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Daniel P. Sullivan

UNIONIZED PUBLIC EMPLOYEES: AN ARGUMENT FOR INCLUSION UNDER THE LANDRUM-GRIFFIN ACT

DANIEL P. SULLIVAN*

INTRODUCTION

In 1959, after extensive investigations of the labor and management fields, the Congress of the United States discovered numerous instances of corruption, breaches of trust and disregard of the individual rights of a significant portion of the national labor force.[1] These investigations revealed continuing failures to observe high standards of responsibility and ethical conduct. Supplementary legislation was required to insure the necessary protection of the rights and interests of employees and also the public in general as its interests are affected by the activities of labor organizations, employers, labor relations consultants and their officers and representatives.[2] Congress, therefore, adopted the Landrum-Griffin Act in order to eliminate and prevent further improper practices on the part of those factions of organized labor which had distorted and defeated the policies of the Taft-Hartley and the Railway Labor Acts resulting in the obstruction and interruption of commerce by:

> 1) impairing the efficiency, safety, or operation of the instrumentalities of commerce; 2) occurring in the current of commerce; 3) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods into or from the channels of commerce, or the prices of such materials or goods in commerce; or 4) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing into or from the channels of commerce.[3]

In order to promote the welfare of national commerce and union democracy, Congress, as a matter of public interest and responsibility, included a "bill of rights" for the members of labor organizations in the

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* Editor, Bobbs-Merrill Publishing Company.

1. In 1959 there were 17,117,000 union members in a national work force of 70,921,000. Thus, the union members made up 24.1 percent of the work force. BNA, *Union Membership Increases 1.1 Million Since 1964; A.F.G.E. Reports 44.1 Percent Boost; A.F.S.C.M.E. 19.8 Percent*, 209 GOV'T EMPLOYEE RELATIONS RPTS. C-1, Sept. 11, 1967.

2. Labor-Management Reporting and Disclosure Act of 1959 § 2, 29 U.S.C. § 401(b) (1965).

3. *Id.* at § 401(c).

Landrum-Griffin Act.[4] Thus, labor organizations, their officers and employees and employers were required to file reports such as annual financial reports indicating their compliance with their respective obligations under the Act.[5] The Act established trusteeships which could be used to terminate unlawful acts of a union local's executive board[6] and provided rules governing election procedures, including standards of conduct for labor elections.[7] Safeguards were also imposed for the benefit of labor organization members by articulating the fiduciary responsibilities of labor organizations and their officers.[8]

There seems to be some question, however, as to whether governmental employees[9] come within the Act[10] even though potential injury may be present. Several reasons were suggested for excluding governmental employees from the Act. First, they would be victimized by an inequitable statutory arrangement whereby such employees would be subject to federal regulations and controls without being extended the benefits and rights enjoyed by other types of labor organizations under federal law such as the right to organize and bargain collectively.[11] Secondly, and even more important than the elimination of an unjusti-

4. *Id.* at § 411-15. This was not the first effort to pass this type of legislation. The Trade Unions Funds Protection Act of 1869 entitled "An Act to protect the funds of trade unions from embezzlement and misappropriation" was passed as a result of the decisions in *Hornly v. Close*, L.R. 2 Q.B. 153 (1867) and *Farrer v. Close*, L.R. 4 Q.B. 602 (1869), which held that a trade union unlawfully restraining trade could not avail itself of the provisions of the Friendly Societies Act § 24 (1855) to prosecute union officials for fraud. The 1869 Act reversed both decisions by providing that associations whose rules might operate in restraint of trade should not be deemed, for the purposes of the Friendly Societies Act, to be societies established for illegal purposes. CITRINE, TRADE UNION LAW 225 (1967). This function is currently filled by the Trade Union Act of 1871, 34 & 35 Vict., c. 31, §§ 1-24, *as amended,* Trade Union Act of 1964. The Act "apparently applies to public employees since the Ministers of Labour have considered *all* employed persons to be under it." CITRINE, TRADE UNION LAW 403 (1967).

5. Labor-Management Reporting and Disclosure Act of 1959 § 201, 29 U.S.C. §§ 431-40 (1964). Legislation of this nature is by no means new.

6. *Id.* at §§ 461-66.

7. *Id.* at §§ 481-83.

8. *Id.* at § 501.

9. A substantial number of AFL-CIO, Teamsters and United Auto Workers are governmental employees. For example, the American Federation of State, County and Municipal Employees (A.F.S.C.M.E.) is affiliated with the AFL-CIO, and recently a Michigan road commission was ordered to bargain with a Teamsters local. BNA, *Michigan Board Orders Sanilac County Road Commission to Bargain with Teamsters,* 188 GOV'T EMPLOYEE RELATIONS REP. B-1 (April 1967).

10. *See* notes 20-33 *infra* and accompanying text. It can be argued that they should be included because of the broadening scope of recently enacted labor laws which have included public employees, their indirect inclusion in practice and the difficulty in regulating Landrum-Griffin type conduct apart from the Act.

