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Effect of Exculpatory Language on Illegal Union Security Provisions

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STUDENT COMMENTS

EFFECT OF EXCULPATORY LANGUAGE ON ILLEGAL UNION SECURITY PROVISIONS

An action[1] brought by the trustees of the United Mine Workers of America Welfare and Retirement Fund seeking a judgment from defendant corporation for $84,176.40 was based on an industry wide collective bargaining agreement called the National Bituminous Coal Wage Agreement, which contained a provision requiring that Quality Coal Corp., one of the employers, pay forty cents to the Fund for every ton of coal produced during a two year period. The employer based its defense primarily on the contention that the entire agreement was invalid because of the inclusion of the provision that

> ". . . as a condition of employment all employees shall be or become, members of the United Mine Workers of America, *to the extent and in the manner permitted by law* . . ." [Italics supplied.]

The employer contended that this language provides for a closed shop, thus violating Sec. 8(a)(3) of the National Labor Relations Act.[2] Both parties filed motions for summary judgment. That of the plaintiffs was granted. On appeal the Seventh Circuit affirmed, holding that the union security provision was so qualified by its terms, expressed in one complete sentence, that it was not violative of Sec. 8(a)(3), thus distinguishing prior cases in which attempts were made to exculpate illegal provisions by general savings clauses.

The problem which faced the court is one which has been productive of much litigation in the federal courts since the enactment of the National Labor Relations Act. Many collective agreements containing union security provisions of questionable validity have contained also exculpatory clauses seeking to limit their operation within limits permissible under the NLRA. The crucial questions on which the validity of any such agreement must turn are (1) whether the union security provision by its nature tends to coerce employees in the direction of union membership, and (2) if there is such coercive

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1 Lewis v. Quality Coal Corp., 270 F.2d 140 (7th Cir. 1959).

2 "(a) It shall be an unfair labor practice for an employer . . . .

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this sub-chapter, . . . shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is later . . . ."

tendency, whether the agreement can be saved by resorting to the formalities of contract law and taking technical refuge in an exculpatory clause.

The oft cited *Red Star Express Line* case,[3] decided by the Second Circuit in 1952, involved a petition by the National Labor Relations Board for enforcement of its order directing employer to desist from giving effect to a union security provision in the collective bargaining agreement which required employees to maintain their membership in the union as a condition of employment. The union security article provided that the employer would hire only union men if available, but otherwise could employ non-union help on condition that they become union members within 24 hours after employment. During negotiations leading to a renewal of the agreement, the parties, being uncertain as to the legality of some provisions of the original contract, agreed by letter upon an addendum to the contract providing that any clauses illegal under the National Labor Relations Act should be considered null and void. It was urged in the litigation that the addendum was sufficient to suspend the operation of the concededly illegal union security provision. The court denied this contention, holding that the execution of the contract, by reason of the inclusion of a forbidden union security provision, constituted an unfair labor practice. "This is so," the court said, "because the existence of such an agreement without more tends to encourage membership in a labor organization. The individual employee is forced to risk discharge if he defies the contract by refusing to become a member of the union." The court went on to say that the modification of the contract did not purge it of its infirmity, for the question is not whether under principles of contract law the addendum would negative the union security provision, but whether it would have the effect of preventing coercive interference with the employees' right to abstain from union membership. The court adopted the finding of the NLRB that the addendum would not eliminate the coercive tendency of the union security provision "because it fails to specify which, if any, clauses were to be suspended." Judge A. Hand stated that because of the vagueness of the language the ordinary employee would be unable to understand that the union security provision was no longer binding, for the parties themselves were unable to determine which parts of the contract were affected.

In the same year the Second Circuit handed down the *Gaynor News* decision,[4] an action brought by the NLRB to cease enforcement

[3] Red Star Express Line of Auburn v. NLRB, 196 F.2d 78 (2d Cir. 1952).
[4] NLRB v. Gaynor News Co., 197 F.2d 719 (2d Cir. 1952), aff'd 347 U.S. 17 (1954).

of a collective bargaining agreement which included a union security provision executed without benefit of a Board-conducted union shop election. Under the law in force at that time no such clause could legally be executed unless the majority of the employees in a Board-conducted election authorized it. Since no election had been held, the provision was illegal. The contract did, however, contain a "savings clause" providing that "should . . . any provision of this agreement be in conflict with [the NLRA], then such provision shall continue in effect only to the extent permitted." The court concluded that the clause did not defer the application of the union security provision, but only postponed the issue of its legality for future determination, emphasizing that only a specific clause deferring application of the union security provision would immunize the contract against the illegality. The court stressed the fact that an employee cannot be expected to predict the validity or invalidity of particular provisions in the contract, and thus would feel compelled to join the union where a union security provision of questionable validity existed.

