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Labor Law—Section 301—The Standing of an Employee to Sue—Contract Breach Amounting to an Unfair Labor Practice.—Smith v. Evening News Ass'n

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ing a subsidiary has the ultimate effect of closing that employer's doors to every person with whom he has any business and is thus an implied agreement "to cease doing business with any other person." The fact that an agreement is couched in terms restrictive of the contracting employer's own business would seem to be of little import if the practical effect of such a clause is to cause him to cease doing business with every other person for whom he performs or exchanges services or obtains supplies. Thus proponents of this line of argument could contend that neutral employers and employees are drawn into the economic conflict. This result is precisely what 8(e) seeks to prevent.

The argument based on the practical effect of the chain shop clause appears to be the most cogent reason for holding such a clause violative of 8(e). It is submitted that on this basis chain shop clauses should be held unlawful. However, it should be noted that the single employer exception can always save a chain shop clause from illegality. It may be maintained that this exception should be determined by the same criteria applicable to 8(b)(4)(A), which is also directed at secondary boycott activity.[17] This view would restrict the utilization of chain shop clauses to situations where there is substantial indicia of control.

It seems apparent from the respective postures of the Ninth and Fifth Circuits that the courts may come to differ greatly in construing and applying section 8(e). While the two circuits are in accord on the illegality of the trade shop clause and could concur on the legal propriety of a carefully constructed struck work clause, they are poles apart in their treatment of the chain shop clause. This latter impasse in "the process of litigating elucidation" may remain until resolved by the Supreme Court.

JOHN P. KANE

Labor Law—Section 301—The Standing of an Employee to Sue—Contract Breach Amounting to an Unfair Labor Practice.—*Smith v. Evening News Ass'n.*[1]—The petitioner sued in his individual capacity and as assignee of the action of forty others for damages for breach of a collective bargaining contract by his employer, Evening News Association. While the respondent was being struck by a union of which the petitioner is not a member, he and other non-striking union employees were refused entrance to the working premises by the respondent. Non-union workers were allowed to be at their job even though the newspaper was completely inoperative. These employees were given full wages while the petitioner was not. Smith sued for the withheld wages as damages for breach of the non-discrimination clause of the contract in the Michigan state court. The action was dismissed on the rationale that a suit by an individual to enforce a contract involving an unfair labor practice was pre-empted by the National Labor Relations

[17] Truck Driver's, Local 728 v. Empire State Express, 293 F.2d 414 (5th Cir.), cert. denied, 368 U.S. 931 (1961); Bachman Mach. Co. v. NLRB, 266 F.2d 599 (8th Cir. 1959); J. G. Roy & Sons v. NLRB, 251 F.2d 771 (1st Cir. 1958).

[1] 371 U.S. 195 (1962).

Board.[2] HELD: Section 301(a) of the Labor Management Relations Act[3] gives the courts, both state and federal, jurisdiction to enforce collective bargaining contracts. Although there arguably may be elements of unfair labor practices present, such does not necessitate the surrender of jurisdiction by the courts to the NLRB. The same policy considerations that have bestowed this concurrent jurisdiction on the courts apply whether the contract rights are those of management, of union or of an individual employee.

The Court strongly reaffirms the relative sweep of section 301 against the pre-emption doctrine. It does not seem to matter what labor policy factors might be running in the contract suit; notwithstanding the traditional jurisdiction of the Board to hear these facts, a court may entertain the suit and decide whatever labor policy questions are relevant. The Court does hedge somewhat when it acknowledges, without specifying, possible restrictions to hearing these actions.

