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Labor Law - Norris - Laguardia Act - Federal Courts Without Jurisdiction to Enjoin Strike in Support of Demand That No Jobs Be Abolished Without Railiway Union's Consent

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LABOR LAW — NORRIS-LAGUARDIA ACT — FEDERAL COURTS WITHOUT JURISDICTION TO ENJOIN STRIKE IN SUPPORT OF DEMAND THAT NO JOBS BE ABOLISHED WITHOUT RAILWAY UNION'S CONSENT — Respondent railroad sought authority from the South Dakota Public Utilities Commission to reduce the number of its station agents. Petitioner union not only contested but also demanded of the railroad that the following provision be added to the existing collective bargaining agreement: "No position in existence on December 3, 1957, will be abolished or discontinued except by agreement between the carrier and the organization."[1] The commission thereafter found maintenance of the particular jobs to be wasteful and issued a mandatory order directing their abandonment.[2] When the union prepared to strike in support of its demanded contract provision, the railroad sought an injunction in a federal district court. The district court's denial of injunctive relief was reversed by the Court of Appeals for the Seventh Circuit.[3] On certiorari to the United States Supreme Court, *held*, reversed, three Justices dissenting, one Justice concurring specially.[4] The union's demand presented a lawfully bargainable issue under the Railway Labor Act, and the Norris-LaGuardia Act applied to deny jurisdiction to issue an injunction. *Order of R.R. Telegraphers v. Chicago & No. W. Ry.*, 362 U.S. 330 (1960).

The Norris-LaGuardia Act, when applicable, imposes strict substantive and procedural requirements and limitations on the granting of injunctive relief by federal courts, and on its face absolutely denies jurisdiction to enjoin strikes.[5] The act is applicable where a "labor dispute" exists, and the act's broad definition of a labor dispute,[6] coupled with liberal constructions

[1] Principal case at 332.

[2] Principal case at 348; 69 S.D. PUBLIC UTILITIES COMM'N ANN. REP. 87 (1958).

[3] The court of appeals reversed the district court on the ground that the subject of the union demand was within the scope of managerial prerogative and therefore that the union could not force bargaining thereon. Chicago & No. W. Ry. v. Order of R.R. Telegraphers, 264 F.2d 254 (7th Cir. 1959).

[4] Justices Clark, Whittaker and Frankfurter dissented. Mr. Justice Stewart concurred in the holding on the ground that there was no substantial federal question sufficient to give jurisdiction. He stated that if there was a federal question, he agreed with the dissent.

[5] 47 Stat. 70 (1932), 29 U.S.C. §§ 104(a), 107-110 (1958). For an example of the nature of these procedural limitations, 29 U.S.C. § 108 provides that no injunctive relief may be granted unless complainant has made every reasonable effort to settle the dispute by negotiation or with the aid of available government arbitration or mediation machinery.

[6] 47 Stat. 73 (1932), 29 U.S.C. § 113 (1958).

of this definition by the Supreme Court,[7] clearly indicated that the act applied in the principal case. The railroad attempted to avoid this apparent applicability by stretching a series of exceptions to the Norris Act so as to embrace the principal case. The exceptions had been created by the judiciary where rail union bargaining demands were found to be unlawful in that the demands exceeded the congressionally-granted bargaining powers of the union under the Railway Labor Act.[8] This "unlawful demand" exception had been most broadly applied in *Brotherhood of R.R. Trainmen v. Chicago River & Ind. R.R.*,[9] where a union struck in support of a demand involving the interpretation of an existing collective bargaining agreement. The Railway Labor Act permits either party to submit such disputes to binding arbitration;[10] this the carrier had done. The Court enjoined the strike on the ground that the specific provisions of the Railway Labor Act should be enforced despite the general commands of Norris-LaGuardia. In the principal case the railroad sought to extend this exception, created for unlawfulness under a labor-regulating statute, to include unlawfulness under a non-labor statute. The railroad urged that the union demand was in two respects unlawful under the Interstate Commerce Act.[11] First, the railroad characterized the union's demand as requiring the retention of jobs found to be wasteful[12] by the South Dakota Commission, and alleged that this violated the National Transportation Policy set forth in the preamble of the Interstate Commerce Act.[13] Second, the railroad contended that the union demand violated that portion of the Interstate Commerce Act which impliedly left to the states the regulation of station service.[14] It

[7] See, *e.g.*, New Negro Alliance v. Sanitary Grocery Co., 303 U.S. 552 (1938), where the Court applied Norris-LaGuardia to protect Negro picketing of a grocery store; the pickets hoped to encourage the hiring of Negroes. In reversing the lower court, Mr. Justice Roberts stated at 559, "We think the conclusion that the dispute was not a labor dispute within the meaning of the Act, because it did not involve terms and conditions of employment in the sense of wages, hours, unionization or betterment of working conditions is erroneous."

