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LABOR LAW--CONSTITUTIONALITY OF AFFIDAVIT AND FILING PROVISIONS OF TAFT-HARTLEY ACT

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LABOR LAW—CONSTITUTIONALITY OF AFFIDAVIT AND FILING PROVISIONS OF TAFT-HARTLEY ACT.—Plaintiff union, its president, and two union members sought to enjoin the National Labor Relations Board and its members individually from disqualifying plaintiff union from participation in union representation elections held by the board among the employees of two Great Lakes shipping companies. The exclusion of the plaintiff union was based on its failure to file affidavits and reports under sections 9 (f), 9 (g), and 9 (h) of the Taft-Hartley Act,[1] which failure by the terms of the act served to disqualify the non-complying union from participation in board procedures. The plaintiff union attacked the requirements as unconstitutional. *Held,* by a statutory three-judge court, one judge dissenting, complaint dismissed. *National Maritime Union v. Herzog,* (D.C. D.C. 1948) 78 F. Supp. 146; affd., 334 U.S. 854, 68 S.Ct. 1529 (1948).

The court first held that the union, as an entity, had standing to raise the constitutionality of the filing requirements on the basis of its affidavit alleging that it has an officer who is a member of the Communist Party, thereby disqualifying the union under the act.[2] Sections 9(f) and 9(g) were upheld on the ground that they were valid conditions attached to a statutory privilege and

[1] Labor Management Relations Act, 1947, 61 Stat. L. 136 et seq., 29 U.S. C.A. (Supp. 1947) §§ 141 et seq. Section 9 (f) requires the filing with the Secretary of Labor by each local union and the national or international union of which it is an affiliate or constituent of inter alia, copies of the union constitution, by-laws, salary schedules, election practices, dues and initiation fee schedules, and financial reports, and requires that the same financial reports be sent to its individual members; § 9(g) requires yearly renewal of the filing and the bringing up to date of the information contained therein; § 9(h) requires that each officer of a local union of any national or international organization of which it is an affiliate file an affidavit "that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods."

[2] The president of the N.M.U. could not raise the issues because he alleged that he was not a Communist and therefore was not adversely affected. The two union members were not adversely affected because they "have no constitutional right to be represented by the collective bargaining agent of their choice."

reasonably related thereto.[3] So holding, the court narrowed its discussion of section 9(h) to the sole question of whether the conditions imposed were valid. To the objection that the requirement of filing violates a union officer's freedom of speech under the First Amendment, the court said that the officer was free to remain silent, depriving his union of the privilege of exclusive representation. But even if this loss of privilege constitutes coercion, the court justified it on the ground that it is mere administrative inquiry which Congress has power to require.[4] Asserting that this was the basis for its holding, the court, went on by way of dicta to discuss other points raised. Assuming that the condition does affirmatively impinge on the officer's freedom of speech, the court stated that an express requirement or prohibition of a certain described course of action "comes to us encased in the armor wrought by prior legislative deliberation" and that the "clear and present danger" [5] test does not apply.[6] But, even assuming that the "clear and present danger" test was applicable, it was concluded that, as a matter of judicial notice, and having due regard for the "strong presumption of constitutional validity which accompanies the judgment of Congress," [7] there is a clear and present danger of the burdening of commerce through

[3] Citing Lewis Publishing Co. v. Morgan, 229 U.S. 288, 33 S.Ct. 867 (1913); Electric Bond and Share Co. v. S.E.C., 303 U.S. 419, 58 S.Ct. 678 (1938). The union argument that even though Congress could constitutionally require financial statements, it could not "virtually destroy" the union for failure to file, was rejected by the court on the ground that the failure to file was the union's fault, citing United States ex rel. Milwaukee Social Democratic Pub. Co. v. Burleson, 255 U.S. 407, 41 S.Ct. 352 (1921).

[4] The court cited Barsky v. United States, (App. D.C., 1948) 167 F. (2d) 241, cert. denied, (U.S. 1948) 68 S.Ct. 1511, involving the House Un-American Activities Committee and one of its numerous contempt citations. Even granting the validity of that "power of inquiry" as against First Amendment objections, it is submitted that the dissenting Judge, who, incidentally, wrote the opinion in the Barsky case, is correct in maintaining that the affidavit requirement is no mere inquiry but is a positive disability imposed by Congress.

[5] ". . . The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." Holmes, J. in Schenck v. United States, 249 U.S. 47 at 52, 39 S.Ct. 247 (1919). For a later application of this doctrine see West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S.Ct. 1178 (1943), and cases cited.

[6] The court cited Gitlow v. New York, 268 U.S. 652 at 670, 671, 45 S.Ct. 625 (1925), as authority for the proposition that only in the event of a general prohibition of acts without a specific prohibition of language does the "clear and present danger" test apply. It is to be noted that Justices Holmes and Brandeis dissented on this very point in the Gitlow case and, in view of the subsequent widespread acceptance of their version of the doctrine, the theory of the majority might be thought to be no longer the law. The Gitlow majority is, however, at least inferentially followed in Bridges v. California, 314 U.S. 252, 260, 62 S.Ct. 190 (1941), where such factors as specific prohibition were noted as absent.

