Michigan Law Review

Volume 52 | Issue 5

1954

LABOR LAW - USE OF FEDERAL REMOVAL JURISDICTION TO DEFEAT STATE COURT INJUNCTION SUITS

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LABOR LAW — USE OF FEDERAL REMOVAL JURISDICTION TO DEFEAT STATE COURT INJUNCTION SUITS—The use of the injunction in labor disputes is by no means a thing of the past. Although equitable relief against union activities is no longer generally available in the federal courts, such relief may often be obtained by application to the courts of the states. In response to state court injunction suits involving parties subject to the National Labor Relations Act,[1] astute union counsel have fairly recently adopted an approach which has thus far achieved some degree of success. This new strategy is simply to remove the case to the appropriate federal district court, where, it is anticipated, the limitations on federal equity jurisdiction contained in the Norris-LaGuardia Act[2] will normally lead the court to vacate any temporary restraining order which may have been issued by the state court, and then to dismiss the action. The success of this maneuver hinges almost entirely on a procedural question—is the case properly removable? But before attempting to analyze this procedural problem it is necessary to give some consideration to the basic substantive law involved.

I. *Substantive Principles*

The instances are few in which federal law grants to a private party the right to secure injunctive relief in a labor dispute. The original NLRA was interpreted as creating only public rights and as conferring upon the National Labor Relations Board exclusive primary authority to remedy unfair labor practices by an employer.[3] That the Labor-

[1] 49 Stat. L. 449 (1935), 29 U.S.C. (1946) §§151-166, as amended.
[2] 47 Stat. L. 70 (1932), 29 U.S.C. (1946) §§101-115.
[3] Amalgamated Utility Workers v. Consolidated Edison Co., 309 U.S. 261, 60 S.Ct. 561 (1940).

Management Relations Act[4] did not change this situation except as it expressly provided for private remedies is firmly established.[5] At present private injunctive relief is authorized by the LMRA only (1) to restrain payments to employee representatives in violation of the terms of the act,[6] and (2) to enjoin breaches of collective agreements.[7] Furthermore, not only do these statutes fail to provide any general private right to equitable relief, but by force of the restrictions contained in the Norris-LaGuardia Act federal courts are, with a few exceptions, unable to grant injunctions even to enforce rights accruing under state law.

By necessity, therefore, employers have turned to state law as enforced in state courts. Here the main problem is the extent to which state authority over labor controversies in industries affecting interstate commerce has been superseded by the federal labor relations legislation.[8] Supreme Court decisions suggest that in general the states have no power to regulate activities which are either made unfair labor practices by the NLRA[9] or are "protected" by that statute.[10] However, a few state courts have indicated their disagreement with this interpretation of the Supreme Court's position by claiming concurrent jurisdiction over unfair labor practices in some situations.[11] The law with respect to conduct which is neither federally prohibited nor "protected" is far from settled.[12] Adding to the uncertainty in this whole area is the sharp disagreement that exists as to the classification of certain types

[4] 61 Stat. L. 136 (1947), 29 U.S.C. (Supp. V, 1952) §§141-197.

[5] Amazon Cotton Mill Co. v. Textile Workers Union, (4th Cir. 1948) 167 F. (2d) 183; Amalgamated Assn. v. Dixie Motor Coach Corp., (8th Cir. 1948) 170 F. (2d) 902.

[6] 61 Stat. L. 158, §302(e) (1947), 29 U.S.C. (Supp. V, 1952) §186(e).

[7] The weight of authority supports the existence of this remedy. Milk and Ice Cream Drivers Union v. Gillespie Milk Products Corp., (6th Cir. 1953) 203 F. (2d) 650. But where the requirements of the Norris Act have not been satisfied no injunction may be issued. Alcoa Steamship Co. v. McMahon, (D.C. N.Y. 1948) 81 F. Supp. 541, affd. (2d Cir. 1949) 173 F. (2d) 567, cert. den. 338 U.S. 821, 70 S.Ct. 65 (1949).

