LABOR LAW - COLLECTIVE AGREEMENTS- VALIDITY AFTER CHANGE OF UNION AFFILIATION BY EMPLOYEES

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Recommended Citation

William F. Andersen, LABOR LAW - COLLECTIVE AGREEMENTS- VALIDITY AFTER CHANGE OF UNION AFFILIATION BY EMPLOYEES, 38 MICH. L. REV. 516 (1940).

Available at: https://repository.law.umich.edu/mlr/vol38/iss4/7

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Among the problems raised in magnified form by the AFL-CIO schism is the determination of rights and duties under a collective agreement when there is a change in affiliation of the members of the union which negotiated the agreement. Suppose that union $A$, as sole bargaining representative for the employees in the particular unit, has negotiated an agreement with the employer, that thereafter a majority of union $A$ shift their allegiance to union $B$. Does the agreement continue to confer rights upon employees who have changed their affiliation? Upon the employees who have not changed their affiliation? This
question would be acute if the agreement provided for a closed shop.¹

Questions would also arise as to duties imposed by the agreement. Are the rights accruing to the union the property of union A, or its successor, union B, as representative of the majority of the employees in the bargaining unit? Is a no-strike covenant in the agreement enforceable against union B? Against union A? May the employer consider the agreement as broken or terminated, thus ending his own liabilities thereunder? Or must he consider the agreement as subsisting with one of the unions? What is the employer’s position with reference to duties of recognition and bargaining under a labor relations act? The further practical question will arise for labor lawyers as to just what can be done to resolve these questions by provisions in the agreement itself. The answers to these questions are far from clear, but must be sought in judicial concepts of the collective bargaining agreement.²

I.

Approaching the problem as one of contract, real difficulty arises from an application of common-law two-party contract concepts to the relationship between an employer and his employees as a group. Attempt is made to determine who are or purport to be the parties

¹ In M & M Wood Working Co. v. National Labor Relations Board, (C. C. A. 9th, 1939) 101 F. (2d) 938, where union A had a closed shop contract with the employer, the members of union A by a very large majority shifted their affiliation to union B. After a temporary shutdown induced by threat of AFL boycott, the employer re-opened his plant with only members of union A who had not gone over to union B. Union B brought an unfair labor practice proceeding. The National Labor Relations Board in Matter of M & M Wood Working Co., 6 N. L. R. B. 372 (1938), found the refusal to re-hire those who had changed their affiliation an unfair labor practice, upon the theory that the closed shop contract either terminated or was adopted by union B upon the change of allegiance—in either case the refusal to re-hire constituted discrimination as to hire or tenure because of union activity. Matter of Smith Wood Products, Inc., 7 N. L. R. B. 950 (1938). The circuit court of appeals reversed the board on the ground that the discrimination was in accordance with a valid collective bargaining agreement.

When the employer in this case sought an injunction against the picketing of union B after he refused to re-hire them, the federal district court denied the injunction because of defective pleading but indicated its position to be the same as the circuit court of appeals on the point of rightful refusal to re-hire. M & M Wood Working Co. v. Plywood & Veneer Workers Local Union No. 102, (D. C. Ore. 1938) 23 F. Supp. 11.

to the agreement. Some courts consider the union to be the party in interest on the employee side, devolving rights upon the individual employee. Others hold that the individual employee is the party contracting through his agent, the union. Still others, completely bogging down and throwing up their hands in despair, say that employees as a group are incapable of contracting or that at most the "agreement" can only establish usages or customs. Occasionally, in order to reach a desired result, a court will employ an incongruous mixture of these theories. One writer, at least, has suggested that the collective agreement be removed from the formalistic area of parties, offer and acceptance, and analogized to wage and hour legislation.

The questions arising out of shifting union membership are likely to be resolved in as many different ways as there are theories of the nature of the collective agreement. When the agreement provides for a closed shop, as in *M & M Wood Working Co. v. National Labor Relations Board*, the court is apt to conclude that the union is a principal party to the agreement and the inquiry will then turn to the question whether there has been a legal dissolution of the union or merger into another union. The important thing to note is that such an approach assumes that the representative negotiating the agreement is the real party in interest and that without its consent, legally obtained, or its due and proper elimination from the scene, nothing can

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5 Young v. Canadian Northern Ry., [1931] A. C. 83 (Privy Council).


