Buffalo Law Review

Volume 11 | Number 1 Article 86

10-1-1961

Labor Law—Courts Lack Jurisdiction Over Dispute "Arguably Subject" to NLRB Until NLRB Declines Jurisdiction

Timothy C. Leixner

The majority decided that if an out-of-state firm can prove its financial stability by passing the test created by Section 90(1), then the holders of life insurance policies with the out-of-state firm are adequately protected even if that firm takes on the risk of financially backing a company which deals in the generally unstable area of fire and casualty insurance.

The dissent, liberally interpreting the pertinent statutes and reasoning that allowing an out-of-state life insurance company to control a fire and casualty insurance company would place a holder of a life insurance policy with the out-of-state firm in as great jeopardy as if the out-of-state firm issued the comparatively risky fire and casualty insurance itself, concluded that such a transaction should not be allowed. The dissent reasoned that Section 90(3) which states: "Nothing in this section shall be construed to relieve any foreign or alien insurer from compliance with any other provision of this chapter," invalidates the majority's theory that only one test is used to determine if such a purchase is permissible. Their position is that Section 90 was amended only to change the procedure of valuing an out-of-state company's assets, and the amendment did not alter the prohibitions of Sections 42 and 193 which the dissent contended, forbids a foreign life insurer from entering into the fire and casualty field.

R. D. S.

LABOR LAW

COURTS LACK JURISDICTION OVER DISPUTE "ARGUABLY SUBJECT" TO NLRB UNTIL NLRB DECLINES JURISDICTION

The Labor Management Relations Act gives the National Labor Relations Board jurisdiction over labor disputes involving the owners of American registered ships, crew members, and labor unions.[1] This means that the rigid regulations governing ships of American registry must be complied with even if the ships do little domestic trade.[2] To escape these regulations, American owners have registered their ships in foreign countries such as Liberia, where regulations are minimal. In the past, the NLRB has asserted jurisdiction over American-owned ships with foreign registry where there was a fair amount of domestic trade involved, even though the crew was largely foreign.[3] "When an activity is arguably subject to Section 7 or Section 8 of the Act, the state as well as federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted."[4] In such cases, where the NLRB may or may not have

1. 29 U.S.C. § 141 (1958).
2. Lauritzen v. Larsen, 345 U.S. 571 (1953).
3. Peninsular & Occidental S.S. Co., 42 LRRM 1269 (1961).
4. San Diego Building Trades Council Unions v. Garmon, 359 U.S. 236, 245 (1959).

jurisdiction, the courts may be called upon to decide whether they may assume jurisdiction over the controversy.

In *Incres v. International Maritime Workers Union*,[5] plaintiff, a Liberian company owned by Italian stockholders, owned and operated two Liberian-registered ships which were manned by totally foreign crews signed on in Europe. It conducted regularly scheduled Caribbean cruises originating at and returning to New York City. Plaintiff, whose main office was in London, maintained an office in New York which it shared with a New York corporation wholly owned by it. The New York corporation, which was managed by the president of plaintiff, acted as its agent in booking passengers, arranging schedules, etc. The defendant union attempted to organize the crew of one of Incres' ships, and in doing so caused members of the crew to leave the ship before departure, thereby preventing its sailing and further preventing plaintiff's other ship from docking at the pier. Further intereference by the union caused the cancellation of several cruises. Incres, by this suit, obtained first a temporary and then a permanent injunction prohibiting the union from picketing plaintiff's ships or urging or encouraging crew members not to work on the ships. The union appealed, and the Appellate Division affirmed the injunction after modifying it.[6] The Court of Appeals reversed, holding that it was arguable whether the NLRB had jurisdiction, and therefore the court could not assume jurisdiction unless the NLRB refused it.

In cases such as this, there seem to be two black and white areas where the dispute is clearly within the jurisdiction of either the courts,[7] or the NLRB;[8] and a large grey area, where it is arguable whether it is within the jurisdiction of the NLRB.[9] When a case falls within this grey area, the courts cannot assume jurisdiction unless the NLRB clearly decides that "an activity is neither protected nor prohibited (by the Labor Management Relations Act), or of compelling precedent applied to essentially undisputed facts.[10] The mere failure of the Board to assume jurisdiction does not leave the court free to act in regulating activities they would otherwise be precluded from regulating.[11]

The question of whether the Board could assume jurisdiction of American-owned ships with a foreign registry was settled by the Board in *West India Fruit & S.S. Co.*[12] There it was held that the NLRB has jurisdiction of events occurring on the high seas on American-owned ships, and acts committed within the territorial limits of a foreign nation, when such acts involve employer and crew, and when the trade they are engaged in is within the coverage of

5. 10 N.Y.2d 218, 219 N.Y.S.2d 21 (1961).
6. 11 A.D.2d 177, 202 N.Y.S.2d 692 (1960).
7. Benz v. Compania Naviera Hidalgo, 353 U.S. 138 (1957).
8. West India Fruit & S.S. Co., 47 LRRM 1269 (1961).
9. San Diego Building Trades Council Unions v. Garmon, supra note 4.
10. Id. at 246.
11. Ibid.
12. Supra note 8.

the Labor Management Relations Act, even though the ship is of foreign registry and the crew is composed of non-resident foreign nationals. Thus, foreign registry and crew are not bars to NLRB jurisdiction over American-owned ships.

