that promotion denotes a scalar ascent of an officer or an employee to another position, higher either in rank or salary. (*Millares vs. Subido*, 20 SCRA 954).

In the *Millares* case above, the Supreme Court, speaking thru Acting Chief Justice J.B.L. Reyes, distinguished between transfer and promotion as follows:

"A transfer is a movement from one po-sition to another of equivalent rank, level or salary, without break in the service. Promotion, on the other hand, is the ad-vancement from one position to another with an increase in duties and responsi-bilities as authorized by law, and usually accompanied by an increase in salary. Whereas, promotion denotes a scalar ascent of a senior officer or employee to another position, higher either in rank or salary, transfer refers to lateral movement from one position to another, of equivalent rank, level or salary." (p. 962)

There is no law that compels an employee to accept a promotion, as a promotion is in the nature of a gift or a reward, which a person has a right to refuse. When petitioner refused to accept his promotion to Director of International Sales, he was exercising a right and he cannot be punished for it as *qui jure suo utitur neminem laedit*. He who uses his own legal right injures no one.

It cannot be said that petitioner's refusal to obey the transfer order was contumacious. For one, petitioner's refusal was justified in that the position of Director of International Sales had been non-existent since 1965 and was inexistent at the time of petitioner's promotion thereto on August 18, 1975, which fact is shown by Northwest's Manual Policies and Procedures (Exhibit "X") and admitted by Northwest's witness, Richardson Sells, in his testimony. Northwest has not even attempted to deny the non-existence of the position.

Assuming for the sake of argument that the communication or letter of Mr. Jenkins was basically a transfer, under the particular and peculiar facts obtaining in the case at bar, petitioner's inability or his refusal to be transferred was not a valid cause for dismissal.

While it may be true that the right to transfer or reassign an employee is an employer's exclusive right and the prerogative of management, such right is not absolute. The right of an employer to freely select or discharge his employee is limited by the paramount police power (*Phil. Air Lines, Inc. vs. Phil. Airlines Employees Association*, L-24626, June 28, 1974, 57 SCRA -489) for the relations between capital and labor are not merely contractual but impressed with public interest (Article 1700, New Civil Code). And neither capital nor labor shall act oppressively against each other (Article 1701, New Civil Code).

There can be no dispute that the constitutional guarantee of security of tenure mandated under Section 9, Article 2, 1973 Constitution applies to all employees and laborers, whether in the government service or in the private sector. The fact that petitioner is a managerial employee does not by itself exclude him from the protection of the constitutional guarantee of security of tenure. Even a manager in a private concern has the right to be secure in his position, to decline a promotion where, although the promotion carries an increase in his salary and rank but results in his transfer to a new place of assignment or station and away from his family. Such an order constitutes

removal without just cause and is illegal. Nor can the removal be justified on the ground of loss of confidence as now claimed by private respondent Northwest, insisting as it does that by petitioner's alleged contumacious refusal to obey the transfer order, said petitioner was guilty of insubordination.

We cannot agree to Northwest's submission that petitioner was guilty of disobedience and insubordination which respondent Commission sustained. The only piece of evidence on which Northwest bases the charge of contumacious refusal is petitioner's letter dated August 28, 1975 to R. C. Jenkins wherein petitioner acknowledged receipt of the former's memorandum dated August 18, 1975, appreciated his promotion to Director of International Sales but at the same time regretted "that at this time for personal reasons and reasons of my family, I am unable to accept the transfer from the Philippines" and thereafter expressed his preference to remain in his position, saying: "I would, therefore, prefer to remain in my position of Manager-Philippines until such time that my services in that capacity are no longer required by Northwest Airlines." From this evidence, We cannot discern even the slightest hint of defiance, much less imply insubordination on the part of petitioner.