[8] See Smith, "The Taft-Hartley Act and State Jurisdiction over Labor Relations," 46 MICH. L. REV. 593 (1948); Cox and Seidman, "Federalism and Labor Relations," 64 HARV. L. REV. 211 (1950). Another but now less important problem concerns the status of picketing as a constitutionally protected form of free speech. See 51 MICH. L. REV. 1217 (1953).

[9] Garner v. Teamsters Union, 346 U.S. 485, 74 S.Ct. 161 (1953); Plankinton Packing Co. v. WERB, 338 U.S. 953, 70 S.Ct. 491 (1950).

[10] Amalgamated Assn. of Street, Electric Railway & Motor Coach Employees v. WERB, 340 U.S. 383, 71 S.Ct. 359 (1951).

[11] Montgomery Bldg. & Construction Trades Council v. Ledbetter Erection Co., 256 Ala. 678, 57 S. (2d) 112 (1951), reh. den. 256 Ala. 689, 57 S. (2d) 121 (1951), cert. granted 343 U.S. 962, 72 S.Ct. 1061 (1952), cert. dismissed as improvidently granted, 344 U.S. 178, 73 S.Ct. 196 (1952); State ex rel. Tidewater-Shaver Barge Lines v. Dobson, 195 Ore. 533, 245 P. (2d) 903 (1952); Winkelman Bros. Apparel, Inc. v. Intl. Brotherhood of Teamsters, 22 CCH Lab. Cas. ¶67,262 (1952).

[12] See 53 COL. L. REV. 258 (1953).

of collective action as prohibited, "protected," or neither.[13] The effect of this confusion is that in many cases the trial judge will exercise a broad initial discretion in passing upon the validity of the preemption defense. Consequently, it would not be surprising to find union defendants eager to effect removal of injunction suits to the federal courts, where defenses based upon the exclusiveness of the NLRB's authority are likely to command maximum respect. And when account is taken of the limited equity powers of federal courts the question of removability clearly assumes decisive importance.

II. *Procedural Problems*

In general, only those actions "of which the district courts of the United States have original jurisdiction . . ."[14] may be removed from the state courts. In determining whether federal courts have original jurisdiction over actions for equitable relief against union conduct, three principal problems are involved: (1) Do such suits, when intended by plaintiff to rest upon state law, nevertheless present a claim under a law of the United States so as to confer federal jurisdiction? (2) Do district courts lack "original jurisdiction" over such suits because the Taft-Hartley Act vests primary authority over unfair labor practices in the NLRB? (3) Do the provisions of the Norris-LaGuardia Act have the effect of withdrawing federal jurisdiction? At the outset it may be said that the majority of the district courts which have passed upon these questions have denied removal on all three grounds.[15] However, only a relatively small number of courts have thus far had occasion to consider this matter, and the minority's position has recently received considerable support from a decision by the Court of Appeals for the Sixth Circuit.[16]

In treating the first of the three problems, the courts have denied federal jurisdiction where plaintiff's complaint is so drawn as to rely solely upon state law even though facts are alleged which might entitle plaintiff to relief under federal law as well.[17] The theory here is that

[13] E.g., stranger picketing. See 20 UNIV. CHI. L. REV. 109 (1952).

[14] 28 U.S.C. (Supp. V, 1952) §1441(a).

[15] For cases denying removal see Richman Brothers Co. v. Clothing Workers, (D.C. Ohio 1953) 114 F. Supp. 185; Castle & Cooke Terminals v. Longshoremen's Union, (D.C. Hawaii 1953) 110 F. Supp. 247; Berrios v. Bull Insular Lines, Inc., (D.C. P.R. 1953) 109 F. Supp. 858; and cases cited in notes 17 and 23 infra.

[16] Direct Transit Lines v. Intl. Brotherhood of Teamsters, (6th Cir. 1952) 199 F. (2d) 89. For other cases allowing removal see Nash-Kelvinator Corp. v. Grand Rapids Bldg. Trades Council, 22 CCH Lab. Cas. ¶67,071 (1952), and cases cited in notes 20, 24, and 28 infra.