7 As in H. Blum & Co. v. Landau, 23 Ohio App. 426, 155 N. E. 154 (1926), where an employee was seeking to enforce individual rights against the employer growing out of a collective bargaining agreement, the court gave him rights on a third party beneficiary theory and held the employer bound on the contract, which had been made by an employer's association, upon an agency theory.

8 Witmer, "Collective Labor Agreements in the Courts," 48 YALE L. J. 195 at 225 (1938): "Doctrine aside, the essential problems in deciding whether an individual may sue on a collective agreement are much the same as those involved in deciding whether he may sue under a minimum wage statute which is itself silent on the subject. The proper inquiries are: Was the statute intended, *inter alia*, for his benefit? Can his benefit, and that of others, be best preserved if we adopt this as one method of enforcing its provisions? Is there any good reason why it should not be enforced in this way?"

9 (C. C. A. 9th, 1939) 101 F. (2d) 938, abstracted in note 1, supra.
remove from it its rights under the agreement. It follows from this, that although there was only one dissent on the vote for changing affiliation in the *M & M Wood Working Co.* case, the fact that there were ten who did not carry out the change made it imperative that the overwhelming majority be discharged in accordance with the closed shop agreement, as the exact provision for dissolution in the local’s charter had not been followed. In considering rights under a collective agreement, the courts have been too ready to assimilate those rights to the ordinary assets of the union. But is the union the real


In *Cassetana v. Filling Station Operators Union, Local No. 410*, (Cal. Super. Ct., San Francisco County, 1937) 1 L. R. R. 516, it was held that the rights under the collective bargaining agreement were the joint property of all the members of the original union; that the union negotiating the agreement retained the rights under the closed shop contract for its members, and the union to which a majority of the employees changed their affiliation inherited the same rights from those members so shifting their allegiance. The court arrived at the conclusion that the employer had discharged the members of the second union in violation of the contract. Query?

11 "In accepting its charter [union A] agreed to conform with the Brotherhood's rules and regulations, one of which provided: 'A local Union cannot withdraw from the United Brotherhood or dissolve so long as ten members in good standing object thereto . . . ?" *M & M Wood Working Co. v. National Labor Relations Board*, (C. C. A. 9th, 1939) 101 F. (2d) 938 at 941. At a meeting held by union A attended by about 450 of the union's 500 members, a motion to close the affiliation with the AFL brotherhood was passed with one dissenting vote. The motion to adopt a CIO international's charter was passed with but seven dissenting votes. Mr. Justice Healy in his dissenting opinion concluded that the votes of those not present could not be used to find the "ten members objecting thereto" as they would have to manifest their objection by attendance and voting—and that therefore union A was duly dissolved.

12 Ordinarily, property rights of the union as an unincorporated association—material property, funds, or any type of right legally enforceable for the benefit of the association—can only be dealt with by the members of the association in accordance with the charter, constitution, and by-laws of the association regardless of individual interests. *Low v. Harris*, (C. C. A. 7th, 1937) 90 F. (2d) 783; Lumber & Sawmill Workers Union v. International Woodworkers of America, Local 49, 197 Wash. 491, 85 P. (2d) 1099 (1938). By analogy to the law of corporations those instruments are construed as a contract between the members individually and the association as an entity. *Weighers, Warehousemen & Cereal Workers Union, Local 38 v. Green*, 157 Ore. 394, 72 P. (2d) 55 (1937).

But where dissolution of the local in accordance with the procedure set up has taken place, or where there has been unanimous action of the members and a new union is organized composed of the same members, it has been held that the rights and duties of the old union are taken over by the new. *Shipwrights', Joiners' & Calkers' Assn., Local No. 2 v. Mitchell*, 60 Wash. 529, 111 P. 780 (1910); *Labonite v. Cannery*
party in interest in the collective agreement? May it possibly be said that the employees, as represented by a majority of them in the collective bargaining unit, are the parties to the agreement? The difficulty here is in developing a concept of an indefinite group as a legal entity for the purposes of contracting.

2.

