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LABOR LAW — INJUNCTIONS — JURISDICTION OF N. L. R. B. HELD EXCLUSIVE

In an action to restrain a labor union and an employer from discriminating against plaintiff employees because of their non-membership in the union, and to direct the union to either admit the plaintiffs to membership or waive a union shop agreement, the Appellate Division reversed the lower court and dismissed the complaint on the ground that exclusive jurisdiction in the National Labor Relations Board precluded any action by a state court in a labor dispute. *Ryan* v. *Simons,* 277 App. Div. 1000, 100 N. Y. S. 2d 18 (2d Dept. 1950).

The plaintiffs here worked on the loading platforms of the News Syndicate Co. in New York City. They had been refused admission to the union (Newspaper and Mail Deliverers Union), although they were willing to join, because the union was a closed union, admitting only sons of certain members. Union insistence that the employer call all union men for work by union seniority, before calling any non-union men, regardless of their plant seniority, threatened to deprive plaintiffs of their previous steady employment. The theory of their action was that the union had breached its common law duty to fairly represent all employees in the plant, both union and non-union.

The problem of admission to union membership where employment depends on such membership has plagued the courts throughout the development of modern labor law. All jurisdictions have been unanimous in refusing to compel unions to accept members regardless of the reason, or lack of reason, for excluding them. *Murphy* v. *Higgins,* 12 N. Y. S. 2d 913, *aff'd.,* 260 App. Div. 854, 23 N. Y. S. 2d 555 (1st Dept. 1940); *Miller* v. *Ruehl,* 2 N. Y. S. 2d 394 (Sup. Ct. 1938); *Acierno* v. *North Shore Bus Co.,* 17 N. Y. S. 2d 170 (Sup. Ct., 1939); *Simons* v. *Berry,* 210 App. Div. 90, 205 N. Y. Supp. 442 (1st Dept. 1924); *Walter* v. *McCarvel,* 309 Mass. 260, 34 N. E. 2d 677 (1941); see SUMMERS, *The Right to Join a Union,* 47 COL. L. REV. 33 (1947). The rationale of these decisions was a traditional notion that a union was a private, fraternal organization, and that it held unlimited power to exclude applicants for membership.

New York limited this doctrine with the passage of § 43 of the Civil Rights Law, which provided that exclusion could not be on the grounds of race, creed, color, or national origin. The case of *Clark* v. *Curtis,* 71 N. Y. S. 2d 55, *reversed,* 273 App. Div. 797, 76 N. Y. S. 2d 3, *aff'd,* 297 N. Y. 1014, 80 N. E. 2d 536 (1948), alleviated some of the hardship of exclusions by holding that a complaint which alleged that the union had violated its common law duty to represent all of the employees stated a good cause of action for an injunction. The Court of Appeals did not clearly indicate the basis of its holding, but the refusal to dismiss was a tacit assertion that the courts would protect the right of the employee to be fairly represented by his statutory agent, even though it would not grant him the full privilege of membership in the union.

The question of the jurisdiction of the court to grant this relief did not arise in connection with an admission case until *Costaro* v. *Simons,* 277 App. 773, 96 N. Y. S. 2d 884 (2d Dept. 1950), *reversing* 94 N. Y. S. 2d 895. The defendant employer in that action moved to dismiss the complaint on the ground that the court lacked jurisdiction of the subject matter since exclusive jurisdiction was vested in the N. L. R. B. The lower court held that it had jurisdiction on the authority of *Clark* v. *Curtis, supra,* reasoning that inasmuch as *Clark* v. *Curtis* had been decided by the Court of Appeals on May 21, 1948, the Labor Management Relations Act of 1947 (Taft-Hartley Act) was presumably considered by that court. The Appellate Division did not discuss the problem of jurisdiction but dismissed the action on the theory that the plaintiffs had not shown any discrimination on the part of the employer.