Neither is the other ground alleged by Northwest in dismissing petitioner which is loss of confidence, supported by evidence. On the contrary, the fact that Northwest wanted to promote petitioner to Director of International Sales as "the Company feels there is need for an executive of (his) experience to fill the position of Director of International Sales" as well as its Manifestation dated March 23, 1976 that Northwest "offered to rehire petitioner as Director of International Sales with office at Minneapolis, U.S.A." clearly indicate that Northwest had full confidence in petitioner. And so We hold and rule that respondent Commission committed grave abuse of discretion in sustaining the dismissal of petitioner on the ground of insubordination and loss of confidence.

Indeed, the outright dismissal of petitioner from his position as Manager-Philippines of Northwest Airlines is much too severe, considering the length of service that petitioner has rendered for eleven (11) fruitful and loyal years, a strong and vital factor that must be taken into account in labor law determinations which this Court, speaking thru Chief Justice Fernando in *Meracap vs. International Ceramics Manufacturing Co., Inc.*, L-48235-36, July 30, 1979, 92 SCRA 412 emphasized should not only be *secundum rationem* but also *secundum caritatem*, to wit:

"It would imply at the very least that where a penalty less punitive would suffice, whatever missteps may be committed by labor ought not to be visited with a consequence so severe. It is not only because of the law's concern for the workingman. There is, in addition, his family to consider. Unemployment brings untold hardships and sorrows on those dependent on the wage-earner. The misery and pain attendant on the loss of jobs then could be avoided if there be acceptance of the view that under all the circumstances of this case, petitioners should not be deprived of their means of livelihood. Nor is this to condone what had been done by them. For all this while, since private respondent considered them separated from the service, they had not been paid. For the strictly juridical standpoint, it cannot be too strongly stressed, to follow Davis in his masterly work, *Discretionary Justice*, that where a decision may be made to rest on informed judgment rather than rigid rules, all the equities of the case must be accorded their due weight. Finally, labor law determinations, to quote from Bultmann, should be not only *secundum rationem* but also *secundum caritatem*." (This excerpt was cited in *Almira vs. B.F. Goodrich Philippines, Inc.*, 58 SCRA 120, 131.)

The trend of recent decisions of this Court as pointed out by Chief Justice Fernando in the recent case of *Johnny Bustillos vs. Amado Inciong and Cummins Diesel Sales and Service Corporation of the Philippines*, G.R. L-45396, January 27, 1983 has been "to vitalize the constitutional mandate of security of tenure as an aspect of the protection accorded labor." For its forceful and authoritative weight, We quote lengthily the careful and clear review of Our decisions as follows:

"1. *Meracap v. International Ceramics Mfg. Co., Inc.* explains why the appeal should be disposed in that manner. Thus: 'In a number of decisions, *Philippine Air Lines, Inc. v. Philippine Airlines Employees*

Association, *Almira v. B.F. Goodrich Philippines*, *Central Textile Mills v. National Labor Relations Commission*, and *Genconsu Free Workers Union v. Inciong*, this Court has sought to vitalize the constitutional mandate of security of tenure as an aspect of the protection accorded labor.' We do so again in this case.