[17] Hat Corp. of America v. United Hatters Union, 24 CCH Lab. Cas. ¶67,861

no claim "arising under"[18] a federal statute is presented, because "the party who brings the suit is master to decide what law he will rely upon."[19] Since counsel for employer-plaintiffs have recognized the importance of resting their claims entirely on state law, this view in itself would be sufficient to defeat removal in most cases in this area. To meet this objection one court allowing removal has contended that "the Court may properly take judicial notice of any Federal laws necessarily brought into play by the allegations of the complaint, although specific reference to such laws has been omitted,"[20] and since, due to preemption, plaintiff actually has no state cause of action, federal law is "necessarily brought into play" by the complaint.[21] This argument is somewhat weakened where, as is almost invariably true in these cases, plaintiff in fact has no private federal cause of action either; in this situation the minority's view comes close to an assertion that federal jurisdiction may be based upon the existence of a federal defense. But on the whole, removal problems involving a claim assertable under both federal and state law have heretofore arisen so infrequently that there seems to be neither authority nor any established principle of federal question jurisdiction which points inevitably to one solution or the other.[22] In apparent recognition of this fact the courts declining jurisdiction seem anxious to justify their action on other grounds as well.

The reason most frequently advanced for not allowing removal is that since the NLRA confers exclusive original "jurisdiction" on the NLRB to remedy unfair labor practices, federal courts are without original jurisdiction to entertain suits involving such conduct.[23] Courts

(1953); Wright and Morrissey, Inc. v. Local 522, Intl. Hod Carriers Union, (D.C. Vt. 1952) 106 F. Supp. 138; Associated Telephone Co. v. Communication Workers, (D.C. Cal. 1953) 114 F. Supp. 334.

[18] 28 U.S.C. (Supp. V, 1952) §1337.

[19] Associated Telephone Co. v. Communication Workers, (D.C. Cal. 1953) 114 F. Supp. 334 at 336.

[20] S. E. Overton Co. v. Intl. Brotherhood of Teamsters, 24 CCH Lab Cas. ¶67,803 at p. 84,358 (1953). In this case the court also employed judicial notice to determine that interstate commerce was involved. For a different approach to the commerce problem see Fay v. American Cystoscope Makers, (D.C. N.Y. 1951) 98 F. Supp. 278.

[21] It seems quite doubtful that removal would be permitted in any case in which the court did not feel that preemption had occurred.

[22] Justice Holmes' statement in The Fair v. Kohler Die and Specialty Co., 228 U.S. 22, 33 S.Ct. 410 (1913), that plaintiff is master to determine what law he will rely upon was made with reference to an attempt by defendant to defeat federal jurisdiction; as applied to the converse situation it is at best pure dictum. On the other hand, the decision in Southern Pacific Co. v. Stewart, 245 U.S. 359, 38 S.Ct. 130 (1917), lends some support to the minority's position, but there too a somewhat different problem was involved.

[23] Walker v. United Mine Workers, (D.C. Pa. 1952) 105 F. Supp. 608; Dynamic Mfrs., Inc. v. Local 614, General Drivers of America, (D.C. Mich. 1952) 103 F. Supp. 651; Rock Hill Printing & Finishing Co. v. Berthiaume, (D.C. S.C. 1951) 97 F. Supp. 451.

