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Labor Law—Section 301—Employee's Standing to Enforce Contract Rights Against His Union—*Humphery v. Moore*

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venting the spirit and harmony of Robinson-Patman, by allowing the practice of temporary price discrimination, the overall effect of which will cause that *potential* danger of substantially lessening competition which the Act seeks to prohibit. While it is true that the court in the scope of its appellate review may upset the Commission's findings if they are not supported by substantial evidence on the record as a whole,³⁸ the courts should scrupulously avoid hamstringing the Commission in carrying out the basic purposes of the Act, by imposing a greater degree of proof than has been necessary in the past, as was done in the instant decision. Who is to know better than the Commission which is staffed by experts in the area of economics and business practices, what constitutes a substantial lessening of competition. "The precise impact of a particular practice on trade is for the Commission, not the courts to determine."³⁹ It would be an understatement to say that the decision in the instant case was a setback to the FTC and we can only watch and wait to determine whether the standard laid down in the instant case will be followed, or rejected by other circuits in subsequent decisions concerning section 2(a) of the Robinson-Patman Act, so far as "secondary line" competition is concerned.

CHARLES K. BERGIN, JR.

Labor Law—Section 301—Employee's Standing to Enforce Contract Rights Against His Union—*Humphrey v. Moore*.¹—Respondent Moore brought a class action in a Kentucky state court, on behalf of himself and his fellow employees, against his union and his company (Dealers). He prayed for an injunction to restrain the implementation of a joint grievance committee's decision to dovetail the seniority lists of his company with those of another company (E & L) which was moving from the area. The two companies had arranged to transfer certain rights to each other, and the question arose whether Dealers was absorbing E & L's business within the meaning of Dealers' collective bargaining contract,² which fact would permit dovetailing. When the issue first arose, the president of the local union, which represented the employees of both companies, informed Dealers' employees that their jobs were not in jeopardy since there would be no absorption. But, when the union became more advised as to the nature of the

³⁸ *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

³⁹ *FTC v. Motion Picture Adv. Co.*, 344 U.S. 392 (1953). The Supreme Court is apparently more favorably disposed to the expertise of the FTC. "We are persuaded that the Commission's long and close examination of the questions it here decided has provided it with precisely the experience that fits it for performance of its statutory duty." *FTC v. Cement Institute*, 333 U.S. 683 (1948).

¹ 375 U.S. 335 (1964), rehearing denied, 32 U.S.L. Week 3297 (U.S. Feb 25, 1964). Includes companion suit *General Drivers, Warehousemen and Helpers, Local Union No. 89 v. Moore*.

² Article 4, Section 5 of the contract was as follows:

In the event that the Employer absorbs the business of another private, contract or common carrier, or is a party to a merger of lines, the seniority of the employees absorbed or affected thereby shall be determined by mutual agreement between the Employer and the Unions involved. Any controversy with respect to such matter shall be submitted to the joint grievance procedure.

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transaction, they successfully recommended at the joint grievance committee hearing that dovetailing be adopted. The committee's acceptance of the suggestion effectuated Moore's pending discharge, which he alleged was a breach of contract since the committee's decision exceeded its power and since it was brought about by dishonest union conduct in breach of its duty of fair representation. The Court of Appeals of Kentucky agreed. Applying state law, they reversed the trial court and granted a permanent injunction.³ On certiorari to the United States Supreme Court, a majority of six Justices, reversing, HELD: This action is one arising under Section 301⁴ of the Labor Management Relations Act and is, therefore, governed by federal law. But on the merits Moore did not prove his case since the committee did not exceed its power and the union did not breach its duty of fair representation.

The concurring Justices (hereafter referred to as "minority") agreed with the majority that on the merits Moore did not prove his case. However, while the majority treated the jurisdictional issue as an employee's suit against his employer and his union for breach of contract, the minority viewed the alleged cause of action as an employee's suit against his union, which they contended should not be brought under section 301.

The inclusiveness of section 301(a) has evolved to where both state and federal courts have jurisdiction to enforce collective bargaining contracts,⁵ provided federal law is applied.⁶ The most recent extension of section 301 is seen in *Smith v. Evening News Ass'n*,⁷ which held that there is concurrent jurisdiction regardless of whether the contract rights are those of management, of union or of an individual employee.⁸ Irrelevant is the fact that there are elements of unfair labor practices present which would ordinarily be within the exclusive jurisdiction of the NLRB.⁹

Yet the sweep of section 301 was not made complete by *Evening News*, on the question as to who has standing to sue under 301. It merely stated that *all* employee suits are *not excluded*,¹⁰ thus leaving the questions as to which breaches of contract are enforceable by an employee,¹¹ and whether

³ 356 S.W.2d 241 (Ky. 1962).