> If, as respondent strongly urges, there are situations in which serious problems will arise from both the courts and the Board having jurisdiction over acts which amount to an unfair labor practice, we shall face those cases when they arise.[4]

The real impact of the decision on the scope of section 301 centers on the inclusion within the section of an individual's suit to enforce an employee's contract rights.[5] Unless the petitioner was within the scope of section 301, his suit would be no more than a common law action, and as it involves a violation of either Sections 7 or 8 of the Labor Management Relations Act, it must be within the primary and exclusive jurisdiction of the NLRB.[6]

Crucial to the handling of this case is the manner in which the pre-emption doctrine is constricted by the Court. The high water mark for pre-emption was the decision in *San Diego Bldg. Trades Council v. Garmon*,[7] wherein the Supreme Court refused to allow a state court's award of damages as a result of a boycott strike even though the NLRB declined to exercise jurisdiction. The reasoning was that the Board was vested with exclusive primary jurisdiction and its failure to exercise this jurisdiction did not grant it to the states.[8] The motive that exists behind the *Garmon* pre-emption doc-

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[2] 362 Mich. 350, 106 N.W.2d 785 (1961).

[3] 61 Stat. 156 (1947), 29 U.S.C. § 185(a) (1958).

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affect commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

[4] 371 U.S. at 197-98.

[5] "Neither the language and structure of § 301 nor its legislative history requires or persuasively supports this restrictive interpretation . . . ." Id. at 200.

[6] This pre-emption doctrine was the starting point for the Michigan Supreme Court: "It seems we must start with the general premise that Congress has pre-empted the field in labor relations matters affecting interstate commerce and has vested exclusive jurisdiction in the National Labor Relations Board to determine such labor disputes . . . ." Supra note 2, at 355, 106 N.W.2d at 787.

[7] 359 U.S. 236 (1959).

[8] "Since the National Labor Relations Board has not adjudicated the status of the

trine is the necessity for uniformity in the formulation and application of a national labor policy.[9] The significance of labor-management harmony in industrial life is axiomatic. Such harmony, *Garmon* would say, is best regulated at the national level.[10] It can be added immediately that this approach is not altogether watertight. Examples of actual conflict with the NLRB are nearly impossible to discover.[11] Moreover, there are peculiar forms of unfair labor practices over which Section 303 of the LMRA gives the courts jurisdiction to hear.[12] Finally, pre-emption seems to surround the NLRB with an air of perfection, a conclusion which the Labor Bar would be, at least, willing to dispute.[13]

The major clash with the pre-emption doctrine is embodied in the instant case. Section 301 confers on the courts jurisdiction to hear breach of collective bargaining contract actions without apparent regard for the circumstance in which the breach may occur.[14]

Implicit in the enforcement of the contract is the possibility of first adjudicating an unfair labor practice. The Court in *Evening News* considers such an objection to be immaterial and will ignore pre-emption even ". . . where the alleged conduct of the employer, not only arguably, but concededly, is an unfair labor practice."[15] Despite the presence of a possible disruption of a uniform national labor policy, a party may avoid pre-emption by characterizing his suit as a contract violation.[16] The Court seems to resolve this possible conflict by holding that the courts do not interfere with the Board's

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conduct for which the State of California seeks to give remedy . . . and since such activity is arguably within the compass of § 7 or § 8 of the Act, the State's jurisdiction is displaced." Id. at 246. This portion of *Garmon* was supplanted by the Landrum-Griffin Act which gave the states the right to hear these actions when the Board declines to do so. 73 Stat. 541 (1959), 29 U.S.C. § 164(c)(1) (1961 Supp.).

[9] As summarized in Sovern, Section 301 and the Primary Jurisdiction of the NLRB, 76 Harv. L. Rev. 529, 546 (1963):

(a) The opportunities for misapplication of the LMRA are considerable since factfinding errors as well as mistakes in the interpretation of legal principles can find their way into court decisions.

(b) If courts can't decide LMRA cases, they can't conflict with NLRB decisions.

(c) Settlement would be inhibited by alternate tribunals.

[10] "To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict . . . ." San Diego Union v. Garmon, supra note 7, at 244.

[11] Sovern, supra note 9, at 571.

[12] I.e., hot-cargo agreements, secondary boycotts and work assignment disputes—practices which violated section 8(b)(4). 61 Stat. 158 (1947), 29 U.S.C. § 187(a) (1958), as amended by 73 Stat. 545 (1959), 29 U.S.C. § 187 (1962 Supp.).