The stage was thus set for *Ryan* v. *Simons,* the principal case. The Supreme Court for Nassau County refused a motion to dismiss the complaint referring to *Clark* v. *Curtis, supra,* and granted an injunction pendente lite restraining the defendants employer and union from interfering with plaintiff's employment. 25 L. R. R. M. 2302 (1950). It is important to note that the relief sought, the preservation of existing employment, had been granted without interruption of that employment, and if found to be justified on hearing, would obviate the harmful results of discrimination.

When the *Ryan* case came on for final hearing, Justice Hooley, in the New York Supreme Court, 98 N. Y. S. 2d 243, 26 L. R. R. M. 2047 (1950), brought the full-fledged doctrine of fair representation to New York. The decision pointed out that this was not a "labor dispute" under New York statutes. Civil Practice Act, § 876-a. (See also N. Y. Lab. Rel. Act, § 704). The theory of the action was that the common law principles of agency were to be applied to the union as the statutory representative of these employees. *Steele* v. *Louisville & Nashville R. R.,* 323 U. S. 192 (1944); *Betts* v. *Easley,* 161 Kans. 459, 169 P. 2d 831 (1946. The rule of law was stated to be: "Where a union is designated as a bargaining agent of all the employees and accepts the principle of the union shop and incorporates such principle into a contract which provides that all non-union men must join the union within thirty days, then such provisions of the contract relating to the union shop are illegal, invalid and void in a case such as this, where the union refuses to admit such non-members without just cause and discriminates against such employees because of non-membership in the union."

The court went on to say that the contention of the defendants that the plaintiffs' only remedy falls within the exclusive jurisdiction of the N. L. R. B. could not be sustained under *Clark* v. *Curtis,* and that the effect of the Taft-Hartley Act had been urged upon the Court of Appeals in the defendants' briefs in the *Clark* case. As noted, the Appellate Division reversed this decision and dismissed the complaint, cutting short the development of a state

remedy for interference with employment by a labor union, with the terse statement that the court had no power to act. The decision brushed aside the holding in *Clark* v. *Curtis* as not controlling in this situation.

The basic problem here, of course, is the matter of federal supremacy in the field of labor law. This case presents a particular phase of the problem in the form of the immediate, pressing predicament of a non-union employee who seeks only to maintain his employment uninterruptedly in the face of discrimination. Without a relatively quick remedy in the courts of his own state, will he find a timely, adequate remedy elsewhere? The decisions of the N. L. R. B. and the Supreme Court on the supremacy problem have not dealt with this specific question. If the question is presented, there are three possible views that may be taken. It may be decided that the Board has jurisdiction of the subject matter and that it must provide a remedy. See *Rockaway News Supply Co.,* N. L. R. B. Release, Nov. 1, 1950, p. 6 (trial examiner's recommendation that union here involved and a different employer cease and desist from the practices here complained of). It may conceivably be decided that it has jurisdiction which, however, should not be exercised in this type of case because of the lack of national significance. *Retail Clerks International Ass'n,* (A-1 Photo Service), 83 N. L. R. B. 564 (1949); *Fred Montgomery,* d.b.a. *Pereira Studio,* 83 N. L. R. B. 587 (1949). The third possibility is that there may be a denial of jurisdiction and a subsequent compulsion upon the complainant to seek his remedy at the state level. Under the N. L. R. A., as amended by the Taft-Hartley Act, any one of the three ptossibilities could result. The question then presented is whether the state court is justified in holding that it had no jurisdiction in the absence of a judicial or administrative holding, or a regulation of the Board asserting that it has jurisdiction, or that, if it has jurisdiction, it is not to be exercised in this situaton.

A partial answer may be found in the reasoning employed by the court in the instant case. It held that this was clearly a "labor dispute" within the purview of the Labor Management Relations Act of 1947, 29 U. S. C. §§158(a) (3) and 158(b) (2), and that, therefore, exclusive jurisdiction was in the Board. The conclusion that this is a "labor dispute" within the meaning of the Act is not an unreasonable one under the wording of the cited sections. The further conclusion concerning exclusive jurisdiction, however, raising problems of a more serious nature.

