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Labor Law—Section 301—Contract Arbitration of a Jurisdictional Dispute.— Carey v. Westinghouse Elec. Corp.

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Labor Law—Section 301 of LMRA—Contract Arbitration of a Jurisdictional Dispute.—*Carey v. Westinghouse Elec. Corp.*[1]—The International Union of Electrical, Radio and Machine Workers (IUE), certified representative of "all production and maintenance employees,"[2] not including the "salaried technical . . . employees," at a Westinghouse plant, filed a grievance with the Company, alleging that certain members of the Federation of Westinghouse Independent Salaried Unions (Federation), certified to represent the salaried technical personnel, were performing production and maintenance work. IUE sought arbitration of the dispute pursuant to its collective bargaining agreement with Westinghouse, which called for arbitration of any grievance involving "interpretation, application or claimed violation of a provision of the Agreement." Westinghouse refused, on the ground that the question involved union representation which was within the exclusive jurisdiction of the National Labor Relations Board. This view was sustained in the New York state courts.[2] The United States Supreme Court granted certiorari. HELD: Section 301(a) of the Labor Management Relations Act[3] gives the state court jurisdiction to compel arbitration of a collective bargaining agreement. A jurisdictional dispute, although possibly cognizable by the National Labor Relations Board, does not necessitate the surrender of jurisdiction, even if one union is not a party to the agreement.

There are two distinct types of jurisdictional disputes which, while closely related, are sufficiently separable to create individual preemption problems. In the instant case, the nature of IUE's complaint could be (1) that the *disputed work* should be performed by members of its bargaining unit, or (2) that IUE has the *right to represent* the Federation members doing that work. The former or "work assignment" controversy is governed by the National Labor Relations Act only in the event of a strike or a threat to strike.[4] Prior to that contingency no argument could be made that Board jurisdiction precludes arbitration.[5] If framed as a "representa-

and if a labor dispute persisted and threatened to substantially interrupt interstate commerce to a degree such as to deprive a section of the country of essential transportation service, then the Mediation Board could not notify the President so that he might create an emergency board, as provided in Section 10 of the Railway Labor Act.

[1] 375 U.S. 261 (1964).

[2] Carey v. Westinghouse Elec. Corp., 11 N.Y.2d 452, 184 N.E.2d 298, 230 N.Y.S.2d 703 (1962).

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

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting 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 and without regard to the citizenship of the parties.

[4] Section 8(b)(4)(D) of the National Labor Relations Act, 61 Stat. 141, 142 (1947), 29 U.S.C. § 158 (1958), makes it an unfair labor practice for a union to strike or threaten to do so to force the employer to assign work to it. Section 10(k), 61 Stat. 149 (1947), 29 U.S.C. § 160(k) (1958) requires the Board to settle the dispute, when such an unfair labor practice is alleged.

[5] Or so one would think. Yet, in Local 1505, Int'l Bhd. of Elec. Workers v. Local 1836, Ass'n of Machinists, 304 F.2d 365 (1st Cir. 1962), an action to compel

tional" problem, however, the dispute would be within the immediate purview of the NLRB, and the preemption issue would become paramount.[6] The Court declines in the present case to decide which of the two hybrids is involved, reasoning that in either event arbitration would be advantageous.[7]

In *San Diego Bldg. Trades Council v. Garmon*,[8] the Supreme Court held that when labor activity was even arguably "within the compass" of the National Labor Relations Act, the state's jurisdiction was displaced. The preemption principle was based on the belief that since statutory and tort law involve rules designed by government, imposed upon the parties from without, a diversity of tribunals applying a variety of procedures would inevitably result in conflict and upset the proper statutory balance between labor and management interests.[9] However, since the conduct prescribed by a collective bargaining agreement is self-imposed, the above considerations do not apply. The Court has held that in such a situation the preemption doctrine is not relevant,[10] Congress having "deliberately chose[n] to leave the enforcement of collective agreements 'to the usual processes of the law.' "[11] Thus, in *Smith v. Evening News*,[12] the Court held that section 301 gives the state jurisdiction to entertain suits for breach of a collective bargaining agreement even when the breaching conduct would constitute an unfair labor practice cognizable by the NLRB.[13] It did, however, make a qualification as to the universality of the rule:

> If . . . there are situations in which serious problems will arise from both the courts and the Board having jurisdiction over acts

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arbitration of a work assignment dispute, the court held that such "jurisdictional disputes between unions are precisely in its [NLRB's] province." For this view the court relied on NLRB v. Radio & Television Broadcast Eng'rs Union, 364 U.S. 573 (1961), where the Board exercised jurisdiction only after persistent work stoppages. For a similar holding, see International Chem. Workers Union v. Olin Mathieson Chem. Corp., 202 F. Supp. 363 (S.D. Ill. 1962). This philosophy has been expressly rejected in Carey v. General Elec. Co., 315 F.2d 499 (2d Cir. 1963) and Retail Clerks Union v. Thriftimart Inc., 59 Cal. 2d 421, 380 P.2d 652, 30 Cal. Rep. 12 (1963).