⁴ 61 Stat. 156 (1947), 29 U.S.C. 185(a) (1958). Section 301(a) is as follows:

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organization, 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.

⁵ *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962).

⁶ *Local 174, Teamsters Union v. Lucas Flour Co.*, 369 U.S. 95 (1962).

⁷ 371 U.S. 195 (1962), noted 4 B.C. Ind. & Com. L. Rev. 766 (1963). See generally Kovarsky, *Unfair Labor Practices, Individual Rights and Section 301*, 16 Vand. L. Rev. 595 (1963).

⁸ *Id.* at 200.

⁹ *Id.* at 197.

¹⁰ *Id.* at 200, 201 n.9.

¹¹ It should also be pointed out that generally some clauses in the collective bargaining contract are promissory to the employees, while other clauses are promissory to the union. See Cox, *Rights Under a Labor Agreement*, 69 Harv. L. Rev. 601 (1956).

an employee can sue a union for these breaches. It is with this latter question that the minority was concerned.

A reading of the majority opinion, by itself, leads one to believe that they did not even consider the question of the employee's standing to sue his union, but merely viewed the allegations of breach of contract by the employer and the union as a cause of action coming within the purview of *Evening News*. This seems to follow the traditional approach to section 301 actions of requiring a showing of a breach of contract.

On the other hand, the minority looked behind the facade of the allegations, and found that the facts did not show any breach of contract by the employer. They contended that at most a breach by the union might be shown, and that that did not give a cause of action under 301. In light of this, the majority opinion takes on a different meaning. It would appear that the majority desired to expand the employee's rights under section 301, and, when their opinion is read in conjunction with the more logical position of the minority, their holding appears to be a policy decision.

Being a policy decision the Court framed its opinion in such a way that, when the same problem arises in later cases, they could either distinguish *Moore* on its facts, or cite it for the rule of law that an employee may sue his union for breach of contract under section 301. It is this aspect that makes the *Moore* decision so confusing.

Another confusing factor is Moore's alleging two separate grounds for breach of contract. Although the allegation of the union's breach of duty of fair representation is of more concern to us, the first allegation that the grievance committee exceeded its power is also significant.

The minority of three Justices, led by Mr. Justice Goldberg, concluded that "a mutually acceptable grievance settlement between an employer and a union . . . cannot be challenged by an individual dissenting employee under § 301(a) on the ground that the parties exceeded their contractual powers in making the settlement."¹² In fact, he added, the parties could resolve their dispute by a joint agreement which applied, interpreted, or amended the contract.¹³

Mr. Justice Goldberg contended that the controlling case on this issue is *Ford Motor Co. v. Huffman*,¹⁴ where it was "held that the existing labor agreement did not limit the power of the parties jointly, in the process of bargaining collectively, to make new and different contractual arrangements affecting seniority rights."¹⁵ Therefore, he reasoned, it should follow that a settlement of a seniority dispute, deemed by the parties to be an interpretation of their agreement, is within their joint authority.¹⁶ "If collective bargaining is to remain a flexible process, the power to amend by agreement and the power to interpret by agreement must be coequal."¹⁷

¹² *Supra* note 1, at 352.

¹³ *Id.* at 353.

¹⁴ 345 U.S. 330 (1953).

¹⁵ *Supra* note 1, at 354, 355.

¹⁶ *Id.* at 355.

¹⁷ *Id.* at 355. Observe that this position assumes that the same considerations that allow the exclusive bargaining agent broad discretion in negotiating a contract, exist when the parties attempt to interpret it. But cf. Aaron, *Some Aspects of the Union's*

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Mr. Justice White, speaking for the majority of the Court, decided the question of whether an employee has standing to challenge the parties' interpretation of their contract by tersely stating, "If we assume with Moore and the courts below that . . . its [the Committee's] interpretation of the section is open to court review, Moore's cause is not measurably advanced."¹⁸ The Court then concluded that the parties purported to proceed under the contract, and that their interpretation was correct.

Thus, the majority never discusses the rationale of their decision to allow the employee to contest the parties' interpretation of their contract.¹⁹

Duty of Fair Representation, 22 Ohio St. L.J. 39, 49 (1961): "It is generally agreed that, with respect to the rights of their individual members, unions have a much more limited area of discretion in administering an existing collective agreement than in negotiating a new one. . . ." See Hanslowe, *Individual Rights in Collective Labor Relations*, 45 Cornell L.Q. 25, 46 (1959): "It is arguable that, whatever the needs for flexibility and wide discretion in the negotiation of new or modification of existing collective contracts, no such flexibility is either needed or appropriate, when rights under a contract are involved."