2. The decision reached not only by a labor arbitrator who heard the case but also by the National Labor Relations Commission was the reinstatement of petitioner with back pay. The challenged order reversed it. Thus: 'In effect, complainant has no involvement in the alleged pilferage. However, since complainant no longer enjoys the trust and confidence reposed upon him by respondent as a Service Supervisor, and hence, a managerial employee, respondent has every right to terminate him. Since the termination is not for a justifiable cause, complainant is entitled to separation pay.' No case has gone that far. Moreover, the ruling in *Central Textile Mills, Inc. v. National Relations Commission* is squarely in point. Thus: 'The weakness of the petition to repeat, is thus indisputable. Petitioner, (management) however, would try to impart a semblance of plausibility by alleging that even on the assumption that no theft was committed, still there was loss of confidence sufficient to cause his dismissal. In the *Philippine Air Lines* decision referred to, the accusation that theft was committed by the employee was likewise not borne out by the evidence. To justify a dismissal, management relied on the allegation that there was breach of trust, a ground analogous to loss of confidence. The Court of Industrial Relations did not agree. Neither did this Court. Reinstatement was ordered. So it must be in this case.' The above ruling is reinforced by a case decided last December 15, 1982, Justice de Castro speaking for the Court in *Acda v. Minister of Labor*. Thus: 'The findings of the Labor Arbiter on this point, as upheld by the National Labor Relations Commission, are quite clear, and We find no reversible error therein the same being substantiated by evidence of record, aside from the fact that said findings had already attained the character of finality by the non-perfection of a proper appeal.' The opinion goes on to state: 'With the charges against petitioner found to be unsubstantiated, We are left with no other alternative but to hold that the so-called 'loss of confidence' is without basis and may not be successfully invoked as ground for dismissal which requires some basis therefor, such ground never having been intended to afford an occasion for abuse by the employer of its prerogative, as it can easily be subject to abuse because of its subjective nature, to dismiss employees in contravention with the 'protection of labor' clause of the Constitution. It is this Constitutional guaranty that accords even to employees employed on a probationary basis the protection that their services 'may be terminated only for a just cause or when authorized by existing laws, or when he fails to qualify as a regular employee in accordance with reasonable standards prescribed by the employer.'

3. There is likewise this excerpt from *Meracap* which calls for the reversal of the assailed order of the Secretary of Labor. Thus: 'In this suit for certiorari to review the dismissal of an appeal from a decision of the then Acting Secretary of Labor Amado G. Inciong by respondent Ronaldo Zamora, Presidential Assistant on Legal Affairs, ordering the dismissal of petitioner Faustino Meracap, the relevance of such a provision becomes apparent. It was alleged by petitioner that while the termination of his services was based on his unauthorized absences, the real reason was due to his union activities. Respondent Zamora ruled otherwise. Such a finding of fact must be accorded deference. Nonetheless, considering that petitioner Meracap has been in the employ of the International Ceramics Manufacturing Company, Inc. for eighteen years, it would appear that the punishment was much too severe. Dismissal was not warranted. Suspension would suffice. To that extent, certiorari lies.' Dismissal, as pointed out in the latest case in point, decided fourteen days after *Acda*, in the ponencia of Justice Melencio-Herrera in *Visperas v. Inciong*, 'is too harsh a penalty. A penalty less punitive should have been proper.' In this case, upon mere suspicion, later found to be unsubstantiated, he was immediately suspended. A two-year suspension would have sufficed, not the loss of his job. The length of service was accorded due consideration in decisions of this Tribunal ordering reinstatement, twenty years in *De Leon v. National Labor Relations Commission* and *Reyes v. Philippine Duplicators* and twenty-two years in *Union of Supervisors v. Secretary of Labor*. Here he was in the service for eleven years when suspended."

Accordingly, We must emphasize here the long and faithful years of service that petitioner had rendered to respondent company, eleven good years, nine of which as Manager with station at Manila. It is plainly abusive of

the company and oppressive to the petitioner that the latter is peremptorily dismissed on the shallow claim of "resignation without notice", and thereafter converted to alleged loss of confidence. This unjustified dismissal of the petitioner calls for Our specific ruling in the cited case of *De Leon vs. National Labor Relations Commission*, 100 SCRA 691, 700, wherein the Court speaking through Justice De Castro said:

"While a Managerial employee may be dismissed merely on the ground of loss of confidence the matter of determining whether the cause for dismissing an employee is justified on ground of loss of confidence, cannot be left entirely to the employer. Impartial tribunals do not rely only on the statement made by employer that there is 'loss of confidence' unless duly proved or sufficiently substantiated. We find no reason to disturb the findings of the Labor Arbiter that the charges against petitioner were not fully substantiated, and 'there can be no valid reason for said loss of confidence x x x.'"

So must this Court re-enforce the constitutional protection afforded labor and assure the right of workers to security of tenure. Justice and equity call for petitioner's reinstatement. It should be so not only *secundum rationem* but also *secundum caritatem*.