allowing removal readily admit the exclusiveness of the NLRB's "jurisdiction," but contend that their jurisdiction may be predicated on the assertion of a claim under a federal statute even though the court ultimately is unable to grant plaintiff any relief.[24] This argument is supported by the well-established doctrine that even a non-meritorious claim under a federal law is sufficient to invoke federal jurisdiction provided it presents a question of some substance.[25] However, the applicability of this doctrine would be rather questionable if the NLRA were interpreted as depriving the district courts of basic jurisdiction over the type of suit here involved.[26] So perhaps the real reason for the minority's position is the feeling that the sections of the NLRA purporting to vest paramount original authority over unfair labor practices in the NLRB[27] were intended merely to prescribe a rule of non-interference by the courts and not to operate as a limitation on their jurisdiction in the strict sense of the term.[28] In this connection it could be argued that a "non-jurisdictional" interpretation of the NLRA, insofar as it tends to defeat state court suits involving unfair labor practices, has the desirable effect of carrying out Congress' policy of granting exclusive original authority over unfair labor practices to the NLRB. Decisions of the Supreme Court[29] and of several courts of appeal[30] dismissing private suits on the basis of the NLRB's exclusive "jurisdiction" furnish some support for the majority's view. However, these cases do not appear to be absolutely conclusive with respect to the present question, since the courts were not called upon to draw a

[24] S. E. Overton Co. v. Intl. Brotherhood of Teamsters, 24 CCH Lab. Cas. ¶67,803 (1953); Pocahontas Corp. v. Bldg. Trades Council, (D.C. Me. 1950) 93 F. Supp. 217.

[25] See The Fair v. Kohler Die and Specialty Co., 228 U.S. 22, 33 S.Ct. 410 (1913); Bell v. Hood, 327 U.S. 678, 66 S.Ct. 773 (1946). It could be argued that the problem raised by a claim for injunctive relief under the NLRA is not sufficiently substantial to constitute a federal question. See 52 MICH. L. REV. 157 (1953).

[26] I.e., as effecting an implied repeal pro tanto of 28 U.S.C. (Supp. V, 1952) §1337. For cases in which the Supreme Court expressly declined to decide the question of implied repeal in connection with review of NLRB rulings in representation cases see NLRB v. IBEW, 308 U.S. 413, 60 S.Ct. 306 (1940), and Inland Empire Dist. Council v. Millis, 325 U.S. 697, 65 S.Ct. 1316 (1945).

[27] The most important section in this respect is 61 Stat. L. 146, §10(a) (1947), 29 U.S.C. (Supp. V, 1952) §160(a), which provides "The Board is empowered . . . to prevent any person from engaging in any unfair labor practice. . . . This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise. . . ."

[28] This was apparently the theory employed in upholding jurisdiction in Reavis v. IBEW, (D.C. Tex. 1951) 101 F. Supp. 542.

[29] E.g., Amalgamated Utility Workers v. Consolidated Edison Co., 309 U.S. 261, 60 S.Ct. 561 (1940).

[30] Volney Felt Mills, Inc. v. LeBus, (5th Cir. 1952) 196 F. (2d) 497; California Assn. of Employers v. Bldg. Trades Council, (9th Cir. 1949) 178 F. (2d) 175; Amazon Cotton Mill Co. v. Textile Workers Union, (4th Cir. 1948) 167 F. (2d) 183.

sharp distinction between dismissal for want of jurisdiction and dismissal for lack of a meritorious claim. Thus this issue, no less than the first problem, is a relatively novel one and can be decided either way without much difficulty.

The final problem as to original jurisdiction concerns the effect of the Norris Act. Here the first inquiry is whether that statute relates to "jurisdiction" in the basic sense, or merely to "equity jurisdiction."[31] Since in *United States v. United Mine Workers*[32] the Supreme Court apparently assumed that the limitations of the Norris Act were truly jurisdictional, it seems that this question must at least tentatively be decided in favor of the courts which deny removal. But in response the minority allowing removal again advance the argument that federal original jurisdiction is not dependent upon the court's ability to grant the relief requested.[33] Thus the crucial issue appears to be one upon which there is no real authority: assuming that the Norris Act applies to true jurisdiction, does it simply limit jurisdiction to issue the injunctions which it prohibits, or does it go further and withdraw jurisdiction even to entertain suits for such injunctions? The difficulty, if not impossibility, in reaching a completely satisfactory solution to this question as a matter of legal theory is emphasized by the fact that no less an authority on equity jurisprudence than Professor Chafee, disagreeing completely with the Supreme Court's assumption in the *United Mine Workers* case, presents a very strong argument that logically the Norris Act should not be interpreted as affecting true jurisdiction at all.[34] So here too, just as is true of the other procedural issues, the state of the law may be described as far from settled. For this reason and in view of the important social consequences flowing from any decision as to the permissible scope of union activities it seems reasonable to suppose that policy factors may have a very significant bearing on the results reached in these cases.