But seemingly in agreement with Mr. Justice Goldberg is Dunau, *Employee Participation in the Grievance Aspect of Collective Bargaining*, 50 Colum. L. Rev. 730, 748 (1950):

[T]he employee has no standing to participate in thrashing out the interpretation of an existing employment standard to the extent that it purports to settle the future scope of a disputed existing right. Insofar as it operates prospectively, the interpretation of a standard, no less than its formulation, is within the exclusive province of the representative, for the interpretative process is a policy-making function which calls for the imaginative and informed choice of available alternatives in construing an agreement. Whether the result is termed an interpretation or a change of the agreement, its essence is to imbue it with a new meaning to which the employees are bound in the future.

Accord, Howlett, *Contract Rights of the Individual Employee as Against the Employer*, 8 Lab. L.J. 316, 324 (1957): "An Employee may also be bound by the union's interpretation of the agreement."

It should be noted that the last two authorities cite as support for their argument, *Donovan v. Travers*, 285 Mass. 167, 188 N.E. 705 (1934), which was decided under state law, before federal participation in this area.

¹⁸ *Supra* note 1, at 345.

¹⁹ Mr. Justice Harlan agreed with the majority's decision on this question. One reason he advanced was that "a committee with authority to settle grievances whose composition is different from that in the multiunion-multiemployer bargaining unit cannot be deemed to possess power to effect changes in the bargaining agreement." *Supra* note 1, at 359.

See Summers, *Individual Rights in Collective Agreements and Arbitration*, 37 N.Y.U.L. Rev. 362, 397 (1962):

Although contract making (or amending) and contract administration are not neatly severable, they are procedurally distinct processes. Most union constitutions prescribe the method of contract ratification, and it is distinct from grievance settlement; the power to make and amend contracts is not placed in the same hands as the power to adjust grievances. . . . Through the ability to change the agreement, the collective parties retain a measure of flexibility. They are not free, however, to set aside general rules for particular cases, nor are they free by informal processes to replace one general rule with a contrary one.

Assuming the above is true, note that the record fails to indicate that the negotiating parties were different from the members of the grievance committee.

But, as has been submitted above, behind this decision lies a policy of expanding the individual's rights under section 301.

On the second allegation of breach of duty of fair representation, Mr. Justice Harlan joined Mr. Justice Goldberg, Mr. Justice Brennan, and Mr. Justice Douglas, who argued that the union's alleged breach of its duty cannot be treated as a claim of breach of the collective bargaining contract supporting an action under section 301(a), especially where, as here, there is no fraud charged against the employer.²⁰ Mr. Justice Goldberg recognized that under appropriate circumstances, the union's breach may be extended to the employer, as in *Steele v. Louisville & N. R.R.*,²¹ but "there the employer willfully participated in the union's breach of its duty of fair representation and that breach arose from discrimination based on race. . . ."²²

The majority of the *Moore* Court indicated that there was collusion between the employer and the union:

No fraud is charged against the employer; but except for the improper action of the union . . . it is alleged that Dealers would have agreed to retain its own employees. The fair inference from the complaint is that the employer considered the dispute a matter for the union to decide. Moreover, the award had not been implemented at the time of the filing of the complaint, which put Dealers on notice that the union was charged with dishonesty. . . .²³

However, Mr. Justice Goldberg contended that this reasoning was too strained to acknowledge collusive action between the employer and the union. He stated that Moore's allegation should "be treated as an individual employee's action for a union's breach of its duty of fair representation—a duty derived not from the collective bargaining contract but from the National Labor Relations Act. . . ."²⁴

On both of Moore's allegations it is hard to accept the majority's reasoning. Mr. Justice Goldberg's position is compelling unless we look at the

²⁰ Supra note 1, at 355.

²¹ 323 U.S. 192 (1944).

²² Supra note 1, at 356.

²³ Id. at 343.

²⁴ Supra note 1, at 351. Mr. Justice Goldberg states:

I read the decisions of this Court to hold that an individual employee has a right to a remedy against a union breaching its duty of fair representation—a duty derived not from the collective bargaining contract but implied from the union's rights and responsibilities conferred by federal labor statutes

Supra note 1, at 355, 356. In so doing he extended the employee's right to sue under federal law against invidious classification, to where the alleged breach of the union's duty involves a differentiation based on a relevant classification, i.e. seniority rankings. (The majority did not have to delve into this issue because of their finding a breach of contract.)