One last point. We reject the holding of the respondent Commission that petitioner's act in accepting from the respondent airline several paychecks relative to his pension fund and the cash value representing an adjustment in the peso amount of his dollar base by reason of currency fluctuation constitutes an admission, if not a conformity, of his lawful separation from office on August 31, 1975. It appears indubitably that the several paychecks mentioned by respondent NLRC were only refunds of petitioner's contribution to the pension fund of respondent airline. The money refunded was petitioner's own money, that which he personally contributed to the retirement plan. If petitioner accepted the cash value representing the adjustment in the peso amount of petitioner's dollar base, the money was legitimately and legally due to the petitioner; they are not benefits or privileges granted by the airline to the dismissed petitioner. There can be no estoppel against petitioner's acceptance of the refund of monies legitimately his own, nor a waiver of his right to question the termination of his services. (*Urgelio vs. Osmeña, Jr.*, 10 SCRA 253). Even employees who receive their separation pay are not barred from contesting the legality of their dismissal. The acceptance of those benefits would not amount to estoppel as held in the leading case of *Mercury Drug Company vs. CIR* as aptly cited in the decision of the Labor Arbiter. (*De Leon vs. NLRC*, 100 SCRA 691).

In *Cariño vs. Agricultural Credit and Cooperative Financing Administration*, 18 SCRA 183, the rationale of the Court's ruling rejecting the argument that acceptance of separation pay and terminal leave benefits by the employees illegally dismissed by their employer constitutes estoppel, is stated thus, which We re-echo as follows:

"Acceptance of those benefits would not amount to estoppel. The reason is plain. Employer and employee, obviously, do not stand on the same footing. The employer drove the employee to the wall. The latter must have to get hold of money. Because, out of job, he had to face the harsh necessities of life. He thus found himself in no position to resist money proffered. His, then, is a case of adherence, not of choice. One thing sure, however, is that petitioner did not relent on their claim. They pressed it. They are deemed not to have waived any of their rights. *Renuntiatio non praesumitur*."

WHEREFORE, IN VIEW OF ALL THE FOREGOING, the decision of the National Labor Relations Commission in Case No. RB-4220 is hereby REVERSED and SET ASIDE, and the decision of the Labor Arbiter dated December 29, 1976 in RB-IV-4220-76 ordering petitioner's reinstatement to his former position with full backwages for three (3) years without loss of seniority rights and other benefits recognized by law, including attorney's fees equivalent to 10% of the total monetary benefits which the petitioner may recover, is hereby REINSTATED. Costs against the respondent Northwest.

Petition granted.

SO ORDERED.

Fernando, C.J., Makasiar, Concepcion, Jr., De Castro, Plana, Escolin, Vasquez, and Relova, JJ., concur.

Teehankee and Melencio-Herrera, JJ., see separate dissenting opinion.

Aquino, J., in the result.

Abad Santos, J., dissents. Management should have freedom to re-assign personnel where no demotion is involved. Here petitioner was even given promotion.

Gutierrez, Jr., J., regret to dissent. The NLRC decision is the correct one especially where it concerns a top official of a foreign airline engaged in multinational or global operations.

Dosch vs NLRC : 51182 : July 5, 1983 : J. Melencio-Herrera : En Banc : Dissenting Opinion Normal 150 Clean
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DISSENTING OPINION

MELENCIO-HERRERA, J.:

I vote to sustain the decision of the National Labor Relations Commission (NLRC) and to dismiss the petition for the review thereof.