[6] A charge could be brought under § 8(a)(5), 61 Stat. 141 (1947), 29 U.S.C. § 158(a)(5) (1958), or a petition under § 9(c)(1), 61 Stat. 144 (1947), 29 U.S.C. § 159(c)(1) (1958). The union could thus either allege a failure to bargain collectively with the employee representatives or in the alternative for a clarification of its Board certificate.

[7] Supra note 1, at 272. "However the dispute be considered—whether one involving work assignment or one concerning representation—we see no barrier to use of the arbitration procedure."

[8] 359 U.S. 236 (1959).

[9] Brief for the Solicitor General as *Amicus Curiae*, p. 9. Garner v. Teamsters Union, 346 U.S. 485, 490 (1953).

[10] Teamsters, Local 174 v. Lucas Flower Co., 369 U.S. 95, 101 n.9 (1962); Atkinson v. Sinclair Ref. Co., 370 U.S. 238, 245 n.5 (1962).

[11] Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 513 (1962).

[12] 371 U.S. 195 (1962).

[13] If a state court can hear such breach actions, it can perforce compel arbitration of them. United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

> which amount to an unfair labor practice, we shall face those cases when they arise.[14]

It is Westinghouse's contention that if the unfair labor practice involves a representational right, concurrent jurisdiction would precipitate the "serious problems" situation *Smith* reserved, and justify retention of sole jurisdiction in the NLRB.

Any problems which concurrent jurisdiction would create must, however, be balanced against those it tends to solve. In so doing, the Court grounds its decision primarily on its belief that in this case the use of arbitration machinery would contribute more significantly to industrial peace.[15] The point is then raised, however, that the arbitration will be neither final nor binding, due to its failure to include Federation, and that inevitably the NLRB will be forced to decide the dispute.[16] This contention appears to have merit since it is clear that the Board is empowered to review the arbiter's award,[17] and it is likely that Federation will demand that it do so.

Since Federation has an identical arbitration clause in its contract with Westinghouse, it could seek relief from that source, although this seems unlikely. A defeat before the arbiter would presumably foreclose the matter unfavorably,[18] while victory would result in two antithetical awards which inevitably would require NLRB unravelling.[19] Federation could go immediately before the Board by engaging in a strike, if the arbiter's award were framed in terms of work assignment, or, if framed in representational terms, by filing a section 8(a)(5) charge or a 9(c)(1) petition as already outlined. The Board will normally show deference to an arbital award which is not "tainted by fraud, collusion, unfairness or serious procedural irregularities. . . ."[20] But the absence of a party whose rights were adversely affected may constitute such a procedural irregularity.[21] This should be the

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[14] Smith v. Evening News, supra note 12, at 197-98.

[15] Supra note 1, at 271. Citing International Harvester Co., 138 N.L.R.B. 923, 926, 51 L.R.R.M. 1155, 1156 (1962), the Court stated:

> The Act [NLRA], . . . is primarily designed to promote industrial peace and stability by encouraging the practice and procedure of collective bargaining. Experience has demonstrated that collective bargaining agreements that provide for final and binding arbitration of grievance and disputes arising thereunder, "as a substitute for industrial strife," contribute significantly to the attainment of this statutory objective.

[16] Brief for the respondent, p. 16.

[17] 61 Stat. 146 (1947), 29 U.S.C. § 160(a) (1958). Section 10(a) provides:

> The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice. . . . This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise. . . .

[18] Acoustical Contractors Ass'n of Cleveland, 119 N.L.R.B. 1345, 1353, 41 L.R.R.M. 1293, 1298 (1958); A. W. Lee, Inc., 113 N.L.R.B. 947, 953-54, 36 L.R.R.M. 1414, 1416 (1955).

[19] It is inconceivable that any union, in this case Federation, after pressing for and receiving an arbital award, would quietly allow it to be disregarded.