Mr. Justice Harlan generally agreed, but he added several questions: (1) "Does such a federal cause of action [that Mr. Justice Goldberg found] come within the play of the pre-emption doctrine, *San Diego Trades Council v. Garmon*, 359 U.S. 236 [1959], contrary to what would be the case were such a suit to lie under § 301, *Smith v. Evening News Assn.*, 371 U.S. 195 [1962]?" (2) even where it is alleged or proved that the employer was a party to the asserted unfair union representation, would such a suit be maintainable under section 301? Id. at 360.

majority's stand as an attempt to expand the scope of section 301 to include an employee's suit against his union when his contract rights are involved. This was the way Moore classified his suit.²⁵ If the majority has made a policy decision, it remains for us to evaluate any justification for this policy.

It should be first noted that the labor laws of the 1930's and 1940's were predicated upon the valid presumption that unions and management were basically antagonistic.²⁶ By reason of the adverse interests, the individual's rights were protected. But it is obvious that the union-management relationship is different today, which fact would warrant a change in the individual's status under the labor laws.

The big step in expanding the individual's rights under section 301 was taken in *Smith v. Evening News Ass'n*.²⁷ The arguments prior to that case, concerning the individual's right to enforce the collective bargaining contract, apply equally as well to this case.²⁸ Of primary importance, however, is the determination of the scope of the NLRB's interest in the employee's grievance against his union. The NLRB suggested in *Evening News* that the employee could enforce his contract rights against the employer under section 301 even though an unfair labor practice was involved.²⁹

²⁵ While Dealers Transport Company was made a party to the action, there was and is no dispute between these respondents and their employer, Dealers Transport Company, and Dealers has taken the position that it is a nominal party to this suit, rather than a real party in controversy. This, therefore, is a suit by individual members of a Union against the Union for rights under an existing collective bargaining agreement.

Brief for Respondents, pp. 5-6.

²⁶ Blumrosen, Legal Protection for Critical Job Interests: Union-Management Authority Versus Employee Autonomy, 13 Rutgers L. Rev. 631, 632 (1959).

²⁷ Supra note 7.

²⁸ To allow indiscriminate individual enforcement of rights under the collective agreement entails the risk of significantly undermining two important considerations in industrial relations. First, it makes employer operation cumbersome and inefficient. . . . And the effectiveness of the union is threatened when individual action undermines its ability to compromise the frequently conflicting interests of its constituency.

Hanslowe, supra note 17, at 44.

To summarize: Individual suits for the enforcement of collective bargaining agreements furnish the surest legal protection against the danger that selfish, arbitrary or careless union officials will mishandle claims inuring to the benefit of individuals and arising from their labor. However, this measure of protection can be bought only at the cost, first, of giving the individual power to press claims inconsistent with the interests of other workers and, second, of risking serious impairment of the operation of the contract grievance procedure.

Cox, Individual Enforcement of Collective Bargaining Agreements, 8 Lab. L.J. 850, 857 (1957).

See Aaron, Reflections on the Legal Nature and Enforceability of Seniority Rights, 75 Harv. L. Rev. 1532 (1962). Summers, Collective Power and Individual Rights in the Collective Agreement—A Comparison of Swedish and American Law, 72 Yale L.J. 421 (1963).

²⁹ Supra note 7, at 198 n.6:

The view of the National Labor Relations Board, made known to this Court in an *amicus curiae* brief filed by the Solicitor General, is that ousting the courts of jurisdiction under § 301 in this case would not only fail to promote, but would actually obstruct, the purposes of the Labor Management Relations Act.

It would seem that the suggestion should be followed here, where the employee seeks to enforce his contract rights against the union, instead of against his employer.³⁰

If the *Moore* case is viewed in light of the above policy reasons, the majority's opinion is understandable. If the Court is consistent, and if it does not later distinguish *Moore* on its facts, the case should serve as a foundation under section 301 to enable an employee to enforce his contract rights against the union.

WILLIAM J. McDONALD

³⁰ [The] principle of exclusive NLRB jurisdiction should yield in suits on collective agreements if: (1) assuring an expeditious remedy for contract breaches is as significant a policy as making a forum available to those whose cases are too small for the NLRB, or as providing a judicial remedy, in addition to that available from the NLRB. . . .

Sovern, Section 301 And The Primary Jurisdiction Of The NLRB, 76 Harv. L. Rev. 529, 551 (1963).

But see Kovarsky, *supra* note 7, at 610: "An important reason for creating the NLRB was to minimize judicial intervention and permit experts to deal with labor problems."