[8] In a series of cases where white or white-dominated rail unions contracted with employers to discriminate against Negro labor, the court enjoined the execution of the contracts and held the Norris Act inapplicable. See, *e.g.*, Graham v. Brotherhood of Locomotive Firemen, 338 U.S. 232 (1949).

[9] 353 U.S. 30 (1957).

[10] 48 Stat. 1191 (1934), 45 U.S.C. § 153 (i) (m) (1958).

[11] 54 Stat. 899 (1940), 49 U.S.C. §§ 1-25 (1958).

[12] The expenses of operating several hundred one-man agencies on little-used branch lines exceeded revenues derived therefrom by $170,399 in 1956. The workload of the agents involved averaged 59 minutes per day. They were paid for a 40-hour week. Union work rules required that many of the agents not be on duty when the only train of the day passed their station. Principal case at 347, 348 nn.1 & 3.

[13] The act's purpose is "to promote safe, adequate, economical and efficient service and foster sound economic conditions in transportation and among the several carriers." 54 Stat. 899 (1940), 49 U.S.C. preceding § 1 (1958) (preamble).

[14] Congress in 1958 made substantial revisions in the regulatory system for the nation's railroads and gave the ICC jurisdiction over large areas which the states had previously regulated. However, after extensive consideration it deliberately left to the states the regulation of station services. H.R. REP. No. 1922, 85th Cong., 2d Sess. 12 (1958). The intent of the Congress was to expedite the abandonment of unprofitable and unnecessary operations. S. REP. No. 1647, 85th Cong., 1st & 2d Sess. 11 (1958). The Senate sub-com-

argued that the union, by demanding that its permission be obtained for any abandonment of station services, was using its congressionally-established bargaining powers to usurp state authority in an area where Congress intended the states to be supreme.[15]

The majority, in an opinion written by Mr. Justice Black, found no conflict between the union's demand and the South Dakota Commission order. This mooted the railroad's argument that the union could not lawfully usurp state authority, and made ineffectual the argument based on conflict with the Interstate Commerce Act's efficiency commands, for the only instances of inefficiency involved were those ordered to be abolished by the state agency. Instead, Mr. Justice Black found that the union merely wanted to discuss actions which might vitally and adversely affect the seniority, security, and stability of railroad jobs; that the union had not defied any state order; and that the union's demand was not prompted by the railroad's action in seeking state authority to put its agency consolidation plan into effect.[16] These findings can be squared with significant facts in the case only with the greatest difficulty.[17] Mr. Justice Black must have reasoned that the union's demand, if granted, would not be per se a veto of the action of the South Dakota Commission, but rather would be only an unexercised contractual veto power. One can only speculate upon the

mittee which conducted the hearings recommended that the railroads help themselves by applying more often to state agencies for authority to abandon uneconomic services. S. REP. No. 1647, 85th Cong., 1st & 2d Sess. 21 (1958). On this point the union urged that the state commission had no implied authority from Congress, and that the commerce clause of the federal constitution preempted state power to interfere with the exercise of a federally-granted bargaining power. See note 20 *infra*.

15 The dissent accepted essentially the position argued by the railroad. This position is an extension of the "unlawful demand" exception to Norris-LaGuardia to include demands unlawful under a non-labor statute. *But cf.* Milk Wagon Drivers' Union v. Lake Valley Farm Products, Inc., 311 U. S. 91 (1940), holding that union conduct violating the Sherman Act (a non-labor statute) did not warrant creating an exception to Norris-LaGuardia.