11. DIVISION OF LAW, OFFICE OF GENERAL COUNSEL, LEGISLATIVE HISTORY OF LABOR MANAGEMENT REPORTING AND DISCLOSURE ACT 1959 483-84 (1959); *Cf.* Sullivan, *How Can the Problem of the Public Employee Strike Be Resolved?,* 19 OKLA. L. REV. 365 (1966).

fiable inequity, is the need for vindicating a fundamental principle of a healthy democratic society—the existence and continued development of genuinely voluntary social organizations, not dependent on government and free from governmental regulation. Government employee labor unions meet every definitional test of a *genuinely voluntary,* private association. They have absolutely no power, statutory, economic or otherwise, to compel anyone to join or remain members of their association. They are completely dependent upon the voluntary support of their members for continued existence and in turn must justify such support by continuing to serve their members. Any misconduct, dereliction of duty or corruption is discouraged by assuring each member the right to withdraw from the organization, thus cutting off the organization's only source of revenue. As a result, it is practically impossible for corruption, racketeering and gangsterism to gain a foothold within the organization.[12] After the investigations of 1959, Congress failed to discover a single instance in which the above evils existed in a governmental employee's union and were reliably informed that a government union had never imposed a trusteeship over a local.[13] Since 1959, however, trusteeships have been imposed on local unions,[14] a development that reaffirms the maxim that legislation, no matter how comprehensive, cannot anticipate all of the future changes which may occur in a relationship.[15] Furthermore, public employee unions at the state and local levels now enjoy substantial collective bargaining rights,[16] and federal employees enjoy certain privileges which are implemented on a voluntary basis.[17] The purpose of this article is to evaluate the possible application of the Landrum-Griffin Act to government employees in light of labor developments that have occurred in the past decade.

APPLICABILITY OF LANDRUM-GRIFFIN TO PUBLIC EMPLOYEES

Direct Inclusion

The United States Government, including any corporation wholly owned by the Government, and any state or political subdivision, is

12. *Id.*
13. *Id.*
14. An example of this occurred recently in Georgia where a trusteeship was required for the DeKalb Education Association. NAT'L EDUC. ASS'N REP., Oct. 25, 1968, at 1.
15. One need only glance at the present definition of what is included under the "commerce clause" of the United States Constitution for authority for this statement.
16. *See* Sullivan, *supra* note 11; Sullivan, *The Supreme Court and Public Employee Collective Bargaining,* 35 TENN. L. REV. 452 (1968).
17. Executive Order No. 10988, 3 C.F.R. 521 (1959-63 Comp.), 5 U.S.C. § 631 (Supp. V, 1964).

excluded from the definition of "employer" in the Landrum-Griffin Act.[18] The Act does not exclude states or political subdivisions which wholly own corporations. They may be excluded, however, merely by the fact that they are owned by the state or its political subdivision. Because this article will cover all government operations, no specific discussion will cover this peculiar statutory omission.

The government is generally regarded as not being covered by an act whether that act specifically excludes or includes the government.[19] Therefore, the fact that the government was not specifically excluded under the Railway Labor Act apparently made no difference to the United States Supreme Court which construed the Act as excluding government employees.[20] In litigation involving a state owned railroad,[21] the Court held that the railroad was covered by the Act. The Court ruled that it was necessary to bring this relationship within the regulatory scheme of the Railway Labor Act in order to prevent labor disputes which would incapacitate the railroad; uniformity of regulation was vital. The underlying policy, the regulation of labor disputes, does not significantly differ from the reasons for including the employees of other branches of government. In the latter situation, however, the labor disputes are of a more serious nature because they involve the dissemination of union funds by illegal acts. This has the effect of destroying employee morale which may result in a substandard work performance for the employer. The disruptive effect of low morale among employees is substantially more significant in public service than in the private sector since the effectiveness of state services is essential to society.

The Government, at all levels, was excluded under the National Labor Relations Act.[22] Government exclusion remained unquestioned some time after the adoption of the Act;[23] however, in *NLRB v. Local 313, IBEW*[24] a county was included within the coverage of the Act under the term "person" and not "employer." The decision, which

18. Labor-Management Reporting and Disclosure Act of 1959 § 3, 29 U.S.C. § 402(e) (1965).

19. Miami Waterworks v. Miami, 157 Fla. 445, 26 So. 2d 194 (1946).

20. This was precisely the point in *California v. Taylor,* 353 U.S. 553 (1957). The court made an exception to the rule in this case.

21. *Id.*

22. Labor-Management Relations Act (Taft-Hartley Act) § 2, 29 U.S.C. § 152(2) (1965).

23. *E.g.,* Victor M. Sprys, 104 N.L.R.B. 1128 (1953).

24. NLRB v. Local 313, IBEW, 254 F.2d 221 (3d Cir. 1958). Such an inclusion finds legislative approval in a large minority of states by general interpretive provisions similar to those of Colorado, which states, "the word 'person' may extend and be applied to body politics." SUTHERLAND, STATUTORY CONSTRUCTION § 6303 (3d ed. 1943).

reversed prior cases denying coverage,[25] was based upon recognized public policy although the court failed to articulate that policy. The court's rationale in ruling that the provision of the Act prohibits compulsory unionism is analogous to the prohibition of criminal acts within a union which could result in labor disputes that undermine employer-employee relationships to the point that public interest is adversely affected. While it appeared that Congress had excluded the Government, the court reasoned that the argument against extending statutory protection to the government employer was not persuasive where the underlying evil that the Act was intended to remedy was present. The Landrum-Griffin Act might be interpreted accordingly if the same evils were present and the overriding need for remedial action was sufficient.