[13] The Labor Relations section of the ABA narrowly defeated a proposed recommendation to take away from the NLRB jurisdiction of unfair labor practices. 48 L.R.R.M. 42 (1961).

[14] "Where the parties have bargained for lawful contractual provisions and agreed upon procedure for enforcement, it would promote the industrial peace . . . to give effect to their arrangements." Brief for the NLRB as Amicus Curiae, p. 16.

[15] 371 U.S. at 197.

[16] Respondent cites this as a *tour de force* and as a method of subverting the jurisdiction of the NLRB, Brief for Respondent, pp. 38, 40. On the other hand, the absence of this method might allow parties to avoid court enforcement by characterizing a breach as an unfair labor practice.

ruling since their jurisdiction is co-extensive.[17] Moreover, the NLRB itself dismisses the shadow of dichotomy in labor law adjudication when the courts are enforcing contracts. In collective bargaining contracts the adverse party consideration should be sufficient to check any ". . . danger of upsetting the federal statutory balance between the interest of labor and management."[18] Hence, in the normal set of circumstances, the enforcement of contract rights should involve little danger of interfering with national labor policy.

The decision in *Evening News* is crucial not only in the restraints added to the pre-emption doctrine but, more importantly, for the substantial enhancement of section 301. It would almost seem that the Court has gone the full route in the delineation of the section. Previously, it had been established that state courts may hear section 301 violations,[19] the only restraint being that federal law be applied.[20] Thus, a state action may be immune not only from federal courts' pre-emption, but from the NLRB pre-emption doctrine that was fatal in the *Garmon* case.

A noticeable gap in section 301 which had existed up to the instant case was the enforcement of individual rights under a collective bargaining contract within this section's jurisdiction. The outstanding case on the point, and the one which was the most influential in the Michigan courts, was *Association of Westinghouse Salaried Employees v. Westinghouse Corp.*[21] This case was brought by a union to enforce the right of employees to wages which were due though they were absent from work as agreed upon in their contract. The suit was dismissed because of the absence within 301(a), the Court believed, of any provision to enforce individuals' rights under federal law.[22] This decision was largely the product of constitutional worries which the Court had if it were to expand the scope of section 301 to cover this suit.[23]

Derived from this holding came a swarm of lower court decisions which dismissed suits by individuals against employers under section 301.[24] The immunity of individuals from section 301 suits did not follow as might be expected. But, inasmuch as employees were made parties to these actions, the suits did forecast the result in *Smith v. Evening News*.[25]

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[17] 371 U.S. at 197.

[18] Brief for the NLRB as Amicus Curiae, p. 14.

[19] Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962).

[20] Teamsters, Local 174 v. Lucas Flower Co., 369 U.S. 95 (1962).

[21] 348 U.S. 437 (1955).

[22] Id. at 461.

[23] From this conclusion inevitably emerge questions regarding the constitutionality of a grant of jurisdiction to federal courts over a contract governed entirely by state substantive law, a jurisdiction not based on diversity of citizenship yet one in which a federal court would, as in diversity cases, administer the law of the state in which it sits.

Id. at 449.

[24] International Ass'n of Machinists v. Servel, Inc., 268 F.2d 692 (7th Cir. 1959) (employees' personal rights cannot be enforced); Copra v. Suro, 236 F.2d 107 (1st Cir. 1956) (§ 301 means both "suits" and "contracts" between only union and management); United Protective Workers of America v. Ford Motors Co., 194 F.2d 997 (7th Cir. 1952) (individuals may join a union suit only if there is a diversity of citizenship); Dimeco v. Fisher, 185 F. Supp. 213 (D. N.J. 1960) (wrongful discharge is common law action, not § 301).

[25] 371 U.S. at 199.