Incres relied heavily on *Benz v. Compania Naviera Hidalgo*,[13] in which the Supreme Court held that the courts had jurisdiction where the ship was of foreign ownership, registry, and crew; was in an American port only transiently; and the underlying dispute was between the ship and the foreign crew. The Court noted, however, that the *Benz* case is only authority for what is clearly beyond the NLRB's jurisdiction. The actual outer limit of its jurisdiction is still undefined, *i.e.*, how "foreign" commerce has to be in order to be excluded. The Court noted that it was not the correct tribunal to adjudicate such an issue,[14] and that the *West India Fruit* and *Peninsular and Occidental S.S. Co.*[15] cases indicated that it was arguable whether the Board would accept jurisdiction. Therefore, the courts must refuse jurisdiction.

The dissent in the *Incres* case,[16] argued that the question here is whether the NLRA applies to the present fact situation; that is, if there is any arguability here it is as to the scope of the Act itself, and not as to whether there was an unfair labor practice or protected activity. In such a situation the Board has no special competence and it is up to the courts to decide if the facts bring the case within the Act. Thus, since the question is the scope of the Act, it is one for the courts. It is apparent, however, that this view is not in accord with past federal and NLRB decisions,[17] as was illustrated in the *West India Fruit & S.S. Co.* case, where the Board assumed jurisdiction in a similar fact situation, and acted on the same theory that the court used in the *Incres* case in deciding it presented an arguable matter.

In addition, the dissent differs with the majority and equates this case with the *Benz* case because of the foreign ownership, registry, and crew, and points out that since the Supreme Court assumed jurisdiction in that case, it had decided that where these facts are present the jurisdiction of the NLRB is not arguable. As the majority notes, however, the lack of domestic commerce in the *Benz* case is the major factor that differentiates it from the *Incres* case. It appears that this is a crucial difference when the labor market is involved.

In essence then, the majority is extending the arguability rule to cases involving ships having as one of their terminal points a United States port, and having an American corporation as its agent in that port. The dissent feels that this extends the rule beyond the Supreme Court's interpretation of the Act in the *Benz* case. The dissent is a voice that will be heard again. Despite its

13. Supra note 7.
14. Garner v. Teamsters, etc., Union, 346 U.S. 485, 490 (1953).
15. Supra note 3.
16. Supra note 5 at 227, 219 N.Y.S.2d at 26.
17. See Peninsular & Occidental S.S. Co., supra note 3; Benz v. Compania Naviera Hidalgo, supra note 7; West India Fruit & S.S. Co., supra note 8.

tenuous reasoning in the *Incres* case, if the courts continue to extend the arguability rule, it seems certain that the Supreme Court will have to define the scope of the Act more precisely. If this is not done, it is not unlikely that in the near future a court will decide that facts similar to those in the *Benz* case present a case failing within the rule. The danger of calling a black case grey clearly presents itself.

T. C. L.

PROPERTY

STATE ACQUIRES PROPERTY RIGHTS WITHOUT USER OR EVIDENCE OF COMPENSATION

Schillawski v. State[1] arises from a claim of several property-owners for damages for de facto appropriation of part of their lands by expansion in 1951-52 of a state highway known as U.S. Route 20. By Chapter 78, Laws of 1800, the Seneca Road Company, a private concern, was authorized to build a toll road, the Seneca Turnpike, from Utica to Canadaigua. A right of way 6 rods wide was granted. Required improvement was to be at least 24 feet. The toll road was to follow the existing Genesee Road, also with right of way of 6 rods. Where deviations were necessary from Genesee Road, the company could purchase or condemn the land needed to fill out the 6 rods. The new road did, in fact, deviate in the area of claimants' land but there was no evidence of payment by the company for the land as required by the statute. Until 1951 the road was never improved to more than 20 feet; then the State widened it to 48 feet. The Court of Claims disallowed the claims, accepting the State's contention that the lands in question were within the boundaries of a pre-existing highway easement.[2] The Appellate Division affirmed.[3] Upon an appeal by permission, the Court of Appeals found that the State had acquired prescriptive rights of 6 rods width along the course of the Seneca Turnpike.

Although the road had only been used to a width of 20 feet (although by the statute it was to have been at least 24) and there was no evidence of the required compensation for land taken at deviation points, the Court held that where the road had been laid out under a statute, the statute, rather than actual user, determined its width, *i.e.*, 99 feet. *Marvin v. Pardee*,[4] cited by appellants, held there was no satisfactory evidence of acquisition of land for a road because there had been no filing of a map or survey of lands acquired by the Seneca Road Company, as required by an 1806 amendment to the 1800 Act. But this case is distinguished by the Court by the lack of any such filing requirement in the 1800 Act itself upon which the instant case turns. However, such a

1. 9 N.Y.2d 235, 213 N.Y.S.2d 68 (1961).
2. 10 Misc. 2d 918, 173 N.Y.S.2d 49 (Ct. Cl. 1958).
3. 8 A.D.2d 992, 188 N.Y.S.2d 968 (4th Dep't 1959).
4. 64 Barb. 353 (1872).