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Labor Law—Labor-Management Reporting and Disclosure Act of 1959—Challenging the Denial of an Equal Right to Nominate Under § 101.—Harvey v. Calhoon

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Supreme Court as restrictive and narrow in scope. In interpreting the former section 8(b)(4), the Court stated that the words "induce or encourage," are broader in scope and effectively prohibited peaceful picketing, while it intimated that the words "restrain or coerce" would not have manifested such intent.[22] It must be assumed that Congress knew of the legal effect of these words when it chose to use them. The wording of 8(b)(4)(ii) as finally passed is the same as was analyzed by the Senate Committee, prohibiting only "threatening, coercing, or restraining" a secondary employer engaged in commerce. As pointing out in the *Fruit Packers* case, when Congress wanted to prohibit picketing per se, it knew how to do so.[23] This is evidenced by section 8(b)(7) which forbids a union from picketing or causing to be picketed, any employer, for a proscribed object.[24] For these reasons it is submitted that the correct interpretation of 8(b)(4)(ii) is that of the *Fruit Packers* case.

Because of the decision in the *Burr* case, the intent of Congress in enacting 8(b)(4) has been cast very much in doubt. It is a doubt that can be removed only by a pronouncement of the Supreme Court, or by a clarification by Congress.

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Labor Law—Labor-Management Reporting and Disclosure Act of 1959—Challenging the Denial of an Equal Right to Nominate Under § 101.—*Harvey v. Calhoon.*[1]—Plaintiff, a member of the National Marine Engineers' Beneficial Association, AFL-CIO, brought suit against the defendant in his capacity as president of District No. 1 to enjoin the holding of a union election. He alleged that the union had violated the rights guaranteed to him and others similarly situated, as union members, by Section 101(a)(1) of the Labor-Management Reporting and Disclosure Act of 1959[2] (hereafter referred to as the LMRDA). This method of enforcing

[22] International Bhd. of Elec. Workers v. NLRB, supra note 18, at 703. The former section 8(b)(4) has been retained by the Landrum-Griffin Act as 8(b)(4)(i). 73 Stat. 542 (1959), 29 U.S.C. § 158(b)(4)(i) (Supp. IV, 1963).

Section 8(b)(4)(i) makes it an unfair labor practice "to engage in, or to induce or encourage any individual. . . ."

[23] Supra note 6, at 317.

[24] 73 Stat. 544 (1959), 29 U.S.C. § 158(b)(7) (Supp. IV, 1963). Section 8(b)(7) reads:

> (b) It shall be an unfair labor practice for a labor organization or its agents . . . .
>
> (7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer. . . .

[1] 324 F.2d 486 (2d Cir. 1963), cert. granted, 84 Sup. Ct. 633 (1964).

[2] 73 Stat. 520 (1959), 29 U.S.C. § 411(a)(1) (Supp. IV, 1963). This section is part of Title I, popularly referred to as "The Bill of Rights" section, and provides that:

> Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to

violations of section 101(a)(1) is provided in section 102.[3] The complaint stated that while the union by-laws allowed any member to nominate himself, but only himself, for union office, the union's national constitution allowed only an incumbent official or a five-year member with the requisite sea-time (180 days, on vessels covered by union contract, in each of two of the preceding three years) to be nominated or elected. The combined effect of these regulations was to preclude all members in the group which could not hold office from being able to nominate an electable candidate. The district court dismissed,[4] finding that plaintiff's complaint came under the provisions of Section 401(e) of the LMRDA[5] exclusively, and that therefore the only remedies open to him were those provided by section 402.[6] The plaintiff then appealed. HELD: Reversed and remanded. The complaint showed that plaintiff was denied an equal right to nominate candidates for union office and therefore stated a cause of action under section 101(a)(1). The court went on to hold that while such violations might also be found to come under sections 401 and 402, the provisions of these sections do not withdraw jurisdiction based on section 102.

The court based its decision on the fact that the complaint alleged that members of a union had been denied an equal right to nominate.

If a member could only nominate himself, but he was ineligible for office, that member had been shorn of any rights to nominate. Taken as a whole then, the union's nominating procedures divided the union into two groups: five-year members with the requisite sea-time, who could nominate themselves, and the remainder who could only vote. With these conditions present, the court stated, "it can hardly be asserted that the members had 'equal rights and privileges . . . to nominate candidates.' "[7]

Since the passage of the LMRDA there has been constant pressure in the courts to bring nomination procedures under the protection provided by sections 101 and 102, but the complainants have found the door closed by the courts' wide use of sections 401(e) and 402. Section 401(e) refers to nominating, as does section 101(a)(1), but seems to cover a wider area of the election procedure than that of the latter section. Section 401(e)

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participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and by-laws.

[3] 73 Stat. 520 (1959), 29 U.S.C. § 412 (Supp. IV, 1963). In essence the provisions of this section allow the aggrieved person to bring action for the appropriate relief (including the enjoining of elections) in the local United States District Court.