16 Principal case at 340.

17 At the South Dakota Commission hearings, the union contended that the existing collective bargaining agreement prevented abolishment of jobs without the union's consent. The union next demanded the inclusion in the collective bargaining contract of a clause expressly setting forth such an agreement. Principal case at 347. The union in a letter accompanying its strike ballot stated that the demanded agreement was necessary to prevent the effectuation of the railroad's plan for eliminating the agencies. The union's strike call stated that the need for the demanded agreement was demonstrated by the state commission's order to abolish the agencies. Principal case at 350 nn.9 & 10. After the union made its demand, the railroad offered several methods of cushioning the effect of abolition of the jobs, among them the transfer of the agents involved to productive jobs, the limiting of job abolishments to an agreed-upon number per year, and the payment of supplemental unemployment benefits to the agents affected. The union flatly refused to discuss any of these proposals. The railroad negotiator then indicated that the company's door would always be open for any discussion of the whole area. The union president testified that the only alternatives he gave the railroad were to agree to the demanded provision or to suffer a strike. Principal case at 349 n.6. Mr. Justice Black's conclusion that the union's purpose in striking was only to gain the right to discuss with management the railroad actions involved does not seem consistent with these facts.

reasons why the Court avoided finding a conflict on these facts. In the principal case the existence of a conflict was obvious, but it is easy to visualize cases in which it would be difficult to determine whether a similar demand was to be used in conflict with a state order. Perhaps by refusing to recognize a conflict until a union actually attempts to enforce an existing contract which is in conflict with a state order, the Court was seeking to avoid facing future cases with the necessity of determining a difficult factual question — whether a non-existent but demanded contract provision would or could be used in a manner inconsistent with state agency action. Furthermore, had the Court acknowledged a conflict and found the bargaining demand unlawful, it would have been faced with the alternative of creating a further judicial exception to the plain terms of Norris-LaGuardia, or of holding that the federal courts were powerless to restrain a union from the unlawful use of its federally-granted bargaining powers.[18] By waiting to find conflict at a stage where the Court must decide whether to enforce a collective bargaining agreement, the Court will have avoided the specific Norris-LaGuardia prohibition of injunction of strikes. If the enjoining of the execution of the contracts is required, the Court then will need to create an exception only to the procedural requirements of Norris. This would be a less difficult course of action in view of several precedents ignoring these requirements.[19]

While the avoidance of these problems may have motivated the "no conflict" finding in the principal case, the finding will raise a number of other problems in the future. Collective bargaining in the industry may not be facilitated because the parties are given no indication of what their rights will be when the union attempts to enforce a contract which conflicts with a state order. Nevertheless, the holding does represent a considerable tactical victory for the unions, for now a union can make it abundantly clear that it will strike in *de facto* opposition to a state order, and the railroad will not be entitled to judicial relief.[20] In view of the fact that the rail unions today are shrinking in membership and desperately fear loss of

[18] If such a holding had been made, however, there would have presumably been no federal constitutional obstacle to the state courts' using their equity powers to enjoin strikes in order to effectuate state agency orders. See note 20 *infra*.

[19] The discrimination cases ignored the procedural requirement and enjoined the execution of contracts. See note 8 *supra*. The procedural requirements have likewise been ignored in enforcing contracts to arbitrate differences. Textile Worker's Union v. Lincoln Mills, 353 U.S. 448 (1957). The same result was reached in Virginian Ry. Co. v. System Federation No. 40, Ry. Employees, 300 U.S. 515 (1937), enforcing the duty to bargain. Further, in the context of enforcement of a collective bargaining agreement the *Chicago River* case may well apply to allow an injunction forcing arbitration, since the controversy arguably will grow out of the interpretation or application of a collective bargaining agreement.

[20] Congressional legislation under the commerce clause of the federal constitution pre-empts state court authority to interfere with a rail union's lawful exercise of its bargaining powers under the Railway Labor Act. California v. Taylor, 353 U.S. 553 (1957); Railway Employees' Dep't v. Hanson, 351 U.S. 225 (1956).

jobs,[21] there will be few of their leaders who can afford not to go all the way in resisting state orders to abandon services. Add to this the fact that a prolonged strike today would toll the death knell of a number of the nation's railroads,[22] and it is apparent that the railroads will now experience even greater difficulties in abandoning uneconomic services. The finding also leaves state regulatory agencies uncertain as to their powers vis-à-vis union bargaining rights, and will therefore not improve the state regulation of railroads. Finally, the finding will prove troublesome in the context of Interstate Commerce Commission regulatory orders. The Commission has broad powers to determine the disposition of employees when authorizing mergers and abandonments of lines of track.[23] If the rationale of the principal case is followed, a union dissatisfied with such a disposition of employees will be able to strike for an agreement that an authorized merger or abandonment not be made without its consent, and there will be "no conflict" between the union demand and the order.[24]