[20] International Harvesting Co., 138 N.L.R.B. 923, 927, 51 L.R.R.M. 1155, 1157 (1962).

[21] The Board has stated: "Assuming that in some circumstances an arbitration

case, "[u]nless all the salutary safeguards of due process are to be dissipated and obliterated to further the cause of arbitration."[22] This is especially true since the employer can not be regarded as in any way representing the interests of the non-party union.[23] The Court's position then, that arbitration of jurisdictional disputes will foster industrial peace is no more than conjectural. Practical considerations may lead to the converse conclusion.[24]

The Court also suggests that NLRB resolution of a representational dispute will leave unsettled issues still to be arbitrated,[25] and unwanted fragmentation can only be averted by allowing the arbiter initial authority to decide every aspect of the controversy. This position contains the same weakness as the one above: Unless the arbitration is final, fragmentation will still be the result. Assuming Federation challenges the representational award and the NLRB exercises its authority to readjudicate, the arbitrator will have made an award dependent on a representational settlement, before that settlement was final and irrevocable. Of course, any "work assignment" rulings made by an arbiter based on a representational determination later reversed by the Board would become a nullity.

In that event an even more serious problem would arise. If Federation members lost work due to the award, the NLRB, in reversing that decision, could force the employer, for doing no more than obeying the arbitration award, to reimburse the affected workers.[26] And the courts might do the same if the workers chose to bypass both arbitration and the Board.[27] The majority's answer is certainly not satisfying to the employer:

> Should the Board disagree with the arbiter, by ruling, for example, that the employees involved in the controversy are members of one bargaining unit or another, the Board's ruling would, of course, take precedence; and *if* the employer's action had been in accord

award might be significant, as the S.U.P. was not a party to the awards limiting the sailors to work in one hatch, we find no merit to the I.L.W.U.'s contention that such awards in its favor are determinative of the case." International Longshoremen's & Warehousemen's Union, 94 N.L.R.B. 388, 397-98, 28 L.R.R.M. 1055 (1951). But see Raley's Inc., 143 N.L.R.B. No. 40, 53 L.R.R.M. 1347 (1963). Note that in this latter decision the non-party union was not the certified bargaining representative of any employees.

[22] Supra note 1, at 274 (dissenting opinion).

[23] As the Supreme Court said in NLRB v. Radio & Television Engr's, 364 U.S. 573, 579 (1960), such a controversy "in most instances, is of so little interest to the employer that he seems perfectly willing to assign work to either [union] if the other will just let him alone."

[24] Both the majority and concurring opinions stress that the undesirable consequences of duplicative proceedings are conjectural. But it is also conjectural that the arbitration will finalize the dispute. Since it appears more likely that Federation would oppose an adverse award, the majority's position must be considered the more conjectural.

[25] If IUE wins a representational action, it will likely try to displace the ex-Federationists with its own men, on the basis that the ex-Federationists are junior to everyone else in its bargaining unit. This seniority problem would turn on the interpretation of the collective bargaining agreement, and be arbitrable. See Sovern, Section 301 and the Primary Jurisdiction of the NLRB, 76 Harv. L. Rev. 529, 574 (1963).

[26] Id. at 571.

[27] It is possible that the courts would first require the union to seek arbitration. Supra note 13.

with that ruling, it would not be liable for damages under § 301.[28] (Emphasis supplied.)

An employer would be wise under this analysis to disregard the arbitrator, if he can anticipate a contrary finding by the Board. This would, of course, merely leave him open to a damage action by the initially victorious union, should the Board not disagree. To so penalize a "bad guess" would seem contrary "to the basic principles of common everyday justice."[29]

No decision by the Court could have averted more than a few of these difficulties. For instance, if representational actions alone are preempted by Board jurisdiction, a union which desired that relief could still, if it wished, frame its argument in the nature of work assignment.[30] If work assignment disputes are also held non-arbitrable, unfair labor practices would be encouraged, since a union would have to strike before the Board, the only other agency to which it would have recourse, acquired jurisdiction.[31] Finally, even the possibility of arbitration of a jurisdictional dispute would necessarily be eliminated.

It is more accurate to say that arbitration must be inherently defective when a party necessary to a binding adjudication is absent. Since all the dilemmas ultimately revolve around the lack of one union's participation, the simple solution would be to provide an arbitral forum where both unions would be heard and bound by the result. The state court, in the instant case, might have allowed Federation to intervene,[32] or the arbiter might take that step on his own motion;[33] but there is no certainty that either would, or under all circumstances, even could.[34] While one union is not represented,

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[28] Supra note 1, at 272.