The analogy seems clear, and the Supreme Court[26] and the Fourth Circuit Court of Appeals[27] have adopted this reasoning. In *Potts v. Hay*[28] the Arkansas Supreme Court held that public employees specifically excluded by a state labor act were still included within a provision of the state constitution granting employees the right to work regardless of whether or not they belonged to a union. The court held that a statute prohibiting the employment of union members as policemen was unconstitutional. Although public employees were not specifically mentioned, the court included them within the purview of the constitution's right to work provision. The issues of compulsory unionism and the right to work were considered so important that the court ignored the well-settled rule of statutory construction that a public employer is not included within an act or constitutional provision unless specifically mentioned.[29] The nature of the underlying social benefit was of such significance that the public employees were included within the protection of the provision. The right to work without the imposition of compulsory union membership seems of similar importance to the freedom to work without being burdened by the disabilities alleviated by the Landrum-Griffin Act. The analogy between the two situations indicates that public employees, while excluded in name from several labor acts, are in fact included because of the judicial recognition that the protection of their rights is as necessary as the protection of the nonpublic employee's rights. The courts are finding that the public employee's inclusion was, in fact, intended. An example of this recognition, although limited in nature, is the

25. *See generally* Note, *Labor: Counties Recognized as "Persons" Under Taft Act,* 10 HASTINGS L.J. 332 (1959).
26. California v. Taylor, 353 U.S. 553 (1957).
27. NLRB v. Local 313, IBEW, 254 F.2d 221 (3d Cir. 1958).
28. 318 S.W.2d 826 (Ark. Sup. Ct. 1958).
29. Miami Waterworks v. Miami, 157 Fla. 445, 26 So. 2d 194 (1946).

recent inclusion of certain classifications of public employees by an amendment to the Fair Labor Standards Act.[30] While the determination of public employees' wages is not significant for the purposes of this article, it does indicate Congressional approval of the statutory regulation of one aspect of the collective bargaining relationship. In addition, the wage schedules not only affect employees of the federal government, but those employed by the states as well.

Another question which arises and indicates the ambiguous nature of current labor legislation is whether an employee is an employee in fact or an independent contractor. In *NLRB v. Howard Johnson,*[31] the court held one party to be an independent contractor because he hired, fired and paid employees and hence could not be an employee himself. Similarly, it is not clear whether a party is an employer or a political subdivision. The Fourth Circuit[32] held that a party was an employer even though he was involved in a nonprofit business incorporated under the Electric Membership Corporation Act of North Carolina[33] and had obtained substantial loans from the Rural Electrification Administration. The ambiguous nature of the term "governmental unit" makes it extremely difficult to define. The combination of definitional ambiguities, court inclusion of employees based upon Congressional intent and the legislative inclusion of some public employees within the labor acts would seem to indicate a likelihood that those public employees suffering the disabilities that Congress intended to alleviate in the Landrum-Griffin Act might very well be covered by that Act.

Indirect Inclusion

While public employees have been specifically excluded from the terms of the Landrum-Griffin Act, there are a number of public employee unions whose ranks include nonpublic employees.[34] When the nonpublic

30. Fair Labor Standards Act of 1966 § 102, 29 U.S.C. § 203(d) (Supp. 1967). Prior to this amendment, section 204(d) excluded public employers, but the courts have included them in certain cases. In *Goldberg v. Nolla Galib & CIA,* 291 F.2d 371, 373 (P.R. Cir.), *cert. denied,* 368 U.S. 990 (1961), the court said, "[i]f employee's activities otherwise involve them in Interstate Commerce, this chapter applies to them even though the action is carried on by the government . . . ." Similarly, in *Wirtz v. R.E. Lee Elec. Co.,* 339 F.2d 686, 692 (4th Cir. 1964), the court said, "[i]f the instrumentality of facility is used for transportation, transmission or communication among the states, then it is an instrumentality of commerce within this chapter although entirely owned and operated by the federal government." This was followed in the Portal to Portal Pay Act § 90, 29 U.S.C. § 262 (1965), which states that an "employer when used in relation to F.L.S.A. in this act will mean the same thing as under F.L.S.A."

31. 317 F.2d 1 (3d Cir. 1963).

32. NLRB v. Randolf Elec. Membership Corp., 343 F.2d 60 (4th Cir. 1965).

33. N.C. GEN. STAT. § 117-6 (1964).

34. The membership of A.F.S.C.M.E. in Detroit, Michigan, includes employees of privately owned hospitals.

members are injured by the public employee union's illegal use of union funds, it would appear that they are protected by the Landrum-Griffin Act since the injured employee is employed by a party who is not excluded under the Act.[35] Because each nonpublic employee member has been injured through the misuse and commingling of dues and initiation fees with the fees of public employee union members, an investigation of the illegal acts necessarily includes an investigation of the public employee union for violations of the Act.[36] Although the illegal acts are committed against private sector employees, the effect of the investigation procedure, nevertheless, draws public employees under the provisions of the Act.[37] This procedure is presently being used by the Labor Management Reports Office of the Department of Labor.[38] Not only has the specific wording of the law been avoided, but the intended sanctions may be applied.

The need for this regulatory procedure in the public sector was pointed out recently when it became necessary to expel a union for engaging in alleged illegal activity.[39] A local police union had engaged in a work stoppage and the lawfulness of the union act was determined with finality by the International. While such conduct perhaps was not illegal, the International was allowed to terminate the accrued rights of the local without recourse under the Landrum-Griffin Act.[40]

In another case a teachers' association local was ordered to show cause why it should not be censured, suspended or expelled from the National Education Association.[41] The final determination of disciplinary action to be taken belonged exclusively to the National Education Association. Again, the protection of the accrued rights was not available to the employees under the Landrum-Griffin Act.

In both of these situations, however, recourse would have been available if any of the local membership had been nonpublic employees.

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35. This position is taken by the Office of Labor-Management Reports. Interview by phone with Louis H. Woiwode, Area Director of Office of Labor-Management Welfare and Pension Reports, Detroit, Michigan, Nov. 22, 1968. The same position is taken by the A.F.S.C.M.E.:

> This law (Landrum-Griffin) . . . is inapplicable to many of our local unions, but it does cover locals which have memberships in the private or non-profit sector, the councils with which they are affiliated, and the international union is covered by it. It provides, among other things, for certain standards to be maintained in safeguarding the rights of union members. . . .