1. Shorn of non-critical details, the facts of this case, abbreviated from the statements made in the majority Decision, are as follows:

- a) Private respondent (NORTHWEST, for short) is an American international airline company with several branch offices outside of the United States, among them one in Manila.
- b) Petitioner was the appointed Branch Manager in Manila of NORTHWEST.
- c) On August 18, 1975, petitioner was ordered "promote(d) and transfer(red)" from Manila to the head office of NORTHWEST in Minneapolis, Minnesota.
- d) On August 28, 1975, petitioner objected to the transfer/promotion stating categorically: "I am unable to accept a transfer from the Philippines", and "prefer to remain in my position of Manager-Philippines until such time that my services in that capacity are no longer required by Northwest Airlines".
- e) On September 9, 1975, NORTHWEST informed petitioner that it "considers your letter of August 28, 1975, to be a resignation without notice".
- f) On September 19, 1975, NORTHWEST filed with the Ministry of Labor a REPORT on Resignation of Managerial Employee in respect of petitioner.
- g) Acting on the REPORT, a Labor Arbiter, on December 29, 1976, ordered the reinstatement of petitioner.
- h) On appeal to the NLRC, the latter re-versed the decision of the Labor Arbiter, and dismissed the case for lack of merit.

2. A corporation, being an artificial entity, cannot exercise its functions except through natural persons. It is not easy to specify which persons in its service are the alter ego of the corporation, and can be deemed to be the employers while all others in the same service are the actual "employees". The situation has given rise to the principle of "employer's agents" who are not to be considered employees (See 48 Am. Jur., 2d., 298). The alter ego of a corporation, or the employer's agents, can be composed of the Board of Directors and/or a management team. Oftentimes, the management team is dominated by a single individual, with others in the team serving merely as consultative or recommendatory staff.

Below the management "person" or "team", there are two general classifications of "management employees" and these are the "executive employees" and the "administrative employees" which, in the United States, are not generally considered within the jurisdiction of the U.S. National Labor Relations Board (see 48 Am. Jur. 2d 1000). Executive and administrative employees can also be subdivided into several categories, depending on the extent of each employee's managerial responsibilities.

In the instant case, I believe that petitioner is a managerial employee, with both executive and administrative functions. His transfer and promotion was a valid exercise of management's prerogative.

Specifically, and for purposes of this dissent, I concur in the findings of the NLRC that the action of NORTHWEST considering petitioner resigned from his position should be upheld, and that no prior clearance to terminate under the Labor Code is necessary (Bondoc vs. Peoples Bank, et al., 103 SCRA 599 [1981]). The interpretation given the Code by the NLRC is entitled to great weight (Madrigal vs. Rafferty, 38 Phil. 414 [1918]; Verdera vs. Hernandez, 10 SCRA 4 [1964]).

Further, I may mention that petitioner's statement that he is unable to accept transfer from the Philippines, and that he will continue as Manila manager of NORTHWEST until such time as his services are no longer required, was, in effect, a declaration that he will remain as Manila manager until terminated. He was indeed terminated, except that, in NORTHWEST's letter of September 9, 1975, he was separated under the more palatable proposition of being considered resigned. The view taken by the Labor Arbiter that petitioner could not be dismissed on the ground of resignation, because petitioner did not resign, was based on semantics, and not on the substance of the problem, if problem there actually was.

It is for the foregoing reasons that I vote to sustain the decision appealed from.

Dosch vs NLRC : 51182 : July 5, 1983 : J. Teehankee : En Banc : Separate Opinion Normal 150 Clean 6 pt 6 pt 0 3 MicrosoftInternetExplorer4 /* Style Definitions */ table.MsoNormalTable {mso-style-name:"Table Normal"; mso-tstyle-rowband-size:0; mso-tstyle-colband-size:0; mso-style-noshow:yes; mso-style-parent:""; mso-padding-alt:0in 5.4pt 0in 5.4pt; mso-para-margin:0in; mso-para-margin-bottom:.0001pt; mso-pagination:widow-orphan; font-size:10.0pt; font-family:"Times New Roman";}

SEPARATE OPINION

TEEHANKEE, J.:

I am constrained to dissent from the majority decision that would reverse the NLRC decision under review (concurred in by the Minister of Labor as chairman) and instead reinstate what might be termed as a "hometown decision" of the Labor Arbiter ordering the reinstatement of petitioner Helmut Dosch to his former position of Philippines-Manager of respondent Northwest Airlines, Inc. (where he had long overstayed for several years) with backwages and an unc customary windfall award of 10% of the total monetary benefits as attorney's fees which puts

a premium on litigation.