[29] Id. at 275 (dissenting opinion).

[30] This may be exactly what happened in the instant case. The original grievance complained that "the employees working on induction heating and . . . performing assembly and wiring; power break operations; machine operations; and attending to the tool crib and storeroom operations should be in the IUE, Local 130 bargaining unit." Brief for the Solicitor General as *Amicus Curiae*, p. 22. While the Solicitor General and the respondent both interpreted the complaint as representational, IUE's theory, at least on this appeal, was work assignment. But the nature of the dispute may depend "wholly upon the way in which the issue is formulated by the moving party for its own tactical advantage." *Amicus Curiae* brief, p. 13.

[31] See supra note 5.

[32] Significantly enough, IUE did not ask the court to interplead Federation. In Local 1836, Ass'n of Machinists v. Raytheon Mfg. Co., 201 F. Supp. 334, 337 (D. Mass. 1962), the court refused to allow a non-party union to intervene, holding that the contract called for arbitration solely between the employer and suing union. While the decision was reversed on other grounds, 304 F.2d 356, supra note 5, the party union insisted on appeal that it had a contractual right to arbitrate with the employer alone.

[33] National Steel & Shipbuilding Co., 40 Lab. Arb. 625, 635-36 (decision of arbitrator, 1963).

[34] "It seems to me there can be no intervenor in an arbitration proceeding by one not a party to the contract." Dumas v. Upland Bros. Inc., 16 Lab. Arb. 588, 589 (N.Y. Sup. Ct., N.Y. County, 1951). "Sec. 22 of the rules of the [American Arbitration] Association provide for only those with a direct interest in a proceeding to participate. If any party could intervene in an arbitration merely by showing that it might be affected in some way by the decision, many intervenors might present themselves." Ball. Bros. Co., 27 Lab. Arb. 353, 354 (decision of arbitrator, 1956).

keeping in mind the disadvantages implicit in either result, the Court would still seem best advised to

> refuse to order arbitration of a work assignment [or representational] dispute whenever only one of the contending unions would be a party to the arbitration proceeding. Whatever difficulties recourse to the NLRB may pose, that forum can produce a definite, peaceful solution at least some of the time. An arbitration proceeding with one of the vitally interested parties missing holds no such promise.[85]

If the decision holds little promise of a definitive solution in this type of situation, it does, at the same time, substantially reinforce the policy premium presently paid both arbitration and section 301 actions. Since arbitration will be accommodated even in such an inherently imperfect setting, it can certainly expect continued broad encouragement. Moreover, if the instant case does not present a problem of sufficient seriousness to require application of the preemption rationale, few, if any, other cases will, and the trend toward court determination of all alleged collective bargaining breaches is likewise strengthened. Thus, by not engrafting an exception to the *Smith* rationale[86] on these facts, the Court lends further support to the non-exclusiveness of section 301 actions, which may well be the primary significance of the opinion.

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Labor Law—Section 301 of LMRA—Refusal to Remand to State Court for Injunction for Breach of No-Strike Clause.—*H. A. Lott v. Hoisting & Portable Engineers' Union.*[1]—This is an action in contract brought in a state court by an employer against a union for damages and injunctive relief for breach of the no-strike clause in their collective bargaining agreement. The defendants petitioned for removal to the United States District Court, predicating jurisdiction on Section 301(a) of the Labor Management Relations Act (Taft-Hartley Act).[2] Upon removal the plaintiff moved in the District Court for remand of his petition to the state court for an injunction inasmuch as Section 4 of the Norris-LaGuardia Act[3] precludes the federal court from granting the equitable relief requested. On this motion to remand the court HELD: Under the removal statute[4] the suit for damages could be transferred to the federal court. Therefore, in the interests of a uniform approach to section 301 cases the court will

[85] Sovern, supra note 25, at 576.

[86] See quote in text, supra at note 14, Smith v. Evening News, supra note 12, at 197-98.

[1] 222 F. Supp. 993 (S.D. Texas 1963).

[2] Labor Management Relations Act § 301(a), 61 Stat. 156 (1947), 29 U.S.C. § 185(a) (1958).

[3] Norris-LaGuardia Act § 4, 47 Stat. 70 (1932), 29 U.S.C. § 104 (1958).

[4] Judiciary and Judicial Procedure § 1441(c), 62 Stat. 937 (1948), 28 U.S.C. § 1441(c) (1958).