[4] 221 F. Supp. 545 (S.D.N.Y. 1963).

[5] 73 Stat. 532 (1959), 29 U.S.C. § 481(e) (Supp. IV, 1963). The section, part of Title IV, covering elections, states "[i]n any election required by this section which is to be held by secret ballot a reasonable opportunity shall be given for the nomination of candidates and every member in good standing shall be eligible to be a candidate and to hold office . . . and shall have the right to vote. . . ."

[6] 73 Stat. 534 (1959), 29 U.S.C. § 482 (Supp. IV, 1963). In enforcing section 401(e), this section requires that the complainant first exhaust any union remedies applicable and then, if unsuccessful, file a complaint with the Secretary of Labor, who is to investigate the allegation and file a complaint with the district court, if necessary, to correct any violations found.

[7] Supra note 1, at 489.

requires that "a reasonable opportunity shall be given for the nomination of candidates and every member in good standing shall be eligible to be a candidate. . . ."[8] It is on the basis of this section that the courts have dismissed complaints of nomination violations brought under section 101(a)(1).[9] However, only in *Jackson v. NMEBA*[10] was there any question of a denial of an *equal right to nominate.* In *Jackson*, implicitly overruled by the present decision, the plaintiff challenged the same nominating and eligibility requirements of the same union as in the instant case. The district court, though, instead of considering the procedures a unit as done by the *Harvey* court, divided these into the self-nomination provision, which on its face seems to make nominations as available as possible, and the eligibility requirement, which the court believed fell under the provisions of section 401(e).[11] Looking at the election procedures in this separate way there could not be found any denial of the equal right to nominate, leaving section 401 as the only available sanction.

Cases, such as the present one, where a colorable violation of both sections 101 and 401 is alleged, present the basic conflict brought on by the interplay of section 101(a)(1) and section 401(e) and their respective remedies. They resolve this conflict only by determining to what extent the nomination protections presented by one of these sections interfere with, and perhaps replace, those of the others. Two specific situations relating to this issue have already been resolved. First, where the election has already been held, the last sentence of section 403[12] makes it mandatory that any complaint of a violation of nomination procedures be made through the Secretary of Labor under section 402, rather than directly to the district court.[13] Second, where a member is challenging any union constitution or by-law restriction on his right to be a candidate or an officer, he must use the procedures of section 402. The courts have found that by analysis most of the alleged nomination violations of section 101(a)(1) fall into one of the above categories and have therefore been dismissed.[14] Contiguous with these interpretations is the fact that a prospective nominee

[8] 73 Stat. 532 (1959), 29 U.S.C. § 481(e) (Supp. IV, 1963).

[9] Mamula v. United Steelworkers, 304 F.2d 108 (3d Cir.), cert. denied, 371 U.S. 823 (1962); Boling v. Int'l Bhd. of Teamsters, 224 F. Supp. 18 (E.D. Tenn. 1963); Jackson v. Nat'l Marine Engineers' Beneficial Ass'n (hereinafter referred to as NMEBA). 221 F. Supp. 347 (S.D.N.Y. 1963); Colpo v. Highway Truck Drivers, 201 F. Supp. 307 (D. Del. 1961), vacated as moot, 305 F.2d 362 (3d Cir.), cert. denied, 371 U.S. 890 (1962); Gammon v. Int'l Ass'n of Machinists, 199 F. Supp. 433 (N.D. Ga. 1961); Johnson v. San Diego Waiters' Union, 190 F. Supp. 444 (S. D. Cal. 1961).

[10] 221 F. Supp. 347, supra note 9.

[11] Jackson v. NMEBA, supra note 9, at 348.

[12] 73 Stat. 534 (1959), 29 U.S.C. § 483 (Supp. IV, 1963).

[13] Colpo v. Highway Truck Drivers, supra note 9. See also, Kolmonen v. Int'l Hod Carriers', 215 F. Supp. 703 (W.D. Mich. 1963).

[14] Mamula v. United Steelworkers, supra note 9, at 109; Boling v. Int'l Bhd. of Teamsters, supra note 9, at 20; Colpo v. Highway Truck Drivers, supra note 9, at 363; Gammon v. Int'l Ass'n of Machinists, supra note 9, at 436; Johnson v. San Diego Waiters' Union, supra note 9, at 447; Flaherty v. McDonald, 183 F. Supp. 300, 303 (S.D. Cal. 1960).

suing in that capacity has no standing under section 102,[15] but must bring an action as a member.

In a case such as *Harvey* where a union member can successfully allege that the union's nominating procedures have violated his rights *to nominate*, the LMRDA presents him with a difficult problem of achieving the most useful legislative remedy. If the violation is under section 101 he can obtain an injunction to restrain the election under section 102, but if it is a violation under section 401 he must wait until the election has been conducted and then apply to the Secretary of Labor for relief under section 402.[16] While the remedy provided by section 402 appears to be complete and adequate, it can have unfortunate consequences for the complainant. The election is held despite the complaint and then the Secretary has two months in which to investigate and bring the violation to court. The speedy remedy of a pre-election injunction is lost, and in the weeks or months after the challenged election, officers who were nominated and elected by a small percentage of the union's members would be in command, to perhaps deny further rights and benefits due the majority and to insure their own re-election.

