Michigan Law Review

Volume 49 | Issue 8

1951

LABOR LAW - LABOR-MANAGEMENT RELATIONS ACT -APPLICABILITY OF NON-COMMUNIST AFFIDAVIT TO PARENT FEDERATION

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LABOR LAW — LABOR-MANAGEMENT RELATIONS ACT — APPLICABILITY OF NON-COMMUNIST AFFIDAVIT TO PARENT FEDERATION— The language of section 9(h) of Title I of the Labor Management Relations Act of 1947[1] conditions assertion of rights under the act by a labor organization upon its submission to the Labor Board of par-

[1] 61 Stat. L. 136, 29 U.S.C. (Supp. III, 1950) §§141-197.

ticularly described affidavits[2] executed by each of its local officers and the officers of "any national or international labor organization of which it is an affiliate or constituent unit." The Board had considered the scope of the quoted phrase not to include the federation type of organization.[3] The Court of Appeals for the District of Columbia Circuit had agreed with the Board's construction.[4] The Fourth and Fifth Circuits, and one district court, had taken a contrary view.[5] The Supreme Court in the recent decision in *NLRB v. Highland Park Manufacturing Company*[6] accepts the latter view.

The case arose upon a charge by a CIO union, majority representative of respondent's employees, that respondent's refusal to bargain collectively with it was an unfair labor practice in violation of section 8(a)(5). The Board issued a complaint, found violation as charged, and ordered respondent to cease and desist therefrom. Enforcement of its order was sought by the Board in a proceeding under section 10(e) before the Court of Appeals for the Fourth Circuit, but was denied, that court holding that since some CIO national officers had not filed the "non-Communist affidavit" of section 9(h), the charging union did not satisfy the procedural qualifications imposed by that section on its right to invoke the power of the Board.[7] On certiorari by the Supreme Court, it was *held*, affirmed. The Court agreed that the affidavit requirement extended to the national federation officers, and saw that without their compliance the Labor Board was without any jurisdiction to proceed.

To agree with the Court's conclusion the premise must be accepted either that the CIO and AFL national federations are "labor organizations" within the definition of that term in section 2(5),[8] or that Con-

[2] The affiant declares "that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in . . . or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods."

[3] Northern Virginia Broadcasters, Inc., 75 N.L.R.B. 11 (1947), rejecting the earlier ruling to the contrary by the Board's General Counsel; discussed, Mulroy, "The Taft-Hartley Act in Action," 15 UNIV. CHI. L. REV. 595 at 622 (1948). Bethlehem Steel Co., 89 N.L.R.B. No. 210 (1950), refusing to follow the holding in the Postex case, (5th Cir. 1950) 181 F. (2d) 919.

[4] West Texas Utilities Co. v. NLRB, (D.C. Cir. 1950) 184 F. (2d) 233.

[5] NLRB v. Highland Park Manufacturing Company, (4th Cir. 1950) 184 F. (2d) 98; NLRB v. Postex Cotton Mills, Inc., (5th Cir. 1950) 181 F. (2d) 919; Oil Workers International Union v. Elliott, (D.C. Tex. 1947) 73 F. Supp. 942. The court of appeals decisions have all been on petitions for enforcement or review of Board orders under §10(e) or (f) of Title I. The district court case was a proceeding to compel a regional director of the Board to count ballots cast in a representation election.

[6] NLRB v. Highland Park Manufacturing Company, (U.S. 1951) 71 S.Ct. 759.

[7] NLRB v. Highland Park Manufacturing Company, (4th Cir. 1950) 184 F. (2d) 98.

[8] "The term 'labor organization' means any organization of any kind, or any agency

gress did not intend the longer phrase, "national or international labor organization," used in section 9(h) to be limited by section 2 (5). In view of the fact that the opinion in the principal case is without any reference whatever to section 2(5), the Court apparently accepts the latter premise. If that premise is sound, the conclusion still does not necessarily follow. The Board had considered section 2(5) to restrict the scope of section 9(h) from application to the parent federations, but had taken the alternative view that if the scope of section 9(h) was to be determined without reference to section 2(5), nevertheless the term "national or international labor organization" was a term of art, understood in the field of industrial relations to refer to those autonomous craft or industrial organizations of workers most of which in combination make up the parent federations.[9] Justice Jackson, for the majority of the Court, in an opinion reminiscent of Holmes' "ordinary meaning" interpretations of the revenue statutes,[10] sees no basis for this view. Congress not having declared the term to be one of art, subject to a construction less broad than the ordinary person would give it, the full breadth of ordinary construction must be accorded it: "The C.I.O., being admittedly a labor union and one of nation-wide jurisdiction, operation and influence, is certainly in the speech of people a national union, whatever its internal composition. If Congress intended geographic adjectives to have a structural connotation or to have other than their ordinarily accepted meaning, it would and should have given them a special meaning by definition."[11]

In the respect that the decision reverses the administrative agency's interpretation of its governing statute, it carries forward the trend initiated in *Universal Camera Corp. v. NLRB*[12] to minimize the weight given to the exercise by the agency of its "expertise."