As hereinbelow stated, respondent commission's decision upholding respondent airlines company's free exercise of its management prerogative to transfer (with promotion yet) petitioner to its home office in the U.S. (where it had in the first place originally employed him) and that no prior clearance to terminate him under the Labor Code is necessary when he refused the transfer assignment since he is a managerial employee is based on good and settled law and jurisprudence. With all due respect, the majority decision in overturning the same substitutes their judgment and discretion for that which is exclusively respondent's management prerogative in the transfer and assignment of its overseas managers. Furthermore, it improperly disregards the factual findings of respondent commission which are amply substantiated by the evidence of record and sets aside respondent commission's decision notwithstanding the absence of any grave abuse of discretion on its part. It is undeniably established from petitioner's own letter that "personal reasons and reasons involving my family" were behind his refusal to accept the transfer as contractually undertaken by him. The contract is the law between the parties and not even this Court can change contractual law and instead order respondent to indefinitely assign petitioner here in the Philippines.

Petitioner is an American citizen, married to a Filipina, with a total of eleven years of service with respondent company as of August 18, 1975. He was first employed in the United States and assigned to its New York and Washington offices, and thereafter for nine years in the Orient, the last 7-1/2 years in Manila. In his application for employment with respondent, he was informed of and indicated conformity to the necessity and probability of transfers and reassignments of respondent's personnel in consonance with the very nature of its airline operations in almost all parts of the world. He indicated therein his "preferred area of assignment" as the U.S.; and his willingness to "accept employment at any station" and transfers "from one location to another both within. . . (and) outside the U.S." and to "travel frequently."

On August 18, 1975, respondent received the written notice from respondent's Vice President for the Orient Region in Tokyo, R.C. Jenkins, of his promotion as Director of International Sales and transfer to the General Office in Minneapolis, Minnesota, effective the same date with promotion in rank and salary and was asked to report to his new assignment on September 15, 1975. The notice noted that petitioner's "assignment in the Philippines has continued for several years longer than is normal for our overseas managers." Respondent installed a new Philippines-manager, L.J. Gilbert, Jr., to take over petitioner's functions "in order to effect a smooth turnover."

Ten days later, on August 28, 1975, petitioner wrote respondent expressing his appreciation for the promotion but regretting that "at this time, for personal reasons and reasons involving my family, I am unable to accept a transfer from the Philippines" and stating that "(I) would, therefore, prefer to remain in my position of Manager-Philippines until such time that my services in that capacity are no longer required by Northwest Airlines." He attempted to take over and resume the position of manager from the duly designated manager, Mr. Gilbert, but was not allowed by the latter (who changed the key to the office). Without any reply from respondent, petitioner on September 4, 1975 took it upon himself to post a notice in respondent's bulletin board announcing his "resumption of duties as Manager-Philippines." On September 9, 1975, respondent's Vice President Jenkins wrote petitioner that "in view of the foregoing, your status as an employee of the company ceased on the close of business on August 31, 1975 and "the company therefore considers your letter of August 28, 1975 to be a resignation without notice." Respondent duly filed with the Labor Department (now Ministry) its verified report on petitioner's resignation as managerial employee, which was controverted by petitioner.

The Labor Arbiter's ruling, in upholding petitioner, that "petitioner did not resign or relinquish his position as Manager-Philippines" and could not therefore be terminated is patently shown in Mme. Justice Herrera's separate

dissent to be "based on semantics and not on the substance of the problem, if problem there actually was." His presumptuous act announcing that he was resuming the managership of respondent company when he well knew that it had designated a new manager was a vain blow of defiance and insubordination. Since he did not want to be promoted nor transferred back to the U.S., he knew his employment was terminated by his own act. He thereafter collected several pay checks relative to his pension refund (by grace of the respondent which merely considered him resigned) and cash benefits signifying such termination of employment.