III. *Policy Considerations*

The dispute over removability represents but one aspect of the whole problem of the proper role to be played by the states in the field of labor relations. Obviously there is little justification for an assertion

[31] That "equity jurisdiction" is not true jurisdiction is pointed out in CHAFEE, SOME PROBLEMS OF EQUITY, c. 8 (1950).

[32] 330 U.S. 258, 67 S.Ct. 677 (1947).

[33] Direct Transit Lines, Inc. v. Intl. Brotherhood of Teamsters, 22 CCH Lab. Cas. ¶67,072 (1952), mandamus den. (6th Cir. 1952) 199 F. (2d) 89; Pocahontas Corp. v. Bldg. Trades Council, (D.C. Me. 1950) 93 F. Supp. 217.

[34] CHAFEE, SOME PROBLEMS OF EQUITY, c. 9 (1950). To the same effect see Cox, "The Void Order and the Duty to Obey," 16 UNIV. CHI. L. REV. 86 (1948).

of federal jurisdiction if the state laws relied upon by plaintiff have not been superseded; removal in this situation would in practical effect accomplish by judicial fiat an extension of the Norris Act's limitations to suits in state as well as federal courts. But where preemption has occurred and a state court nevertheless grants injunctive relief the case for allowing removal is strong. In view of the frequently crippling effect of those labor injunctions which are found on appeal to have been issued erroneously,[35] the normal procedure for vindication of a federal defense, viz., appeal to the highest state court followed by application to the Supreme Court for review, is highly inadequate from the union's standpoint in injunction suits. In fact, it seems that in such cases removal constitutes the only practicable method for ensuring to union defendants their full rights under federal law.[36] Here the difficulty stems, of course, from the doctrine that removal jurisdiction cannot be based upon the existence of a federal question raised in the answer.[37] Whether according complete protection to union defendants justifies what could perhaps be considered a circumvention of this doctrine through some slight stretching of established legal principles relating to original jurisdiction is a matter of opinion. It need only be said here that since any non-recognition of federal rights by the state courts is doubtless due to the confused state of the law[38] rather than to a deliberate attempt to flout national policy, the number of occasions calling for removal will probably diminish as time passes and Supreme Court decisions or subsequent legislation tends to clarify the dividing line between federal and state authority. But in the meantime the fact that even a few federal courts have been willing to take jurisdiction, when coupled with the decisive practical effect of such a holding, makes it clear that any union counsel faced with a state court injunction suit who fails to attempt removal is overlooking one of his best possible defenses.

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[35] See FRANKFURTER AND GREENE, THE LABOR INJUNCTION 224 (1930).

[36] In Capital Service, Inc. v. NLRB, (9th Cir. 1953) 204 F. (2d) 848, the court at the request of the NLRB enjoined an employer from enforcing a state court injunction against picketing. Query as to the correctness of this decision in view of 28 U.S.C. (Supp. V, 1952) §2283, which in general prohibits federal courts from enjoining proceedings in state courts.

[37] For a criticism of this doctrine see Fraser, "Some Problems in Federal Question Jurisdiction," 49 MICH. L. REV. 73 (1950); but cf. Bergman, "Reappraisal of Federal Question Jurisdiction," 46 MICH. L. REV. 17 (1947).

[38] See, e.g., comment in 27 N.Y. UNIV. L. REV. 468 (1952), contending that federal law should not be held to have affected common law remedies against union action. Cf. the subsequent decision in Garner v. Teamsters Union, 346 U.S. 485, 74 S.Ct. 161 (1953).