The rationalization of this reversal is that the language in section 9(h) is jurisdictional, therefore "that an issue of law of this kind, which goes to the heart of the validity of the proceedings on which the order is based, is open to inquiry by the courts when they are asked

or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."

[9] E.g., the United Automobile, Aircraft and Agricultural Implement Workers of America, CIO; the National Maritime Union, CIO; the International Ladies Garment Workers Union, AF of L; the United Brotherhood of Carpenters and Joiners of America, AF of L; the United Mine Workers (unaffiliated).

[10] Cf. Eisner v. Macomber, 252 U.S. 189 at 219, 40 S.Ct. 189 (1920) (dissent), Lucas v. Earl, 281 U.S. 111, 50 S.Ct. 241 (1930).

[11] Principal case at 760.

[12] 340 U.S. 474, 71 S.Ct. 456 (1951).

to lend their enforcement powers to an administrative tribunal."[13] Heretofore, however, it has always been considered that the rights created by the act devolve to *every* union which is the majority representative of the employees in an appropriate bargaining unit, and that section 9(f), (g), and (h) condition the enforcement by a union of these rights upon the submission of the required reports and affidavits, therefore are merely procedural.[14] It may be significant that Justice Frankfurter, who wrote the decision in *Universal*, dissents from the holding in the principal case, referring to the act as having been written by experts in the field of industrial relations, noting that the Board is the best source in determining whether a term used in that field has a technical connotation and concluding that its view should be upheld "if there is no reasonable ground for rejecting it."[15] Both majority and dissenting judges,[16] then, accept the premise that section 2(5) was meant to be no limitation upon the scope of section 9(h). But it is not certain that this premise is the correct one. Rather, to paraphrase Justice Jackson's language quoted above, it would seem that if Congress had intended adjectives having a geographic connotation to extend the scope of a term which is defined precisely in the act, it would and should have provided for such an extension. There being neither such a provision in the language of the act nor any indication in its legislative history that Congress considered the term "national or international labor organization" used in section 9(h)[17] to have an in-

[13] Principal case at 761.

[14] Even if it be agreed that the reversal is of the Board's determination of its own jurisdiction. Cf. the treatment in the past, as yet unmodified, which encouraged the Board to believe it had practically a free hand in deciding when there exists an unfair labor practice or representation question "affecting commerce," §§9(c) and 10(a). Consolidated Edison Co. of New York v. NLRB, 305 U.S. 197, 59 S.Ct. 206 (1938); NLRB v. Fainblatt, 306 U.S. 601, 59 S.Ct. 668 (1939). Cf. also NLRB v. Hearst Publications, Inc., 322 U.S. 111, 64 S.Ct. 851 (1944), which held that the Board's determination that persons were "employees" under the act, for the purpose of assertion of rights thereunder, was not to be set aside on review if it had "warrant in the record and a reasonable basis in law," notwithstanding the status of such persons under the state law. At 131.

[15] Principal case at 761.

[16] Justice Douglas wrote a dissent agreeing with Frankfurter's reasoning and amplifying it, principal case at 761-2.

[17] The same term is also used in sec. 9(f) and (g), which require the submission of financial reports and other information by the organizations covered. The proviso to sec. 10(c) admonishes the Board in considering charges and complaints of employer domination of labor organizations to apply the same rules and regulations irrespective of whether such organization is affiliated with a "labor organization national or international in scope." In every other part of the act, except sec. 402, providing for the formation of a Joint Committee on Labor-Management Relations to study, inter alia, the internal organization and administration of "labor unions," the term "labor organization" is uniformly used, unmodified by adjective or phrase.

It is perhaps of some significance that it was conceded in the principal case that the sec. 10(c) reference covered the federation type of organization.

dependent meaning determinable without reference to section 2(5),[18] one may argue with much justification that section 9(h) requires affidavits of federation officers only if federations are "labor organizations". as section 2 (5) defines that term.