What do the labor relations acts contribute toward a solution of these problems? The National Labor Relations Act in section 8 (5) creates a duty in the employer to bargain collectively with the representative of the majority of his employees in the appropriate unit. The statute contains no qualification on this duty as to time—the inference being that the duty so to bargain is continuing. If so, it would follow that when the majority in the bargaining unit changes its representative, the duty to bargain imposed upon the employer shifts to the new representative. Such an analysis tends to support the conclusion that the real party in interest in the collective bargaining process is a majority of the employees in the appropriate unit considered as an entity, and that the representative, the union, is nothing more than the agent of that entity and has an entirely separate identity. It may likewise be argued from the language of the statute that when the majority changes its representative while a collective agreement is in force, the new representative should be substituted for the old or the agreement terminated, for otherwise the continuing duty to bargain collectively could not effectively be carried out.

The National Labor Relations Board has gone no further, in the problem presented by the M & M Wood Working Co. case, than to indicate its view that either of two results follows a shift in employee allegiance. The collective agreement either automatically terminates, or else is continued with the new representative substituted for the old. In deciding the closely related question whether a representation question...
under section 9 of the act can be raised while a collective agreement is still in force, the board has followed the lead of the Railway Mediation Board and assumed that the existing collective agreement did not stand in the way, and if a new representative was certified, it would replace the original under the agreement as valid and subsisting. This conclusion has been reached even though the existing agreement provided for a certain representative to be recognized for a specific length of time.

This continuing duty imposed upon the employer to bargain collectively with his employees through their majority representative would seem to be an application of the principle of representative government as applied to labor relations. Upon a majority change in affiliation the new representative would be substituted for the old in the employer-employee governmental scheme—just as the elected representative of the people replaces his predecessor in the legislative body. Collective bargaining and industrial democracy are not ends in themselves, however, in so far as the policy of the National Labor Relations Act is concerned, but rather are means to an end, the end being stability, in the larger sense, in labor relations. Such stability may possibly be advanced by allowing the agreement which is the product of the bargaining to give definiteness and certainty to the employment relation for a reasonable period, and this approach might tend to support the legalistic position taken by the courts in disposing of the agreement on strict contract principles. In so far as this is true, the

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19 "The whole process of collective bargaining and unrestricted choice of representatives assumes the freedom of the employees to change their representatives, while at the same time continuing the existing agreements under which the representatives must function." Matter of New England Transportation Co., 1 N. L. R. B. 130 at 138-139 (1936); Matter of Hubinger Co., 4 N. L. R. B. 428 (1937); Matter of Columbia Broadcasting System, Inc., 8 N. L. R. B. 508 (1938).
20 It is recognized that this doctrine is qualified by later decisions of the National Labor Relations Board which are considered subsequently, but such qualifications, being in the nature of a time limitation, do not affect the basic proposition that the existing collective agreement of itself does not prevent the representation question from arising.
21 The political analogy is, of course, somewhat imperfect in the case of the closed shop agreement. See De Vyver, "The Intra-Union Control of Collective Bargaining," 5 Law & Contem. Prob. 288 (1938), as to the actuality of democratic control over collective bargaining.
22 "As has frequently been stated, collective bargaining is not an end in itself; it is a means to an end, and that end is the making of collective agreements stabilizing employment relations for a period of time, with results advantageous both to the worker and the employer." Report of the Committee on Labor, H. Rep. 1147, 74th Cong., 1st sess. p. 20 (1935).
Labor Act may be said to involve somewhat conflicting elements of policy, and its usefulness in resolving questions arising out of collective agreements to be somewhat doubtful.\textsuperscript{28}

No generalizations can be made concerning the attitude of the state labor relations boards concerning agreements to fix status. The New York act contains a provision authorizing the board to declare the life of the certified representative, and it has ruled, that, in the absence of special circumstances, the selected representative is to remain bargaining agent for one year.\textsuperscript{24} As to an election and certification, the Pennsylvania board's policy is to deny requests for an election after recent certification.\textsuperscript{25} On facts substantially similar to those in the \textit{M & M Wood Working Co.} case, the Pennsylvania board was overruled after deciding as did the National Labor Relations Board in the \textit{Oregon} case.\textsuperscript{26} It has been held by the New York board that a closed shop contract precluded an election and certification of a representative because of the possibility of resulting legal confusion if a new representative was elected.\textsuperscript{27}

3.