In 1954 the same court in *NLRB v. Gottfried Baking Co.*,[5] directed enforcement of a Board order instructing the employer to cease giving effect to a collective bargaining agreement containing a provision that the employer would hire only union members, that the union would have the right to supply replacements, and if unable to do so, the employer could hire anyone he wished, provided the new hire be required to become a union member within 30 days. In an attempt to salvage as much union security as possible should the preferential hiring device be declared illegal, the union had secured inclusion in the contract of a clause, entirely separate from the preferential hiring provision, stating that

> "If . . . the closed shop is in conflict with the law, then the union shop shall prevail . . . . together with such additional provisions for union security as shall be legally permissible, it being the intention of the parties to grant the maximum union security permitted by law."

The court held the preferential hiring provision illegal, citing the *Red Star* case for the proposition that such an agreement by its very terms tends to encourage union membership. Nor, said the court, was the provision purged of its inherently coercive tendency by the vague and separate "savings clause."

The common rationale of the three cases is that a union security

[5] 210 F.2d 772 (2d Cir. 1954).

provision illegal per se because written so as to exclude non-union applicants at the threshold cannot be purged of its illegality by a general savings clause which fails to eliminate the tendency of the union security provision to encourage union membership. Whether the savings clause exculpates the union security provision of its unlawful character as a matter of contract law is not determinative of the question whether the clause prevents an 8(a)(3) violation that would otherwise occur. An illegal union security provision, apart from the practices occurring under it, inherently tends to encourage union membership. The coercive effect on an employee issues directly from the nature of an illegal union security provision, and the tendency to coerce union membership is not checked by mere contract formalities. The coercive tendency is nullified only if the employee is clearly apprised of the fact that no form of union membership not sanctioned by law will be required of him. A savings clause which fails clearly to specify which provisions of the agreement it affects is not sufficient to so apprise prospective employees. A vague, general, and independent savings clause will not help the ordinary employee to understand that the union security provision is not literally binding according to its terms, for the employee will be unable to predict the validity of a provision to which he cannot be sure the savings clause is meant to apply. He will still feel compelled to join the union where a questionable provision exists. Only a savings clause specifically deferring application of the union security provision until the issue of its legality is determined would clearly inform an employee that the provision is not presently binding, and thus nullify its natural coercive effect.

The same collective agreement which gave rise to the *Quality* litigation came before the U.S. District Court for the Middle District of Tennessee in 1958 in *Lewis v. Fentress Coal & Coke Co.*[6] That case arose in the same manner as the *Quality* case, the plaintiffs suing for a money judgment under the trust fund agreement. After holding that it was the intent of the parties that the union security provision should not be operative in a state having a right to work law,[7] such as Tennessee, the court answered the contentions put forth by the employer by holding that the union security provision was not violative of Sec. 8(a)(3) of the NLRA. The court characterized the exculpatory language[8] (identical to that considered by the Seventh

[6] 160 F. Supp. 221 (M.D. Tenn. 1958) aff'd 264 F.2d 134 (6th Cir. 1959).

[7] 9 Tenn. Code Anno. §§ 50-209, 50-210.

[8] "It is further agreed that as a condition of employment all employees shall be or become, members of the United Mine Workers of America, to the extent and in the manner permitted by law . . . ."

Circuit in the *Quality* case) as a savings clause and held that it was sufficiently clear and unequivocal to absolve the union security provision of illegality. Judge Miller in his opinion distinguished the *Red Star, Gaynor,* and *Gottfried* cases on the basis that the clauses in those cases were vague and uncertain and were not savings clauses in the real sense of the term, but attempts to effect the deletion from the agreement of any provision which might later be held invalid.

