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Labor Law—Union Liability for Concerted Action Where There Is an Alternative Judicial Remedy

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Crystal Sugar Co., supra; Martino v. Michigan Window Cleaning Co., 327 U. S., 173 (1946); *Mabee v. White Plains Pub. Co.,* 327 U. S. 178 (1946); *Roland Electric Co. v. Walling,* 326 U. S. 657 (1946). *Contra: North American Co. v. Securities Exchange Commission,* 327 U. S. 686 (1946).

The *Federal Baseball case, supra,* was not followed in *Gardella v. Chandler,* 172 F. 2d 402 (2d Cir. 1949). The court distinguished present day baseball from that of 1922 and held it to be now within the scope of the antitrust statutes. Radio and television broadcasting of games were the principal grounds of distinction. The court compared the televising of games to a theatrical production in which the viewers, although in a different state from the source of the broadcast, are the spectators and the players the actors, together forming an indivisible unit.

Organized Baseball has grown considerably since the time of the *Federal Baseball Case.* Today players are more frequently shuttled back and forth across state lines to play games and to carry out their assignments in the extensive farm systems. In 1951 the 16 major league teams owned a total of 175 farm clubs scattered throughout the United States and Canada. World's Series receipts for the 4 games played in 1950 amounted to $1,928,669.03 of which $975,000.00 was derived from national radio and television broadcasting of the games. See Baseball Guide and Record Book 1951, pp. 130, 158.

It is submitted that Organized Baseball's present interstate features combined with its monopolistic practices are sufficient to bring it within the antitrust acts. Future exemptions from these statutes, if necessary to baseball's continued existence and the public interest, should be made by Congressional enactment and not by the courts.

Robert S. Gottesman

LABOR LAW—UNION LIABILITY FOR CONCERTED ACTION WHERE THERE IS AN ALTERNATIVE JUDICIAL REMEDY

The plaintiff employed a member of one of the defendant unions who had been fired and suspended for a violation of a union rule. When the plaintiff refused the local Building Trades Council's request that the employee be compelled to pay the fine or be discharged, the Council called the workers off the job and together with the other unions, picketed and boycotted to compel compliance with their demands. An added condition to the resumption of work was the payment of a sum of money to a charity as a penalty on the employer. The employer thereupon sued the Building Trades Council, the participating locals and their agents on two counts for damages arising out of the work stoppage. The Nevada court found for the plaintiff on both counts holding that (1) to compel payment

of a fine or penalty imposed upon an employer without his consent is an unjustified objective of concerted action and damages thus caused are actionable, (2) to compel payment of money due by a workman to the union is an unlawful objective of concerted action against his employer and damages arising therefrom are actionable. *Building Trades Council v. Thompson,* ———Nev.———, 234 P. 2d 581 (1951).

In finding for the plaintiff upon the second count the court relied upon *Dorchy v. Kansas,* 272 U. S. 306 (1926). In that case the propriety of a strike to collect a disputed claim for back pay on behalf of a former employee was in issue. The court determined that since an adequate judicial remedy was available to the claimant and collection by economic coercion deprived the employer of the right to have the matter litigated, the objective was an improper objective of concerted action.

The general rule as it has evolved through the cases in the turbulent history of the labor movement is:

> "Workers are privileged intentionally to cause harm to another by concerted action if the object and the means of their concerted action are proper; they are subject to liability to the other for harm so caused if either the object or the means of their concerted action is improper." Restatement, Torts, §775.

This section embodies the *prima facie* tort theory which was initially formulated by Judge Holmes in his dissenting opinion in *Vegelahn v. Guntner,* 167 Mass. 92, 104-109, 44 N. E. 1077, 1079-1083 (1896). The theory provides that all intentional harm is *prima facie* tortious unless it can be justified. Holmes contended that the economic self-interest of workers in their struggle served as a justification for the results of their concerted action in the same manner that capital is justified under the theory of free competition in committing intentional harm to business competitors to maximize profits. See *Mogul Steamship Co. Ltd. v. McGregor Gow & Co.* [1892] A. C. 25; *Beardsley v. Kilmer,* 236 N. Y. 80, 140 N. E. 203 (1923). Under the new approach which predicated liability upon a lack of privilege instead of upon an infringement of an employer's property rights, judicial attention was directly focused upon a revaluation of interests in the light of a more modern economic policy. See *Barile v. Fischer,* 197 Misc. 493, 94 N. Y. S. 2d 346 (Sup Ct. 1949); noted, 51 Col. L. Rev. 398 (1951).

In applying the *prima facie* tort doctrine the courts have weighed the legality of most objectives of concerted action without regard to the existence of an adequate judicial remedy. Thus a labor union is almost universally privileged to interfere with employers' rights to obtain an increase in wages or a reduction of working hours. *Reardon, Inc. v. Caton,* 189 App. Div. 501, 178 N .Y. Supp. 713 (2nd Dept. 1919). Labor's interest in maintaining union organization has also

been found privileged, but to a lesser extent. See *Smith Metropolitan Market Co. Ltd. v. Lyons,* 16 Cal. 2d 389, 106 P. 2d 414 (1940), but see *Opera on Tour, Inc. v. Weber,* 285 N. Y. 348, 34 N. E. 2d 349 (1941). There is disagreement concerning the permissibility of other labor ends such as the closed shop, see *Jensen v. Reno Central Trades & Labor Council,* ———Nev.———, 229 P. 2d 908 (1951); *St. Germain v. Bakery and Confectionery Union,* 97 Wash. 282, 166 Pac. 665 (1917); and minimum working force, see *Empire Theater v. Cloke,* 53 Mont. 183, 163 Pac. 107 (1917); *Haverhill Strand Theater v. Gillen,* 229 Mass. 413, 118 N. E. 671 (1918). There is almost unanimity among courts in finding certain objectives of concerted action illegal. The use of union power to continue the punishment of an expelled union member exceeded the limits of privilege in *Barile v. Fischer, supra,* and the collection of a pecuniary penalty from the employer, the subject of the first cause of action in the instant case, was held an unlawful objective in *Carew v. Rutherford,* 106 Mass. 1 (1870); see also 31 Am. Jur. §221; Restatement, Torts §792.

On the other hand the existence of a judicial remedy to the attainment of a labor objective has not uniformly operated to render it illegal under the *prima facie* tort doctrine. In *Spivak v. Wankofsky,* 155 Misc. 530, 278 N. Y. Supp. 562 (Sup. Ct. 1935) a strike to compel performance of a contract with a union was held lawful. See also Restatement, torts §789 which provides that compelling performance of an agreement, or of a duty imposed by law against an employer is a proper objective of concerted action. In *Cappy's Inc. v. Dorgan,* 313 Mass. 170, 46 N. E. 2d 538 (1943) an injunction against a strike to compel performance of a contract was denied even though the contract was entered into by the employer under the compulsion of an earlier strike whose objective was the collection of back pay from the employer.

However, where the objective of concerted action is the collection of money, either in the nature of back pay or a fine which a union member has consented to pay, it has been found to be unlawful because of the availability of a judicial remedy for its attainment. *See Dorchy v. Kansas, supra, and the principal case.*

One can conclude, therefore, that while the availability of a judicial remedy for the attainment of an objective is not vital in determining the legality of its attainment by self-help, yet, when that objective is the collection of money, resort to self-help to collect it becomes illegal because there is an adequate judicial remedy.

It is submitted that when an objective of concerted action satisfies the basic prerequisite of the *prima facie* tort doctrine, that it is economically beneficial to labor as a class and is not expressly prohibited, its permissibility should not depend upon the absence of a judicial avenue to its accomplishment.

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