Further, for the individual member who filed the original complaint, the remedy provided for section 401(e) by section 402 may mean no remedy at all. This latter section provides that once the Secretary has brought a civil action on his complaint the court may not void the election unless "the violation of section [401] may have *affected the outcome* of an election. . . ."[17] (Emphasis added.) Thus a court may find that one member's rights have been denied under section 401, and yet leave that member without a remedy. It is not therefore of molehill significance to know into which section, 101(a)(1) or 401(e), an alleged violation falls.

We have seen what does *not* constitute a violation of a member's equal right to nominate under section 101(a)(1), but what *is* protected by this section? The instant case, the only one yet decided where a denial of the equal right to nominate has been found, points out that the right to nominate candidates for union office is curtailed when this right is dependent upon membership classification, and that such is a violation of section 101(a)(1).[18] However, based on other decisions, the legislative history of the act, and the wording of the act itself, it seems that, despite the severity of union restrictions on the eligibility to *be* a nominee or hold office, such restriction will not be considered to be violations of section 101(a)(1) as long as every member can nominate one of the eligible group. As stated in *Jackson*, "It is the eligibility requirements which plaintiff attacks and these are *exclusively* dealt with by section 401(e)."[19] There seems to be no other way to interpret the words "equal rights . . . to nominate." To expand

[15] Mamula v. United Steelworkers, supra note 9, at 112.

[16] While it has been argued that violations of § 101 raise a pre-election cause of action, see Summers, Pre-Emption and the Labor Reform Act—Dual Rights and Remedies, 22 Ohio St. L.J. 119, 135-40 (1961), the federal court decisions are to the contrary, see Jackson v. NMEBA, supra note 9, at 348 and cases cited therein.

[17] 73 Stat. 532 (1959), 29 U.S.C. § 482(c)(2) (Supp. IV, 1959-62).

[18] Supra note 1, at 489.

[19] Jackson v. NMEBA, supra note 9, at 348. For similar statements see cases cited supra note 9.

this phrase to include an "equal right . . . to nominate *whomever he desires*" would be a case of improper legislation by judicial interpretation. During floor debate on the Bill of Rights section, the proponent stated that "under this Bill of Rights title, a union member will be protected, as he should be protected, in his rights to *participate in all union activities*. He will be insulated against discriminatory treatment."[20] (Emphasis added.)

Thus the protection of section 101(a)(1) seems to be limited to a member's right to participate in the nomination procedure, and not the right to nominate a particular person. The *Harvey* court found that the implicit classification of the membership was discriminatory treatment, and it would seem that in the future the court will not find such violation of section 101(a)(1) unless the complainant states that through some act of the union he or a group of his fellow members were unable to participate as nominators. The court in *Jackson v. Int'l Longshoremen's Ass'n*, in speaking of another right guaranteed by section 101(a)(1), found that "Title I of the act does not, of course, guarantee . . . the right to vote for a specific person, but guarantees only the right to vote for a duly nominated and qualified candidate."[21] The same statement, replacing "vote" with "nominate," seems to be equally applicable to section 101(a)(1).

Section 401(e), as mentioned above, states with a great deal more detail the safeguards a union must provide to its members in the nomination and election procedure. It not only seems to cover the provisions of section 101(a)(1), but also governs complaints about the eligibility to be nominated. Where it does conflict with section 101(a)(1), as it did in the present case, the court correctly found that because of the importance Congress attached to the provisions of section 101, Congress could not have meant the remedies provided by section 402 to be exclusive. The very name of the section "Bill of Rights" implies the emphasis Congress placed upon it (though perhaps duplicating section 401) in its effort to guarantee union members their rights "just as the rights of the American people are set forth in the Bill of Rights of the Constitution of the United States."[22]

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Labor Law—Railway Labor Act—Jurisdiction of National Mediation Board Over Striking Employees of an Airline Employed at a Government Nuclear Research Station.—*Pan American World Airways, Inc. v. United Bhd. of Carpenters & Joiners.*[1]—In 1963, Pan American World Airways contracted with the Atomic Energy Commission to perform "housekeeping" and general support services at the Commission's Nuclear Research Development Station, located in Jackass Flats, Nevada. The Station is devel-

[20] Remarks of Sen. Kuchel in 2 Legislative History of LMRDA of 1959 at 1373 (1959).

[21] 212 F. Supp. 79, 82 (E.D. La. 1962).

[22] Remarks of Sen. McClellan, supra note 20, at 1104.

[1] 324 F.2d 217 (9th Cir. 1963), cert. denied, 32 U.S.L. Week 3340-41 (U.S. March 31, 1964) (No. 725).