So to say does not require disagreement with the holding in the principal case, but it does make agreement much more difficult. Aside from the apparently negative view of the District of Columbia Circuit in *West Texas Utilities Co. v. NLRB*,[19] it has never been determined judicially whether parent federations are within the section 2(5) definition.[20] It is doubted, however, that the phraseology of that section, the emphasis in which is primarily upon collective bargaining representation, can include the CIO and AFL, in which individual employees do not directly participate and which do not ordinarily take part in the collective bargaining process.[21] On the other hand, it can

[18] There was comparatively little debate on sec. 9(h), and most of that preceded the rewriting in conference of the original House and Senate bills, when the structure of the anti-Communist sections, making a labor organization ineligible for certification as a bargaining representative "if one or more of its national or international officers is . . . or . . . can reasonably be recognized as being" a Communist, was such as to raise no question of limitation by section 2(5), 93 CONG. REC. 4894-5 (1947). Some individual members of Congress seem to have formulated their own opinions on the question of federation applicability. Cf. Rep. Madden at 93 CONG. REC. 6542, Sen. Murray at 93 CONG. REC. 7468 (1947); their statements must be taken rather as uncontested assumptions than as interpretations argued on the merits.

The question of federation applicability has not seemed to provoke much interest on the part of Congress since the problem's development by the Board and the courts. Mulroy cites Senators Ball and Taft as taking a view tolerant of the Board's interpretation, "The Taft-Hartley Act in Action," 15 UNIV. CHI. L. REV. 595 at 622 (1948). No legislative proposal for eliminating the ambiguity, if any, in sec. 9(h) scope was made during the course of the fight in the first session of the 81st Congress to repeal or nullify LMRA. The only change proposed would have affected sec. 9(h) scope only in the respect that the affidavit would be made a condition to employer, as well as to union, invocation of Board action. S. 1685, 81st Cong., 1st sess., 95 CONG. REC. 4957 (1949).

[19] (D.C. Cir. 1950) 184 F. (2d) 233. The view is more in the nature of dictum, the decision being based rather on the holding that federation applicability is constitutionally precluded by the reasoning through which the Supreme Court sustained the validity of section 9(h) in American Communications Association, CIO v. Douds, 339 U.S. 382, 70 S.Ct. 674 (1950). That holding is obviously rejected by the Court in the principal case, the decision expressly stating that applicability of sec. 9(h) to the federations "is consistent with the context and purpose of the Act," as defined in Douds. Principal case at 760.

[20] In United States v. CIO, 335 U.S. 106, 68 S.Ct. 1349 (1948), an action brought under sec. 304 of LMRA, the question whether a parent federation is a "labor organization" within the definition of the act was before the Court but was not decided, the case being disposed of on other grounds. The question was not considered by the Fourth Circuit in its decision in the principal case or in Oil Workers International Union v. Elliott, (D.C. Tex. 1947) 73 F. Supp. 942. That the CIO was covered by sec. 2(5) was stipulated in NLRB v. Postex Cotton Mills, Inc., (5th Cir. 1950) 181 F. (2d) 919.

[21] There is no indication in the legislative history of the original NLRA that sec. 2(5) was intended to cover organizations other than employee bargaining representatives, although the intention was clearly manifested to eliminate every possibility of employer interference. S. Rep. No. 1184 on S. 2926, 79th Cong., 2d sess., (1934) p. 4. Furthermore, the use of the verb "means," rather than "includes," used in the definitions of four other terms in

hardly be imagined that Congress intended to purge the lower ranks of the nation's labor unions of Communists and other revolutionaries, yet allow them to run rampant in the national organizations of the parent federations. Accordingly, although one may doubt whether the language used by Congress is technically susceptible of the meaning the Court places upon it in the principal case, it is beyond doubt that this decision does appropriately effectuate the policy behind the affidavit requirement, i.e., "to wholly eradicate and bar from leadership in the American labor movement, at each and every level, adherents to the Communist party and believers in the unconstitutional overthrow of our Government."[22]

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sec. 2, would seem to indicate by contrast that an all-inclusive definition was intended. Sec. 2(5) remains unchanged in LMRA from its original wording in NLRA. Its reenactment was without debate or other discussion.

When a federation does, however, occupy a position in relation to one of its component parts similar to that of a national or international and its locals, as it does in its relation with an organizing committee directly chartered and supervised by it, then it would seem possible to say that it is a "labor organization," as section 2(5) defines the term. The Board's position prior to the principal case accorded with this view, for in such a case the affidavit requirement of section 9(h) was applied to the CIO, American Optical Co., 81 N.L.R.B. 453 (1949).

[22] NLRB v. Postex Cotton Mills, Inc., (5th Cir. 1950) 181 F. (2d) 919 at 920, quoted with approval in principal case at 760.