A.F.S.C.M.E. DEPARTMENT OF EDUCATION AND RESEARCH, MEMORANDUM, Jan. 10, 1966.

36. *Id.*

37. *Id.*

38. *Id.*

39. PUBLIC EMPLOYEE, July, 1967, at 4.

40. *Id.*

41. NAT'L EDUC. ASS'N REP., July 19, 1968, at 8; NAT'L EDUC. ASS'N REP., Oct. 25, 1968, at 1.

While the rights affected were not as substantial as those which brought about the passage of the Act,[42] the absence of this type of control over a labor organization which has the benefit of initiation fees and dues allows union leaders to arbitrarily expel any member that might question the disbursement policies of the union.[43]

Public employee unions having nonpublic employee members are brought within the Landrum-Griffin Act because of their operational structure. Their activities are so interrelated that it becomes difficult to distinguish whose dues are spent on particular union functions. Since the same commingling takes place in private sector unions, they would have the duty to meet the requirements of the Act regarding members who are public employees.[44] Because the reporting requirements may also include this situation, the State of Michigan had five public employee unions reporting to the Office of Labor Management Reports under the Landrum-Griffin Act in 1964.[45] If such an interpretation of the Act is followed by the Office of Labor Management Reports and compliance occurs as a matter of practice, it would seem that the Act has become applicable to public employees. Even though the clear intent of the Act is to exclude public employers from the definition of the term "employer," it appears that the nonstatic purpose of the Act has been altered in practice.

Stevens and Embry—Judicial Inaction

In *Stevens v. Carey*,[46] a federal employee filed suit in a district court under the Landrum-Griffin Act. The plaintiff in this action was employed at Fort Benjamin Harrison, an Indiana facility operated by the Department of Defense. She was a member of the American Federation of Government Employees, a union representing certain employees at Fort Benjamin Harrison and was also a duly elected member of the executive committee of that union. The plaintiff had objected to certain proposed amendments to the union's constitution and shortly thereafter was removed from the executive committee and suspended from the union. A hearing was held which affirmed the removal and suspension. On appeal the plaintiff alleged that her right of free speech was denied, that the union constitution violated her procedural rights of due process and that the defendant union failed to maintain fiscal integrity in conducting the

42. DIVISION OF LAW, OFFICE OF GENERAL COUNSEL, *supra* note 11.
43. Embry v. Federation of State Employees, 64 L.R.R.M. 2335 (N.D. Ga. 1966).
44. *See* note 35 *supra*.
45. U.S. DEPT. OF LABOR, REGISTER OF REPORTING LABOR ORGANIZATIONS 137 (Jan. 1, 1964).
46. Civ. Action No. IP. 68-C. 453 (S.D. Ind. 1968).

affairs of the union. It is in this posture that the litigation stands at the time of this writing.[47]

Many of the previous arguments for granting the federal employee status under the Landrum-Griffin Act could be applied by the court in the *Steven's* case. But whether they are applied or not, there seems to be no question that the court will have to come to grips with the realities of the employment relationship when considering the apparent statutory exclusion of public employees. In this context, it is possible that the court may find public employees indirectly included within the provisions of the Act.

Part of Mrs. Steven's cause of action is based on "rights" granted by Executive Order 10988.[48] Such "rights," in all likelihood, may be considered illusory since the court may not be willing to cross lines it has refused to cross in the past. For example, one court has refused to enforce certain "rights" created under the Executive Order because enforcement would violate the separation of powers concept.[49] The judicial regulation of employees hired by the executive branch would result in the regulation of employment relationships within another governmental branch, a function the court did not want to perform. Hence, any discussion of the case will probably be centered around Landrum-Griffin rights and not those "rights" set forth in Executive Order 10988.

While this may not be the first suit filed by a public employee under the Landrum-Griffin Act,[50] it graphically raises the issues under discussion. To speculate whether the case will go any further than a motion for dismissal under the public employer exclusion[51] or whether the court will fully discuss the issues raised in this article would be mere conjecture on the part of this writer. It seems clear, however, that *Stevens* may provide a forum for further discussion and consideration of the applicability of the Act to the public employer-employee relationship. Unfortunately, no answer has been filed[52] to indicate what precise issues will be raised. It

47. The defendants filed an answer on Nov. 25, 1968, claiming that the court did not have jurisdiction since the plaintiff had not exhausted the available administrative remedies. Stevens v. Carey, Civ. Action File No. IP. 68-C-4 (S.D. Ind. 1968). The remainder of the text discussing this case is still applicable since the issues raised may still be litigated.

48. Executive Order No. 10988, 3 C.F.R. 521 (1959-63 Comp.), 5 U.S.C. § 631 (Supp. V, 1964).

49. BNA, *Court Affirms Ruling That Judiciary May Not Review Agency Applications of Executive Order 10988*, 267 GOV'T EMPLOYEE RELATIONS REP. A-1 (Oct. 21, 1968).

50. Embry v. Federation of State Employees, 64 L.R.R.M. 2335 (N.D. Ga. 1966).

51. Labor-Management Reporting and Disclosure Act of 1959 § 3, 29 U.S.C. § 402(e) (1964).

52. Letter from Irving L. Fink, Plaintiff's Counsel to Daniel P. Sullivan, Nov. 7, 1968.

seems clear from the pleadings, however, that the court will have a broad spectrum of issues with which to extend the law. If a motion to dismiss without further pleadings is summarily granted by the court, the question, for all intents and purposes, will remain unanswered since a motion to dismiss is not conclusive as to all issues which *might* have been raised. Therefore, the court may dismiss the case either because a public employee has no cause of action and Executive Order 10988 is not controlling, or the Bill of Rights section of the Landrum-Griffin Act is inapplicable. While either might well be the conclusion of the court, without amendment, any valid issues raised in the pleadings will remain dormant.