The Labor Arbiter's other justification that "the wide discretion given to airline companies to transfer and/or promote their employees considering the nature of their functions merely refers to pilots, stewardess, mechanics and other employees occupying similar positions where the exigencies of the service may require unqualified obedience to management. It should not be applied to herein petitioner, a manager in Manila whose unblemished service for eleven (11) years, rejected a promotional transfer to a position that remained unfilled since 1965. The element of immediate necessity is definitely wanting" is contrary to law, logic and jurisprudence, as will readily be seen from the NLRC decision, as follows:

"The hiring, firing, transfer, demotion and promotion of employees has been traditionally identified as a management prerogative. This is a function associated with the employer's inherent right to control and manage effectively its enterprise. The free will of management to conduct its own business affairs to achieve its purpose can not be denied. This exercise finds support not only in actual management practice but has become a part of our jurisprudence in labor relations law x x x. (Note: Cases quotations and citations omitted)

"There is no intimation in the record of the case that the transfer of the petitioner was motivated by any unfair labor practice acts since the petitioner is a manager and the dispute herein has no relation whatsoever to union activity. In truth, the reason given by the petitioner in his refusal to transfer was due to 'personal reasons and reasons involving my family.' At this point, it is worthwhile to mention that if an employee finds himself in a situation where he believes that personal reason cannot be sacrificed in favor of the exigency of the service, then he has no other choice but to disassociate himself from his employment.

"In the light of all the foregoing, we find that petitioner's transfer and promotion is a valid exercise of management's prerogative. It is our view, therefore, that respondent's decision to consider him resigned from his job after he defied management's order to transfer and promote him to a new position at the general office at Minnesota, U.S.A. is justified and warranted. Moreover, the fact that petitioner had accepted from the respondent several pay checks relative to his pension refund and the cash value representing an adjustment in the peso amount of his dollar base by reason of currency fluctuation constitutes an admission, if not a conformity, of his lawful separation from office on August 31, 1975. No prior clearance to terminate him under the Labor Code is necessary, petitioner being a managerial employee." (Emphasis supplied)

Finally, I cannot give my assent to the ruling in the majority decision that "Even a manager in a private concern has the right to be secure in his position, to decline a promotion where, although the promotion carries an increase in his salary and rank but results in his transfer to a new place of assignment or station and away from his family. Such an order constitutes removal without just cause and is illegal. Nor can the removal be justified on the ground of loss of confidence as now claimed by private respondent Northwest, insisting as it does that by petitioner's alleged contumacious refusal to obey the transfer order, said petitioner was guilty of insubordination." (Majority decision, at page 10) The same seems to be at war with the factual findings and settled principles and jurisprudence above set forth in respondent commission's decision. In a nutshell, "if an employee finds himself in a situation where he believes that personal reason cannot be sacrificed in favor of the exigency of the service, then he has no other choice but to disassociate himself from his employment."

If we hold that "such an order (of transfer) constitutes removal without just cause and is illegal" (notwithstanding that there is no factual basis for the statement therein that such transfer would be "away from his family"), as the

majority decision does, this would be to reverse the roles of employer and manager and to permit such managers to dictate their own situs of service or country and place of assignment in usurpation of the employer's exclusive prerogative and in gross violation of their contractual undertakings accepting the employer's right to determine their assignments. Concretely applied to this case, petitioner has already overstayed in his Orient assignment for several years, having been assigned therein for nine years as of 1975. Eight more years have lapsed in the interregnum (1976-1983). The majority decision would order his reinstatement as Philippines-Manager of respondent, with three years backwages yet. For how long more will respondent have to keep him in Manila? Does it mean that as long as petitioner declines a transfer or reassignment away from Manila, he is "secure in his position" as decreed in the majority decision and he can no longer be transferred or reassigned elsewhere?

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