The problem obviously calls for a judicious balancing of the various interests, public, group and individual, involved. These are most vivid in the case of the closed shop contract, where the problem of determining the effects of a change in affiliation are acute because of the collateral results that necessarily flow from that determination. Under section 8 (3) of the National Labor Relations Act it is permissible for the employer to discriminate as to hire and tenure as required by a valid closed shop provision.\textsuperscript{28} So if there is a determina-

\textsuperscript{28} Under the National Labor Relations Act the board is given no duties in reference to collective bargaining agreements as to enforcement; compare with the National Railroad Adjustment Board created by the Railway Labor Act, 44 Stat. L. 578 (1926), as amended by 48 Stat. L. 1189 (1934), 45 U. S. C. (1934), § 153.


\textsuperscript{25} Grant Building, Inc., Case No. R-5 (1937), C C H Labor Law Service, ¶ 21, 401.005.

\textsuperscript{26} Pennsylvania Labor Relations Board v. Red Star Shoe Repairing Co., (Pa. Ct. Com. Pleas, Philadelphia, 1938), 2 L. R. R. 387, where the court said that the employees after entering into a contract for a year should not be allowed to abrogate it merely by changing their affiliation, "to accept such a principle would be to thwart the very purpose of the legislation enacted to encourage and legalize contracts for definite terms and fixed conditions. ... Certainly one year is not an unreasonable period during which employees may bind themselves to ... definite working conditions."

\textsuperscript{27} In Re Triboro Coach Corp., (N. Y. L. R. B. Case No. SE-201, 1938) 2 L. R. R. 860. Yet where the collective agreement did not provide for a closed shop, the New York board has held it not to preclude an election and certification. In Re Enterprise Garnetting Co., (N. Y. L. R. B., 1938) 3 L. R. R. 316.

tion that the rights under such an agreement remain with the originally contracting union A, the employees affiliating with union B will lose their jobs by the terms of the agreement. Or, if the employer cannot, as a practical matter, obtain substitutes, he will then, in continuing to hire the old employees who have shifted, be guilty of a violation of the contract rights of union A and its members. Especially in this situation the interests of the minority and old representative must be considered if it is determined that the rights under the agreement go with the majority. How should these interests be weighed? An analogy to the determination of seniority rights by the union suggests itself. There is authority supporting the proposition that the seniority rights of employees may be changed by action of the representative and the employer, even where the employee involved does not belong to the union. The intangible concept of vested rights cuts across the picture here; yet it might be reasonable to assume, on a democratic theory, that since the rights were created by the collective agreement authorized by the majority, they may be taken away by the same entity.

Where the agreement provides for a closed shop or preferential hiring, and the union has members outside the particular bargaining unit under consideration, it would seem that those outside members would have a contingent interest in the agreement. This interest, while somewhat remote, has influenced at least one court in its determination of the effect of a change in affiliation. The union, as representative

29 To say that they are measured by their contract, the constitution, charter, and by-laws of the union as an unincorporated association, is to assume the result. Can the interest of the minority be said in this case to be any different or stronger than the interests of the minority where the majority execute a closed shop contract with the employer? See Williams v. Quill, 277 N. Y. 1, 12 N. E. (2d) 547 (1938).


81 In Mason Mfg. Co. v. United Furniture Workers, (Cal. Super. Ct., Los Angeles, 1938) 2 L. R. R. 838, a majority of the employees of the plaintiff transferred their affiliation from an AFL local to a CIO local. The plaintiff discharged them in accordance with a closed shop contract with the AFL local, and was allowed an injunction against the picketing of the CIO local. The theory was that the contract neither terminated nor shifted to the CIO local—the contract not being the personal property of the employees working for plaintiff, but the common property of all the members of the AFL local as they had a contingent interest therein for if vacancies occurred or additional employees were needed, the plaintiff would have to hire from within the local.

The court also placed some weight upon the policy in favor of certainty and
of the majority of the employees and an entity of some kind itself, also has an interest in the agreement. But that interest would seem to be inferior to the interests of the majority of the employees. The interest of the parent and affiliated unions is more difficult of measurement; that they do have an interest which must be taken into consideration is apparent.