The constitutional doubts raised in *Westinghouse* were swept away and section 301 was cast in much expanded terms in the leading case of *Textile Workers Union v. Lincoln Mills*.[26] This action was brought to gain specific performance of an arbitration award to employees. The union brought the suit in its own right as an enforcement of the arbitration provision of its contract. In granting the relief, the Supreme Court construed section 301 as creating a substantial body of federal common law for labor relations.[27] The Court could find no constitutional obstruction to reaching this decision.[28]

Finding the body of law which section 301 creates to include suits brought by individual employees seems to follow logically from the *Lincoln Mills* decision. The only noticeable movement involved in reaching the *Evening News* decision is the reading of section 301 to include not only suits between union and management, but also suits between all parties to the collective bargaining contract.[29]

While it may now seem that section 301 has come full circle in its sweep of power, there remains left over from the legions of varied interpretations fertile areas for distinction and avoidance of the holding in this case. The Court itself gives a clue to this possibility in a footnote which states that the Court is not deciding that the petitioner's suit by reason of the nature of the breach is within section 301.[30] The opinion then, not applicable to all of the facts of the case, takes on the aura of an advisory decision. This departure from accepted Supreme Court procedure formulated a primary basis for Mr. Justice Black's lone dissent.

The significance of this peculiar manner of deciding a case may indeed be seen in its affect upon future employee suits. For, while the Court appears to have gone the full course in opening up 301, Mr. Justice White clearly holds back from deciding that these employees in this discrimination suit have standing to sue. One immediately wonders why there would not be standing.

The one clear result of this decision is that *Westinghouse* will no longer control these suits. Individual employee's rights can be sued upon in damages (*Evening News*), as well as protected by injunction (*Lincoln Mills*). The only remaining aspect is the question as to which breaches of contract are enforceable by an employee. As stated before, *Evening News* talks in terms of employee suits having standing, but when applied to this discrimination suit, the Court stops short. The answer to this inconsistency may lie in the preservation of a distinction that arose in *Westinghouse:* contract clauses promissory to unions, and clauses promissory to employees,[31] which distinction

[26] 353 U.S. 448 (1957).

[27] Id. at 451.

[28] "There is no constitutional difficulty. Article III, § 2 extends the judicial power to cases 'arising under the laws of the United States . . . .' The power of Congress to regulate these labor-management controversies under the Commerce Clause is plain." Id. at 457.

[29] See note 5 supra.

[30] 371 U.S. at 201 n.9.

[31] "[T]here is set out no violation of a contract between an employer and a labor organization as is required to confer jurisdiction under § 301. The facts show an alleged violation of a contract between an employer and an employee. . . ." Supra note 21, at 464.

also found its way into the *Lincoln Mills* decision.[32] Thus, while a clause in a collective bargaining contract, such as this discrimination clause, seems to benefit employees, its primary effect is upon the union's position vis-à-vis management. It is perfectly conceivable that Smith's suit on remand may be again dismissed. This time, rather than giving pre-emption as the grounds, the Court would find that the clause may properly only be sued upon by the union.

In view of these sub-surface distinctions that obstruct actions before the courts, a suit before the Board would appear to be the course of least resistance. This should have been all the more compelling for Smith and the other petitioners inasmuch as the NLRB has procedural apparatus prepared for just this type of claim.[33]

This raises the question of the relative desirability of resorting to one of the two systems: the courts or the Board. The NLRB has procedural disadvantages in two respects: the statute of limitations and the administrative labyrinth. The reason the Evening News Association urged pre-emption of the petitioner's suit was that by the time the action was brought, the six months statute of limitations had run.[34] Additionally, the procedural obstructions to the quick remedy desired produce a delay which can make the Board financially unappetizing, especially to a worker.[35]

On the other hand, the enforcement of contracts in court would expose one to the perils involved with contract law.[36] These perils need not apply where the action brought to the NLRB is based upon an unfair labor practice. Along the same line, the employee's ability to enforce his rights can be divorced from a contract in the nature of a "sweetheart agreement."[37] His union's cooperation may not be so crucial, especially if he represents a minority voice within the organization.