In the *Quality* case the Seventh Circuit reached the same result as did the Tennessee District Court in the *Fentress* case, but placed a different label on the exculpatory language of the National Bituminous Coal Wage Agreement. In writing the *Fentress* opinion Judge Miller considered the issue as being the same one involved in the *Red Star, Gaynor,* and *Gottfried* cases, continually referring to the exculpatory language as a savings clause. He was content to rest the decision on the ground that the clause was "clear and unequivocal" enough to excise the infirmity from an otherwise illegal union security provision. Judge Castle in the *Quality* opinion envisaged the situation as being essentially different from that involved in the three earlier cases. Each of the collective agreements previously considered by the Second Circuit contained a union security provision which concededly would have been illegal standing alone. The only possibility of preserving its legality was by resort to an independent savings clause which the parties had included in the contract. Judge Castle, in the *Quality* opinion, emphatically disagreed with the *Fentress* approach of characterizing the exculpatory language as a savings clause and of circumscribing the scope of its reasoning by the concepts and language employed in the *Red Star, Gaynor,* and *Gottfried* cases. He rested the *Quality* decision on the holding that the union security provision was so limited and qualified by its own terms that it was not violative of 8(a)(3). The qualifying phrase "to the extent and in the manner permitted by law" was considered to be an integral part of the union security provision. It was noted by the court that "[t]he language employed is not couched in the form usually employed in a so-called 'savings clause.' It is language which serves to restrict and modify the words of the same sentence in which it is employed and relates to that subject matter alone. Here the meaning and intent of the contractual provision involved is fully expressed in one sentence. No general requirement is imposed, limitations on which must be searched for in some other separate . . . clause of the contract." The court stressed the idea that the validity of the union security provision is assured "by the very language in which the condition of union membership is stated," that this is not

a case of a provision illegal by its terms which must be sustained, if at all, by resort to an independent general savings clause. It is, says the court, rather a case where the provision is qualified by its own terms so that it meets in itself the test of legality. The majority opinion in the *Quality* case thus reinforces the stamp of validity placed upon the coal industry's collective bargaining agreement by the *Fentress* decision, and more clearly delineates the distinction between that agreement and those involved in the *Red Star, Gaynor,* and *Gottfried* cases.

The dissent in the *Quality* case urged that the agreement was unlawful under the NLRA as not being consonant with the prohibition of 8(a)(3) against a closed shop contract. The dissent characterized the exculpatory language as a savings clause and relied in part on the tools of thought fashioned by the Second Circuit in the *Red Star* and related cases. In commenting on the provision "that as a condition of employment all employees shall be . . . members of the United Mine Workers of America, to the extent and in the manner permitted by law . . . ." the dissent asserts that "[c]ertainly the language of [Sec. 8a(3)] . . . does not 'permit' a closed shop to any extent or in any manner . . ." and hence there is an inherent contradiction, within the single sentence which so influenced the reasoning of the majority, between its principal clause and the phrase which purports to qualify it. This intrinsic ambiguity, under the well established principles of contract law,[9] allows the court to ascertain the meaning of the provision by looking to the actual conduct of the parties under it. Since the case directly involves the illegality of the agreement and not the practices occurring thereunder, this "a posteriori" reasoning is utilized only to comprehend the construction placed upon the ambiguous language by the parties themselves. By the strict maintenance of a closed shop[10] the parties have realistically interpreted the ambiguous terms as allowing that degree of union security, federal law to the contrary notwithstanding. Where a federal law and a private contract conflict, the latter must fall. In this instance the agreement becomes wholly unenforceable because it contains a provision to the effect that all parts are dependent upon each other.[11] The dissent went on to reinforce its position by applying here the "a priori" argument of the Second Circuit cases that such a

[9] 3 Corbin, Contracts § 558 (1957).

[10] An employee when hired had to join the union by the morning of the third day or get fired, and, if a non-union employee refused to join, then the union employees would refuse to work on instructions from the union.

[11] "Integrated Instrument—This agreement is an integrated instrument and its respective provisions are interdependent . . . ."

provision has an inherently coercive tendency to encourage union membership, and considered the "savings clause" as too vague to purge the provision of illegality notwithstanding the fact that they were integrated within the same sentence.