Is the policy of the Act such that it must preclude state action concerning the relations between the individual employee and his union representative? Did the Congress consider this situation as one "affecting" interstate commerce to the extent that it required uniform federal regulation and sanction? Did the Congress consider the question at all? Was it cognizant of the progress being made in the states under the common law principles and state statutes to protect the right of freedom from discrimintion in the field of em-

ployment? How does this decision affect the power of the New York court to hear a labor case involving discrimination on one of the grounds stated in § 43 of the N. Y. Civil Rights Act? Are we faced with the anomaly wherein a man who has been denied union membership, and consequently the right to work because of race, creed, color, or national origin may seek relief in the state courts, while the man who has suffered the same wrongs because he is not the son of a deceased member of the union must seek his remedy at the federal level?

The Appellate Division found its answer in the cases of *Amazon Cottin Mills* v. *Textile Workers Union,* 167 F. 2d 183 (4th Cir. 1948), and *California Ass'n. of Employers* v. *Building and Construction Trades Council,* 178 F. 2d 175 (9th Cir. 1949). It is submitted, however, that these cases merely hold that administrative remedies on the federal level must be exhausted before recourse is made to the federal courts. The Appellate Division has apparently confused a question of the primary jurisdiction of an administrative agency with a Constitutional question of federal supremacy.

The basic question as to whether the federal government has pre-empted the entire field of labor relations and has thereby removed all common law or statutory power previously reserved to the state over the identical subject matter has led to divergent lines of reasoning in judicial decisions. The problem is essentially one of legislative policy. Ideally, the Congress should draw the lines delimiting jurisdiction or the Board should od so under the rule-making authority granted it by § 6, N. L. R. A. In the absence of a clear expression of Congressional intent or administrative policy, the Supreme Court has attempted to reach workable solutions: in the field of representation problems, *Bethlehem Steel Co.* v. *New York State Labor Relations Bd.,* 330 U. S. 767 (1947), *La Crosse Tel. Corp.* v. *Wisconsin Employment Relations Bd.,* 336 U. S. 18 (1949); in the field of employer labor practices, *Algoma Plywood & Veneer Co.* v. *Wisconsin Employment Relations Bd.,* 336 U. S. 301 (1949), *Plankington Pcking Co.* v. *Wisconsin Employment Relations Bd.,* 338 U. S. 953 (1950), *Missouri- Pacific R. R.* v. *Porter,* 273 U. S. 341 (1927); in the field of concerted labor activities, *International Union* v. *Wisconsin Employment Relations Bd.,* 336 U. S. 245 (1949), *Hill* v. *Florida,* 325 U. S. 538 (1945), *United Auto Workers* v. *O'Brien,* 339 U. S. 454 (1950). For an excellent discussion of the above fields of regulation and the problems raised by the courts' decisions, see Cox and Seidman, *Federalism and Labor Relations,* 65 HARV. L. REV. 211 (1950).

Electric Ry. Employees v. *Wisconsin Employment Relations Bd.,* 71 S. Ct. 359 (Feb. 26, 1951), sets out the most recent development of the strict and the liberal views on the federal supremacy question as regards the subject of concerted labor activities. The majority opinion adheres to the strict view that the entrance of the federal government occupies the field to the exclusion of

state regulation. (See particulary Footnote 12 of the court's opinion). Justice Frankfurter, in a strong dissent, favored the more liberal view that the states are not precluded from enacting and enforcing laws on labor relations merely because Congress has entered the field. "It is equally clear," he stated, "that the boundaries within which a state may act are determined by the terrain and not by abstract projection." 71 S. Ct. at 370.

It is submitted that the *Ryan* case presents a less complex problem of less "national significance" than any case thus far before the Supreme Court, and one in which "conflict" between state and federal regulation is very remote. The "terrain" suggests that this is a proper case for local jurisdiction and should not be added to the already burdensome schedule of the N. L. R. B. by reason of the refusal of the state courts to act.

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