In determining the advisability of recourse to the Board or to the courts to enforce a contract, where any injunctive relief is sought, the provisions of Norris-LaGuardia would put employees in a more favorable position than employers. Despite the classification of the action as specific performance of a no-strike clause rather than as an unfair labor practice, the court would

[32] "There [in *Westinghouse*] the union sued to recover unpaid wages on behalf of . . . employees. . . . The question here concerns the right of the union to enforce the agreement . . . which it has made with the employer." Supra note 26, at 456 n.6.

[33] The Board has a specific procedure to award back wages when there has been discrimination affecting an employee's wages. Harvest Queen Mill & Elevator, 90 N.L.R.B. 320, 26 L.R.R.M. 1189 (1950).

[34] 371 U.S. at 197 n.5.

[35] The Board's procedure and effect on claimants have been described as a ". . . slow and creaking procedure which like a wounded snake, has dragged its slow length along, sans bargaining, sans labor peace, sans everything, but pride of opinion, ill temper and frustration." International Ass'n of Machinists v. Cameron Iron Workers, Inc., 257 F.2d 467, 474 (5th Cir. 1958).

[36] Contract was not enforced since it was oral and violated parol evidence rule. Hamilton Foundry & Mach. Co. v. Molders & Foundry Workers, 95 F. Supp. 35 (S.D. Ohio 1951).

[37] A contract which does not properly protect an employee's rights may be disregarded by the courts as such a contract is before the NLRB for containing illegal union security provisions. Sovern, supra note 9, at 571.

have no injunctive power,[38] whereas the Board would.[39] As this limitation does not extend to actions against employers,[40] the employee would have free access to the courts.

A further implication of the case might be that the individual employee would have standing, under section 301, to sue the union for breach of the contract. In deciding whether to classify his complaint as a contract violation or an unfair labor practice, the complainant would consider the traditional judicial requirement of exhaustion of internal remedies,[41] which is not required in complaints to the Board.[42] In such a suit it would seem that any injunctive jurisdiction of the court would not be beyond the reach of individual employees against the union, as such actions by individuals would not be "a part and parcel of the abuses against which the Act was aimed."[43]

Nevertheless, while there may be decided exceptions to the desirability of employees using the courts to bring suit against an employer, they are just that—exceptions. There can be little doubt that this new weapon of employees, and thereby of unions, against management shall be utilized in the enhancing of their bargaining position. What is definitely still in doubt is whether and where the courts will mark off the access of employees to section 301. The use of *Evening News* to answer this is limited.

PAUL E. D'HEDOUVILLE

Negotiable Instruments—Due Date of Note—Effect of Acceleration Clause in Mortgage.—*Poultrymen's Service Corp. v. Brown.*[1]—A promissory note payable to the order of the plaintiff 120 months after date was

[38] Sinclair Ref. Co. v. Atkinson, 370 U.S. 195 (1962).

[39] 61 Stat. 146 (1947), 29 U.S.C. § 160(a) (1958).

[40] Brotherhood of Locomotive Eng'rs v. B. & O. R.R., 310 F.2d 513 (7th Cir. 1962).

[41] See Parks v. IBEW, 52 L.R.R.M. 2281, 2311 (4th Cir. 1963) and Detroy v. American Guild of Variety Artists, 286 F.2d 75, 77-78 (2d Cir.), cert. denied, 366 U.S. 929 (1961) holding that Section 101(a)(4) of the Landrum-Griffin Act:

> No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislator: *Provided,* That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof: *And provided further,* That no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition.

limits the jurisdiction of the court. Compare Sheridan v. United Bhd. of Carpenters, 306 F.2d 152 (3d Cir. 1962), holding that the four months proviso was directed only to the unions. In view of the legislative history indicating an intent to retain judicial discretion, and those decisions using the rationale of *Detroy* to establish an absolute right to sue after four months, the *Sheridan* approach seems the better interpretation. See 105 Cong. Rec. 16414 (1959).

[42] LMRA § 10(i), 61 Stat. 149 (1947), 29 U.S.C. § 101(i) (1958).

[43] Textile Workers Union v. Lincoln Mills, supra note 26.

[1] 77 N.J. Super. 198, 185 A.2d 706 (Ocean County Ct. 1962).