[7] The court recognized the familiar rule that the presumption is inoperative or at least balanced when a challenge to the action of Congress is grounded upon a claim of individual civil rights, but blandly asserts that Congress can, by a finding of "impending danger to national interests," re-establish the presumption "in full vigor."

industrial disputes caused by Communist officers if their unions are not foreclosed from using board procedures.[8] The objection was urged that the statute provides no ascertainable standard of conduct for a union officer, in view of the difficulty the Supreme Court has already experienced with the word "affiliated."[9] The court rejected the argument.[10] The opinion was concluded by describing the position of a bargaining representative as "highly fiduciary" in its nature and therefore subject to standards fixed by Congress, even in apparent conflict with the individual's constitutional rights.[11] The dissent raised strong objections to the majority position that the filing of affidavits is a mere condition upon a privilege, contending that when Congress creates a government facility the use of which becomes a practical necessity for continued operation in the field, it cannot then require as a condition of that use the waiver of constitutional rights.[12] The dissenting judge further maintained that the affidavit requirement is an indirect abridgement of freedom of speech and assembly which can be justified only by a finding of clear and present danger, based upon the taking of evidence. In the case as a whole, both majority and dissent skipped or touched

Such a rule would put it within the power of the legislature to control almost absolutely all civil liberties by a mere recitation in the preamble of any restrictive measure it desired to pass. See, for example, H.R. 5852, 80th Cong., 2d sess., § 2 (11) (1948).

[8] It was upon the question of taking judicial notice as against the taking of evidence in regular form as to the nature of the Communist Party and its members that the main emphasis of the dissent rests. The dissenting judge cited Schneiderman v. United States, 320 U.S. 118, 63 S.Ct. 1333 (1943), a denaturalization case, and Bridges v. Wixon, 326 U.S. 135, 65 S.Ct. 1443 (1945), a deportation case, to bolster his assertion that there must be a presentation of "clear and convincing evidence" to justify the conclusion of the court. The majority distinguished the above cases on the ground that they involved "highly penal proceedings" and justified its refusal to hear evidence on the basis that the instant case falls within the majority holding in Gitlow v. New York, 268 U.S. 652, 45 S.Ct. 625 (1925), noted supra, note 6, and that the determination of Congress is, therefore, binding.

[9] See Bridges v. Wixon, 326 U.S. 135 at 141, 142, 65 S.Ct. 1443 (1945).

[10] The court declared that the affiant is not called upon to define "affiliated" in his affidavit, but only to say whether he considers himself affiliated in the sense in which that word has significance to him. In view of the express reference in § 9(h) to § 35 of the Criminal Code dealing with perjury, however, it might well be doubted that the affiant's subjective evaluation of his ideological ties will be accorded the respect indicated by this court.

[11] The case cited by the court that is most directly in point is In re Summers, 325 U.S. 561, 65 S.Ct. 1307 (1945), holding that a pacifist may not become a member of a state bar association (that is, may not practice law) if he cannot in good faith swear to "uphold" (by force) the constitution of a state. This point is most interesting if for no other reason than that it may demonstrate the proposition that bad law leads to more bad law.

[12] Hannegan v. Esquire, 327 U.S. 146, 156, 66 S.Ct. 456 (1946). See also Justices Brandeis and Holmes dissenting in United States ex rel. Milwaukee Social Democratic Pub. Co. v. Burleson, 255 U.S. 407 at 417, 436, 41 S.Ct. 352 (1921). It is interesting to note that the majority opinion in the Burleson case is cited twice by the majority in the principal case to sustain its contentions, without regard to the fact that its present validity is dubious in the light of the Supreme Court's citation of the dissent in the recent case of Hannegan v. Esquire, supra.

most lightly knotty points which seem to be worthy of far more consideration than was given them. For instance, the problem of a bill of attainder prohibited by the Constitution [13] is dismissed without discussion, upon the assertion that there is no "punishment" involved here.[14] Likewise, assertions of denial of liberty of assembly and association under the First Amendment and the due process clause of the Fifth Amendment, both as to officers and members, were hardly mentioned.[15] The question whether the statute involves arbitrary and unreasonable discrimination against unions and against Communists in violation of the due process clause of the Fifth Amendment was not considered.[16] The problem of "guilt by association" was mentioned only in the dissent.[17] A prior justification of section 9(h) [18] on the ground of the Constitutional guarantee to the states of a republican form of government [19] was nowhere mentioned. Some, at least, of these issues are important, and it is to be hoped that the Supreme Court will face them squarely when it is required to determine the validity of section 9(h).[20]

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[13] Art. I, § 9.

[14] But see United States v. Lovett, 328 U.S. 303, 66 S.Ct. 1073 (1946); Ex parte Garland, 4 Wall. (71 U.S.) 333 (1866); Cummings v. Missouri, 4 Wall. (71 U.S.) 277 (1866).

[15] See Boudin, "Supersedure and the Purgatory Oath Under the Taft-Hartley Act," 23 N.Y. UNIV. L.Q. 72 at 96 (1948), for citation of cases and discussion.

[16] See 48 COL. L. REV. 253 at 255 (1948); 42 ILL. L. REV. 487 at 490 (1947); for a different emphasis, see Boudin, "Supersedure and the Purgatory Oath under the Taft-Hartley Act," 23 N.Y. UNIV. L.Q. 72 at 91 (1948).

[17] See Schneiderman v. United States, 320 U.S. 118, 136, 63 S.Ct. 1333 (1942), and concurring opinion by Justice Murphy in Bridges v. Wixon, 326 U.S. 135 at 157, 65 S.Ct. 1143 (1945); see also 48 COL. L. REV. 253 at 261-262 (1948) and cases cited.

[18] Oil Workers International Union v. Elliott, (D.C. Tex. 1947) 73 F. Supp. 942.

[19] Art. IV, § 4.

[20] Unfortunately, that question was not considered as presented by the appeal of the principal decision. In a memorandum decision per curiam, the Supreme Court affirmed the district court decision to the extent that it passed on §§ 9(f) and 9(g), finding it unnecessary to consider the validity of section 9(h). National Maritime Union v. Herzog, 334 U.S. 854, 68 S.Ct. 1529 (1948). Presumably, unions must now file under §§ 9(f) and (g) in order to have standing to question the validity of § 9(h).