In 1966, a similar case answered one of the issues raised in *Stevens*. In *Embry v. Federation of State Employees,*[53] the plaintiff, a member and officer of a public employee union, was charged with misconduct. At a hearing on these charges he was found guilty not only of misconduct but also of violations of the union's constitution. He was then dismissed and suspended.[54] The plaintiff alleged that the dismissal and suspension violated his rights under the Landrum-Griffin Act.[55] The defendant moved to dismiss, contending that the court lacked jurisdiction because of the public employer exclusion in the Act. Plaintiff replied by alleging that since a portion of the union membership consisted of private sector employees, the Landrum-Griffin Act should be applicable to the union.[56] The court held[57] that the section of the Landrum-Griffin Act dealing with the procedure that must be followed when a union member is suspended applies only to members of labor organizations included in the Act. Since labor organizations are covered only when they deal with nonpublic employers, the motion to dismiss was granted. In dismissing the action, the court also rejected the corollary argument that if a public employee union also contains private sector employees, the Act should be applicable. Appellate proceedings in the Fifth Circuit Court were withdrawn after the district court's decision,[58] and the plaintiff subsequently filed a libel action against the union for its charges of misconduct in the original action.[59]

53. 64 L.R.R.M. 2335 (N.D. Ga. 1966).

54. Brief for the Appellant for the Judicial Panel of the Union, Embry v. Federation of State Employees, 64 L.R.R.M. 2335 (N.D. Ga. 1966).

55. Brief for Plaintiff, Embry v. Federation of State Employees, 64 L.R.R.M. 2335 (N.D. Ga. 1966).

56. Plaintiff's Brief on Motion to Dismiss, Embry v. Federation of State Employees, 64 L.R.R.M. 2335 (N.D. Ga. 1966). *See also* A.F.S.C.M.E. DEPARTMENT OF EDUCATION AND RESEARCH, *supra* note 35.

57. Embry v. Federation of State Employees, 64 L.R.R.M. 2335 (N.D. Ga. 1966). *See* note 102 *infra.*

58. Interview by phone with Howard Moore, Jr., Plaintiff's Counsel, Nov. 29, 1968.

59. Embry v. Federation of State Employees, Civ. Action No. B.23260 (Super. Ct., Fulton Cty., Ga., Sept. 13, 1966). Interview by phone with Howard Moore, Jr., Plain-

At first it seems that *Stevens* and *Embry* might well lay the inclusion argument to rest. Since the dismissal in *Embry* merely dealt with the employer exclusion, however, the possibility of extending the interpretation of the term "employer" still exists. In addition, since the apparent trend is toward including public employee unions which have private sector employees within the Landrum-Griffin Act, the *Embry* decision presents a conflict between the practice of the Labor Department and the decisions of the United States district courts. The conflict necessitates further clarification and may provide a basis for future adoption of the inclusion argument. The *Stevens* case may present the opportunity for clarification if it proceeds beyond a motion to dismiss.

Adequacy of Existing Remedies

An argument could be made that existing law, in certain regards, is adequate to cope with the issue under consideration. Therefore, a private union member may bring a mandamus action to force union officials to produce their records without the aid of the Landrum-Griffin Act.[60] In *Mooney v. Bartender's Union*,[61] the court analogized that since stockholders had a right to inspect company books, a similar right should be accorded union members. The court reasoned that although unions primarily benefit their membership, they also have a considerable impact on the public, and the welfare of both would be promoted by recognizing a right of inspection.

The right of inspection is provided by statute in a dozen states.[62] Some states allow the members to inspect the union financial records at will,[63] while others require the union to present each member with a report of the financial activities of the union.[64] A few states require the union to file a financial report with the office of the State Department of Labor[65] or

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tiff's Counsel, Dec. 5, 1968. *U.S. v. Haverlick*, 195 F. Supp. 331 (N.D.N.Y. 1961), *aff'd*, 311 F.2d 229 (2d Cir. 1962), was the first cause of action under the Landrum-Griffin Act not precluding a libel action.

60. Mooney v. Bartender's Union, 302 P.2d 866, *vacated*, 313 P.2d 857 (1957).

61. *Id.*

62. ALA. CODE tit. 26, § 382 (1958); CONN. GEN. STAT. ANN. § 31-77 (Supp. 1969); FLA. STAT. ANN. § 477.07 (1966); HAWAII REV. LAWS § 90-11 (1955); KAN. STAT. ANN. § 44-806 (1964); MASS. ANN. LAWS ch. 146 § 7 (1967); MINN. STAT. ANN. § 179.21 (1966); N.Y. LABOR LAW §§ 720-32 (McKinney 1965); ORE. REV. STAT. § 661.040 (1967-68); CCH, STATE LAWS, S.C. 41,550, 42,060 (1966); S.D. CODE § 17.1105 (Supp. 1960); TEX. REV. CIV. STAT. ANN. art. 5154a(3) (1962); WIS. STAT. ANN. § 111.08 (1957); Smith, *Select Aspects of the Wisconsin Empolyment Peace Act*, 45 MARQ. L. REV. 338, 356-57 (1961-62). Statutes of this type have been upheld by the states. AFL v. Mann, 188 S.W.2d 276 (Tex. Civ. App. 1945); State Fed'n of Labor v. McAdary, 246 Ala. 1, 18 So. 2d 810 (1944).