Apart from a consideration of the "no conflict" finding, the decision also may have important implications with regard to the scope of the subjects about which management is legally obligated to bargain under the National Labor Relations Act. Section 8 (d) of the NLRA defines the duty of unions and employers to bargain on "wages, hours and other terms and conditions of employment."[25] In *NLRB v. Wooster Division of Borg-Warner Corp.*,[26] bargaining demands were categorized as "mandatory" or "permissive." A demand is mandatory only if its subject matter falls within the scope of section 8 (d). It was held that each party has an obligation to bargain in good faith on mandatory demands, but that a party who insists on agreement on a permissive demand, to the extent that negotiations on a mandatory subject reach an impasse, commits an unfair labor practice. Borrowing from these ideas, the court of appeals in the principal case theorized that demands falling outside the scope of section 2, First,[27] of the Railway Labor Act were not mandatory subjects of bargaining, and

[21] Time, Oct. 17, 1960, p. 104.

[22] *E.g.*, the plight of the New York, N.H. & H.R.R. was reported on June 27, 1960: Losses over the last three years have totaled $17.4 million and are expected to reach $23 million by the end of 1960. According to its president, the railroad was then juggling every bit of available cash to stay in a currently solvent position, and the president expected insolvency within 12 months if help in the form of lower taxes and subsidies was not forthcoming. The statement was made in connection with an ICC investigation of the particular railroad's troubles. Wall Street Journal, June 27, 1960, p. 1, col. 4.

[23] 54 Stat. 905 (1940), 49 U.S.C. § 5 (2) (f) (1958); ICC v. Railway Labor Executives Ass'n, 315 U.S. 373 (1942).

[24] Rail unions are now making strong efforts in the courts to block ICC-approved mergers until job security is guaranteed. Time, Oct. 17, 1960, p. 104.

[25] 49 Stat. 449 (1935), as amended by 61 Stat. 136 (1947), 29 U.S.C. § 158 (d) (1958).

[26] 356 U.S. 342 (1958).

[27] This section requires employers and unions to bargain on rates of pay, rules, and working conditions. 48 Stat. 1187 (1934), 45 U.S.C. § 152, First (1958). The duty is enforceable by order of a federal court. Virginian Ry. v. System Federation No. 40, Ry. Employees, *supra* note 19.

therefore that a strike in support of such demand would be unlawful and could be enjoined.[28] Since the Supreme Court did find the demand within the scope of section 2, First,[29] and made no mention of the mandatory-permissive concept, there is no basis for inferring that a *Borg-Warner*-type doctrine has been applied to the Railway Labor Act. However, in finding that the union's demand was within the scope of section 2, First, the Court at least made it certain that henceforth employers subject to the Railway Labor Act have a duty to bargain in good faith over demands that no jobs be abolished without union consent despite objections that such demands invade what was considered to be a traditional area of exclusive managerial prerogative. In justifying this finding the Court emphasized that Congress requires the ICC to include in orders approving railroad consolidations conditions which insure that for a certain term the consolidation will not worsen the position of the employees with respect to employment, and also that Congress authorizes the ICC to include conditions protecting employees in authorizations of abandonment.[30] This emphasis suggests that employers subject to the NLRA will not have a duty to bargain over similar demands until there is comparable federal legislation to protect employees against displacement in this area. But the Court also emphasized that in the past unions and railroad employers had bargained over displacement benefits.[31] Thus it may be that a history of bargaining over displacement of workers will alone be enough to support a holding that an employer subject to the NLRA has a duty to bargain in good faith over a demand that no jobs be eliminated without union consent.

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[28] Chicago & No.W. Ry. v. Order of R.R. Telegraphers, 264 F.2d 254 (7th Cir. 1959). The court of appeals suggested both that a dispute over a permissive issue is per se not within the Norris-LaGuardia definition of a labor dispute, and that a strike in support of a demand on a permissive subject is unlawful and falls within the *Chicago River* exception to Norris-LaGuardia.

[29] Principal case at 339.

[30] Principal case at 337, 338.

[31] *Ibid.*