The employer also obviously has interests involved. Perhaps he would not have entered into the agreement with the new representative of his employees. Should he be forced to accept the new representative under the agreement as subsisting? A legitimate inducement to the employer to make a contract may be the thought that it will tend to stabilize the employment relation and to lessen the possibility of labor organizational strife. On the other hand, where the agreement calls for a closed shop and the employer is faced with the *fait accompli* of a majority shift of his workers in union allegiance, there would seem to be the counter interest to have the new representative substituted for the old, for otherwise he would be obligated to discharge the majority of his employees and face the perhaps impossible task of filling their places with new men.

The public at large has an interest, both in ending industrial turmoil in order that production may be promoted and in the well being of the laboring group. These interests, though somewhat in conflict, and in any event extremely difficult of evaluation, must presumably be taken account of by the courts.

4.

It has been the object of this study to analyze the collective agreement problems growing out of a shifting of union allegiance rather than to suggest a complete formula for the solution of those problems. In any particular case the various interests heretofore mentioned will be present in varying degrees and should be carefully appraised. It might be useful for analysis to draw a distinction between a mass and a gradual change in affiliation. A distinction might again be taken in the mass change situation between the case where the change was accomplished by a complete dissolution of the old representative as an unincorporated association in accordance with its charter, and the case of

*fixation in the relationship, saying, “industrial strife and turmoil are bound to follow if employees working under a closed-shop agreement can, while such an agreement is in effect, change their affiliation and disrupt otherwise harmonious employer-employee relationships.”*

*Such a distinction has been suggested, drawing upon an analogy from the law of property as to the differing treatment of avulsion and alluvion; and the additional possible analogy to mass conferring of citizenship as contrasted with individual conferring of citizenship. See Rice, “The Legal Significance of Labor Contracts under the National Labor Relations Act,” 37 Mich. L. Rev. 693 at 723, note (1939).*
where the change failed to achieve such a dissolution. When the shift in union membership has been accomplished gradually and has resulted in only a slight majority in the new union, the interests favoring stability and certainty in the employment relationship could easily take precedence in support of the position of the old union. But where there is a mass shift in allegiance, the democratic principle might carry more weight. Such considerations seem to have influenced the National Labor Relations Board in several recent decisions refusing to grant an election and certification where the existing contract had only a short time to run. The critical case seems to be the one where the shift is by a great majority, as in the *M & M Wood Working Co.* case, and there is no dissolution of the old union as a legal entity. Here the various interests are present in sharpest conflict. The only thing that seems clear to the writer in the whole picture is that the courts should avoid a too ready application of strict two-party contract concepts, albeit admitting that they may be made to apply. It may be necessary to look at the collective agreement in a new light in order to best protect the interests involved in such a situation. It may be well for the common law to show its elasticity and move to meet this challenge with the development of a new concept, treating the collective bargaining agreement as sui generis at law as well as in fact. Perhaps the problem, highly involved as it is with considerations of policy, calls for legislative treatment. In any case, it is submitted that the result obtained in the *M & M Wood Working Co.* case probably does not represent a proper balancing of all the interests there involved.

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38 Where there is a formal dissolution of the union according to its charter, or where there is unanimous action without formal steps, the cases have caused no trouble, as then the courts can easily consider the new union the same legal entity as the old. See cases cited supra, note 12.

34 The National Labor Relations Board has qualified its concept of the continuing duty to bargain collectively to the extent that they will not grant a petition for election and certification where the existing agreement has a term of less than a year to run. The duration of the contract was not so long "as to be contrary to the policies and purposes of the Act." Matter of Superior Electrical Products Co., 6 N. L. R. B. 19, 2 L. R. R. 130 (1938); Matter of National Sugar Refining Co., 10 N. L. R. B. 1410, 3 L. R. R. 685 (1939).

85 In Brisbin v. E. L. Oliver Lodge No. 335, 134 Neb. 517, 279 N. W. 277 (1938), *P* had joined union *A*, which had a collective agreement with the carrier providing for discharge of married women. *P* married but kept it a secret. Union *A* dissolved and *D* union, having no connection with union *A*, was certified as representative of the employees in the bargaining unit in which *P* worked, but she did not become a member. *D* attempted to get the carrier to discharge her in accordance with the collective agreement—*P* sought an injunction to restrain such action by *D*. Held, no injunction would issue as *D* union had succeeded to the rights of union *A* under the agreement and had the right therefore to force her discharge.