The precise distinction between the formalistic reasoning of the majority and the pragmatic argument of the dissent in *Quality* is apparent from their respective approaches to the union security provision with its qualifying phrase. The majority states that the one complete sentence by its very language is clear and unequivocal; the dissent, both in its deductive and its inductive rationale, asserts that the sentence is intrinsically ambiguous and vague. The dissenting judge is not content to be influenced by semantics alone, but views the words with their phenomenalistic trappings.

On November 25, 1959, three months after the *Quality* case was decided, the U.S. Court of Appeals (D.C. Cir.) handed down the decision in *Honolulu Star-Bulletin v. NLRB*,[12] reversing a Board decision which had held that the collective agreement involved constituted a closed shop contract. The general laws of the International Typographical Union contained a closed shop requirement in conflict with Sec. 8(a)(3) and also with Sec. 2(a)[13] of the collective contract. The agreement, in Sec. 24(c), incorporated by reference the general laws of the International Typographical Union *"not in conflict with federal* and territorial (state) *law or this contract . . . ."* [Italics supplied.]

The Board contended that this was an illegal closed shop contract, theorizing that employees would have the impression that the union laws were incorporated in their entirety and would not differentiate those contrary to federal law or to contract Sec. 2(a). The court, however, held Sec. 24(c) clear and unequivocal and stated that an erroneous impression of clear contract terms does not change their meaning. The *Red Star* and related cases were distinguished on the basis that the Star Bulletin contract contained no explicit illegal union security provision, and Sec. 24(c) did not suspend the operation of any illegal provision, but rather incorporated certain general laws. A factual difference certainly exists. While the former decisions rested on an attempted exculpation of subsisting contract terms, the qualifying language in the Star-Bulletin contract ("not in conflict with federal . . . law or this contract") is used for the purpose of culling out

[12] 45 L.R.R.M. 2184 (D.C. Cir. 1959).

[13] "The words 'employee' or 'employees' when used in this agreement apply to journeymen and apprentices. The term 'journeymen' and 'apprentices' shall in no way be understood to apply exclusively to members of the International Typographical Union."

portions of an external document incorporated by Sec. 24(c). Despite this factual difference, the basic issue is similar. The employee is still faced with the task of determining whether general language of a qualifying nature applies to a specific union security provision and of risking discharge on a faulty determination.

However, while in the prior cases, including *Quality*, it was necessary for the employee to search out applicable federal legislation in order to grasp the real significance of the contract's union security requirements, in this case a perusal simply of Sec. 2(a) of the agreement, to which the qualifying language of Sec. 24 has directed him, will apprise the employee of the fact that union membership is not a prerequisite to employment. This essential difference precludes classification of this case as authority either contrary to the *Red Star* rule or reinforcing the *Quality* holding. A further distinction between the Star-Bulletin and Quality contracts lies in the contrast between the clarity innate in the former's qualifying language and the controverted ambiguity in that of the latter.

The *Quality* case does not appear to encroach substantially upon the well-settled rule of the *Red Star* and related cases that a union security provision having an innate tendency to coerce union membership cannot be saved by taking technical refuge in the principles of contract law under the guise of general exculpatory language. The *Quality* case is distinguishable on its facts in that the union security provision and the qualifying language are embodied in one integrated clause. Furthermore, while the *Red Star, Gaynor,* and *Gottfried* cases were commenced by the NLRB by way of unfair labor practice charges arising out of allegedly illegal union security provisions, the *Quality* litigation was instigated by trustees[14] of the union trust fund to recover a money judgment for sums owed under the collective agreement. The obvious justice of the union's claim to this amount, coupled with the interdependence of all contract provisions, so that the striking down of one would abrogate the whole, militated against a defense based solely on the alleged infirmity of a single clause topically unrelated to the one sued upon. These considerations preclude the effective use of the *Quality* case to erode the bedrock of the *Red Star* rule.

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[14] The following language in the opinion indicates that the court, in reaching its result, was influenced by trust considerations: ". . . a trust was created, the corpus of which was any money transferred or delivered by Quality to the trustees for the purposes of the agreement or which Quality became obligated to transfer to the trustees for that purpose. We hold that a trust was created." Supra note 1, 142.