63. *See, e.g.*, ORE. REV. STAT. § 661.040 (1967-68).

64. *See, e.g.*, MINN. STAT. ANN. § 179.21 (1966).

65. ALA. CODE tit. 26, § 382 (1958).

the Secretary of Labor.[66]

This type of reporting is generally required of private sector unions; however, some statutes that were enacted to control the financial activities of private sector unions have also been employed to control these activities in public employee unions.[67] The Massachusetts State Department of Labor,[68] as a matter of practice, requires that a financial statement be filed[69] while New York does not, although both private and public sector labor organizations are covered by the New York statute.[70] The New York act is divided into seven principal parts which include sections dealing with: 1) the fiduciary obligations of officers and agents of unions;[71] 2) specific prohibited financial interests and transactions;[72] 3) obligations of employers and others;[73] 4) enforcement of fiduciary obligations;[74] 5) financial reporting;[75] 6) accounting requirements;[76] and 7) enforcement of financial reporting and accounting duties.[77] The act was adopted because experience had demonstrated that officers and agents of some labor organizations abused their positions of fiduciary responsibility. Experience had also shown that the efforts of labor to correct abuses from within needed the aid and supplementation of legislation.[78]

Because public employers must operate under debt limitations and account for their appropriations, they are not included within the requirements of the New York act.[79] This limitation is significant; however, union regulation is the principal goal of this type of legislation and therefore the limitation is not crucial to the regulatory scheme. A

66. S.D. CODE § 17.1105 (Supp. 1960).

67. This is accomplished by defining a labor organization in the Act as:

> . . . any organization of any kind which exists for the purpose, in whole or in part, or representing employees employed within the state of New York in dealing with employers or employer organizations or with a state government, or any political or civil subdivision or any agency thereof, concerning terms and conditions of employment. . . ."

N.Y. LABOR LAW § 721(2) (McKinney 1965). An excellent summary of the effect of this Act is contained in N.Y. DEPT. OF LABOR, 9TH ANNUAL REPORT OF THE ADVISORY COUNCIL ON THE LABOR AND MANAGEMENT IMPROPER PRACTICES ACT 1-10 (1968).

68. MASS. ANN. LAWS ch. 146 § 7 (1967).

69. Interview by phone with Thomas M. Raftery, Director of the Office of Business Statistics, Massachusetts Department of Labor, Nov. 27, 1968.

70. N.Y. LABOR LAW § 721 (McKinney 1965).

71. *Id.* at § 722.

72. *Id.* at § 723.

73. *Id.* at § 724.

74. *Id.* at § 725.

75. *Id.* at § 726.

76. *Id.* at § 727.

77. *Id.* at § 728.

78. *Id.* at § 720.

79. Interview by phone with R. Gray, N.Y. Deputy Industrial Commissioner for Legal Affairs, Nov. 27, 1968.

distinction does indeed exist within the relationship of private and public sector employees, yet both experience the same difficulties where union finances are concerned.

In addition to the statutes already mentioned, it can be argued that existing laws are adequate as they pertain to the public sector. In 1967, at the Red River Army Depot in Texarkana, Texas, a fraudulent petition for the exclusive recognition of a union was submitted to a public employer.[80] The president of the local independent union representing some employees at the depot submitted the petition to the personnel office, allegedly containing the required number of names for exclusive recognition of a wage board unit. The fraudulent nature of the petition was apparent on initial review because several names were entered in the same handwriting and there were obvious misspellings of familiar names. The employee refused to acknowledge these discrepancies although additional investigations verified the initial finding that the petition was not valid. As a result of charges filed in a district court,[81] the employee was found guilty of violating the federal law prohibiting intentional falsification of a material fact in any matter within the jurisdiction of any department or agency of the United States.[82] The defendant was found guilty of the charge and was fined $100. He also received a six-month suspended sentence and was placed on active probation for one year. Forthcoming administrative action could subject the defendant to admonition or removal from the federal service.[83]

Federal law prescribes a dues checkoff right[84] for federal government employees whereby money is taken from the employees' pay and transferred to the union. The entire financial structure of the union is dependent upon these dues. On the authority of the case cited,[85] it seems

80. BNA, *False Union Petition Results in Criminal Conviction for Army Employee*, 238 GOV'T EMPLOYEE RELATIONS REP. A-6, 7 (April 1, 1968).

81. *Id.*

82. It was claimed that the employee violated 18 U.S.C. § 1001 (1965). The statute states:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Id.

83. BNA, *supra* note 80.

84. The "right" to dues checkoff was created by Executive Order 10988, 3 C.F.R. 521 (1959-63 Comp.), 5 U.S.C. § 631 (Supp. V, 1964). There is some doubt, however, whether this "right" is enforceable in court. BNA, *Court Affirms Ruling that Judiciary May Not Review Agency Applications of Executive Order 10988*, 267 GOV'T EMPLOYEES RELATIONS REP. A-1 (Oct. 21, 1968).

85. BNA, *supra* note 80.

clear that any pilfering or mismanagement of union funds would fall within the prohibition of title 18 section 1001[86] since a party engaging in these activities would be willfully concealing the manner in which union funds are disbursed.[87] It seems clear that section 1001 provides federal employees with some protection from the unlawful actions of a union official regarding monetary matters. One striking limitation regarding the applicability of this section, however, is that it does not require the union to file reports as does the Landrum-Griffin Act. This makes the discovery of illegal union activity significantly more difficult.

