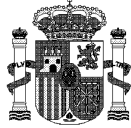

CONSTITUTIONAL COURT OF SPAIN
Cabinet of the President
Press Office

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USING THE COMPANY'S TECHNICAL MEANS DOES NOT VIOLATE THE RIGHT TO STRIKE

The Plenum of the Constitutional Court has dismissed the *amparo* appeal submitted by the Union Confederación General del Trabajo declaring that when Telemadrid broadcasted a soccer match the 29 September 2010 during a general strike, it did not violate the right to strike foreseen in Article 28.2 of the Spanish Constitution. The Judgment explains that the use by the rest of the workers of the technical means available in the company does not violate the aforementioned right, as long as they do not exercise functions that they normally do not exercise in order to substitute the strikers. The constitutional protection of the right to strike imposes some restrictions to the employer. However, it does not oblige him — nor does it the rest of the non-strikers workers— to contribute to the success of the strike. The rapporteur of this Judgment was the President of the Constitutional Court, Francisco Pérez de los Cobos and there is a dissenting vote form Judge Fernando Valdés Dal-Ré adhered by Adela Asua and Judge Juan Antonio Xiol.

The events took place during the general strike of the 29 September 2010. That day, Telemadrid only broadcasted the Champion's league match. The Union thinks that this broadcast violates the right to strike because they internally substituted the workers and they used unusual technical means. The Court denies this statement and confirms both previous judgments.

The Plenum explains that the Law prohibits what it is called *"strikebraking"*, term that, following the constitutional doctrine, includes not only the employment of workers to do tasks that are normally done by the strikers, but also, the exercise by the workers of different functions than the usual ones.

In this case, following the events that have been proven in the challenged decisions, the broadcasting of the soccer match the 29 September 2010 was carried out the same way any other day.

That day, as always, the Federación de Organismos de Radio y Televisión Autonómicos (FORTA) sent a signal from the stadium to the central control of Telemadrid, where a worker that had not gone on strike, and that one of his normal tasks was to exchange signals, sent it to the studio. The latter remained on because, because of the strike, nobody had turned it off once it had concluded the broadcast of another Champion's match played the night before. This way, the broadcaster, who had not gone on strike, could broadcast the

match. The signal, as always, was returned automatically from the stadium to the central control and, from there to computer graphics (in both departments there was a worker that had not gone on strike), instead of sending it from central control to computer graphics, department in which all workers had gone on strike. The coordinator of computer graphics, among whose functions was generating the logo of Telemadrid, was the one that inserted the images.

From then on, in a normal day the signal goes from continuity to Encoder A (which is the one used normally) and, at the same time, another signal goes to central control, from where a worker sends it to Encoder B. The day of the strike, only this second step was done.

To sum up: the workers that did not go on strike made possible the broadcasting of the match without exercising "*different functions from the ones they normally did (the worker of central control exchanged the signals as he normally did and the coordinator of computer graphics has to create the logo that appears in the broadcast*)". Moreover, they used a technical mean (Encoder B) which was available before the strike call, but which it is not frequently used. Therefore, concludes the Court, there was not such violation of Article 28.2.

The Judgment explains that constitutional case law deems abusive the exercise by the employer of his right to internally substitute the workers (ius variandi) during a strike day. But, in this case, the employer did not exercise the ius variandi, he exercised "*his power of the productions means' organisation*." There is not a provision that during "*a strike prohibits the employer to do it.*"

If we demand that the employer "*does not use his own*" means we would be "*asking him to collaborate with the strike, behaviour that is not foreseen in our legislation*". "*Neither the Constitution, nor the case law oblige the rest of the workers to collaborate with the strike because the liberty to work of those workers must be respected. And they do not oblige the employer to reduce the business beyond the logical consequences derived from the strike".*

In its dissenting vote, Valdés Dal-Ré considers that the Plenum should have upheld the *amparo* appeal because the substitution of workers in the strike was done with personnel *from a superior professional level* which violates the right to strike. This happened in the case of the coordinator of computer graphics that inserted the logo in the images. *At that time, he had considerable responsibility because he controlled different departments, the computer graphics department among others*. In turn, the Judge considers that the constitutional case *is not being adapted to occupational reality's evolution* provoked by the use of new technologies which, in his opinion will leave workers unprotected in their relation with the employer.

Madrid, 14 February 2017