Section 1001 may also be applicable where an employee is entitled to union membership under Executive Order 10988 and he is *wrongfully* dismissed from the union. It would seem that the union officials dismissing the member would have willfully concealed a material fact in a matter within the jurisdiction of a department of the United States Government.[88] The fact that Executive Order 10988 requires a department to consult with the union would put the matter within a department's jurisdiction because of its power to control its employees' relations. In this manner section 1001 could be interpreted, as it already has been to a certain degree, to preclude all forms of illegal acts perpetrated by a union, union member or government official in a collective bargaining relationship. This argument may provide the courts with a method to expand an extremely limited provision to include the present confines of the Landrum-Griffin Act, at least for criminal prosecutions. Its extension to include the reporting requirements would be impractical since successful prosecution would be difficult without the daily information appearing in the reports.

While section 1001 has the potential for regulating the membership-union relationship, it would seem unnecessary to expand the provision in light of the procedure which has already been provided by the Landrum-Griffin Act. Of course, the courts may conclude that the application of the Landrum-Griffin Act to the regulation of public employee unions is more desirable than an expansion of section 1001. An additional limitation of section 1001 is that it does not provide a corresponding civil action,[89] a remedy available under the Landrum-Griffin Act. A civil action in tort based upon a statutory violation, however, may be available under section 1001, but the present forms of action may prevent the inclusion of such

86. 18 U.S.C. § 1001 (1965).
87. *Id.*
88. *Id.*
89. *Id.*

conduct.[90] Furthermore, an action directed at the government would not be successful since the government has not granted its permission to be sued under section 1001. The Landrum-Griffin Act would also be subject to the latter limitation if public employees are included within its coverage; however, its usefulness will not be fatally limited since the principal thrust of the Act is toward intra-union activity as opposed to a conspiracy between unions and employers against employees or illegal acts perpetrated primarily by the employer.

A second example of existing law that has adequately coped with the issue under consideration involves a Texas transit union. In *Transit Union v. Public Transportation Board*,[91] a private sector employer, the owner of a transit system, had a collective bargaining agreement with the union representing his employees. The agreement included a provision establishing a pension fund financed by both employer and employee contributions. A bank was made the trustee of the fund; however, the administrative duties of the trust were performed by a committee consisting of two management representatives and two union representatives. Unresolved decisions within the committee were referred to binding arbitration. In 1963, the City of Dallas, pursuant to a city ordinance, bought the transit company but refused to recognize the union under the pension plan. Thus, the trustee-bank was unable to ascertain its duties as trustee and sought a declaratory judgment naming the *company* and the *union* as defendants. The court held that since a public employer could neither bargain collectively with a public employee union nor enter into an agreement with such a union, the instrument creating the fund was of no effect. The court went on to say, however, that it would be improper to allow the public employer to have exclusive control over the administration of the trust contrary to the bilateral nature of the fund when it was created. The court resolved the conflict by exercising its equity power of deviation in dealing with trust instruments and ruled that if the public employee union would refrain from striking, it could jointly administer the pension fund with the public employer, if approved by the employees.

The use of trusts is a common method of controlling union funds. It seems clear that whenever the misuse of a trust fund occurs, such misuse may be challenged by seeking a declaratory judgment as was done in the *Transit Union* case. Not only does the *Transit Union* decision

90. An excellent discussion of the difficulties which may be encountered is contained in *Jamur Prod. Corp. v. Quill*, 51 Misc.2d 501, 273 N.Y.S.2d 348 (Sup. Ct. 1966). The decision provides a discussion of whether private citizens have an action in tort for damages resulting from a strike by public employees. The court held that no cause of action existed.

91. 69 L.R.R.M. 2177 (Tex. Civ. App. 1968).

indicate that the declaratory judgment is an appropriate remedy to regulate the issue under discussion, but it is an illustration of how underlying public policy forms the basis for such regulation. The court, in balancing interests, held that the fair and reasonable control of the pension fund was more important than the enforcement of a clearly drawn statute prohibiting such an agreement. The equity powers of the court are apparently broad enough to protect public employee union funds regardless of what legal theory is used and whether the attack is by a public employer of the union whose conduct gave rise to the Landrum-Griffin prohibitions. The broad protection afforded by the exercise of the court's equity powers under the general public policy argument might also be considered as limitless by other courts.

It seems clear that the law, even in the absence of the Landrum-Griffin Act, furnishes an arsenal of remedies with which to curtail the misuse of union monies. Under federal and state statutes and the common law, the misuse of funds can be curtailed in the public sector; however, on a large scale these methods are at best awkward. For example, requiring public employee unions to report under the Landrum-Griffin Act would avoid cumbersome criminal prosecutions required under federal law. In addition, since most of the public employee unions are affiliates of national labor organizations, a uniform reporting system would produce simplified union regulation because only one reporting system—the Landrum-Griffin method—would be in effect. Any state reporting procedure could produce fifty separate systems and result in the same difficulties encountered prior to the Landrum-Griffin Act—no single agency would be able to stay abreast of a union's financial dealings since the information would be located in fifty different places. Similarly, allowing this regulatory device to develop in equity rather than through legislative action would result in the creation of fifty jurisdictional interpretations, a result as undesirable as fifty separate reporting systems. The uniformity that the Landrum-Griffin Act would bring to union disclosure requirements would seem to provide the most pragmatic solution.

CONCLUSION

After a decade under the Landrum-Griffin Act it appears that this form of regulation is still necessary. Between 1961 and 1965 twenty-six people were jailed each year for violations of the Act.[92] Furthermore, approximately $463,000 were stolen from union related funds during the

92. *Hearings on S. 731 & H.R. 5883 before the Sen. Subcomm. on Labor & Pub. Welfare*, 89th Cong., 1st Sess., at 19 (1965).

same years.[93] This is not intended to imply that the Act has been unsuccessful; however, human frailties being what they are, persistence is necessary in discovering the proscribed conduct.

An additional reason for using this form of regulation and extending it to the public sector is the substantial increase in public employee union wealth. The increased wealth was created by extending the right to have union dues withheld by their employer and transferred to the union.[94] It has also been facilitated by granting public employers the power to enter into union security agreements.[95] Regulation is perhaps further justified since unwilling as well as willing employees must participate in the dues checkoff scheme in order to maintain their jobs. The extension of the Landrum-Griffin Act to the public sector would serve to deter those practices that the Act was originally designed to terminate.

The question of whether the Landrum-Griffin Act should be extended to include public employers is met with the presence of existing federal and state legislation and court decisions which presently, to a limited degree, regulate public employers and their employees in certain Landrum-Griffin type situations. Perhaps the principal agrument in favor of extending the Landrum-Griffin Act, however, is that compliance would furnish a common source for the data provided by the Act's reporting requirement. This is not the case under the non-Landrum-Griffin regulation of public employers and public employee unions since information is so broadly dispersed that neither regional nor national misuse of public employee union funds can be effectively detected. Because uniformity in reporting is required to make the system workable in the public sector, it would seem apparent that a Landrum-Griffin form of regulation would be more functional than the methods presently being used.

Although public employee unions are specifically excluded by the Act, this problem has been successfully resolved under the National Labor Relations Act,[96] the Railway Labor Act[97] and right to work laws.[98] In 1966 Congress amended the Fair Labor Standards Act to include some public employees[99] and removed the state and political subdivision exemptions with respect to employees of hospitals, institutions and schools.[100] Thus, Congress is beginning to recognize that labor legislation

93. *Id.*

94. Members of the Professional Construction Inspector's Association of Detroit were recently granted this right. JOURNAL OF COMMON COUNCIL OF DETROIT 673 (1967).

95. For example, agency shops are presently allowed in Detroit, Michigan. Joint Common Council Resolution 2025 (1968).

96. *See* notes 22-30 *supra* and accompanying text.

97. California v. Taylor, 353 U.S. 553 (1957).

98. Potts v. Hays, 318 S.W.2d 826 (Ark. Sup. Ct. 1958).

99. Fair Labor Standards Act of 1966 § 102, 29 U.S.C. § 203 (Supp. III, 1965-67).

100. *Id.* at § 203(d).

cannot be divided into public and private sectors. In addition, the close decisions involving the issue of whether workers are public or private employees have been resolved in favor of the employee's inclusion within labor legislation.[101] All of these situations[102] indicate a trend toward including public employees within labor legislation. This trend is further indicated by the treatment given by the Labor Management Office of Reports to public employee unions, whose membership includes private sector employees, that have misused union funds. Of course, the significance of this trend must be balanced against the *Embry* decision; however, since the Labor Management Office of Reports has continued to apply the Landrum-Griffin Act to public employee unions with private sector employees and since the *Embry* decision did not specifically mention this contention, although it was made, it can be maintained that the argument is still viable. It is also suggested that the other reasons which support the inclusion of public employee unions within the Act are not impugned by *Embry* since they were not raised or rejected by the court. *Stevens,* of course, could serve to clarify this entire area of the law.

Finally, the legislative history of the Landrum-Griffin Act indicates that public employees were excluded because they lacked the mutuality present in the private sector—the right to bargain collectively and enter into collective bargaining agreements. The public employee collective bargaining relationship is growing numerically[103] and financially[104] with increasing support coming from the legislatures, the courts and at all levels of government.[105] When the reason for the rule is no longer valid,

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101. *See, e.g.,* NLRB v. Howard Johnson, 317 F.2d 1 (3d Cir. 1963).

102. Since some doubt has been raised as to the scope of the application of the Landrum-Griffin Act, a familiar rule of statutory construction would apply:

> A doubtful application of a statute will be controlled by the express language of one or several other statutes which are wholly unrelated, but apply to similar persons, things, or relationships. . . .

SUTHERLAND, STATUTORY CONSTRUCTION § 6102 (3d ed. 1943).

103. Over one million public employees are union members. Anderson, *Labor Relations in Public Service,* 1961 WIS. L. REV. 601.

104. An indication of the rapid financial growth of such groups can be clearly demonstrated. Prior to the enactment of the Michigan Public Employee Labor Law in 1965, approximately $10,000 a year went to the union's coffers in Detroit through dues checkoff. After the law was enacted, this figure increased to approximately $910,000 for the fiscal year ending June 30, 1967, and to approximately $1,025,000 for the fiscal year ending June 30, 1968. Interview with F. Demare, Deputy Controller of Detroit, in Detroit, Michigan, Nov. 26, 1968. It should be noted that a substantial number of Detroit public employee union members do not make their payments through dues checkoff. *Id.* Thus, the sum which the unions in Detroit receive every year is substantially larger than the figures stated above. The Detroit growth rate exists in spite of the prohibition that wages may not be a mandatory subject of collective bargaining in Michigan, a distinct deterrent to rapid union financial growth. MICH. STAT. ANN. § 5.193(8) (1965 Supp.).

105. For a discussion of this growth see Sullivan, *supra* note 11. Similar support is also found in Canada and Australia. Sullivan, *Canada: 20 Years of Public Employee Collective Bargaining Experience—A Solution for the U.S.?* 10 N.H. BAR J. 144 (1968);

the rule itself should no longer be recognized. There seems to be no clearer application than the Landrum-Griffin public employer exclusion.

Sullivan, *Court Arbitration of Public Employee Labor Relations Disputes*, 10 N.H. BAR J. 84 (1968).